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October 14, 2008

Via Federal eRulemaking Portal and Overnight Delivery

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 Regulations Amending the Endangered Species Act's Section 7 Implementing Regulations, 73 Fed. Reg. 47868 (August 15, 2008)

Dear Secretary Kempthorne and Secretary Gutierrez:

Please accept the following comments regarding the above-referenced Proposed Regulations Amending the Endangered Species Act's ("ESA") Section 7 Implementing Regulations ("Proposal") on behalf of the Center for Biological Diversity, Conservation Northwest, Environmental Defense Center, Spirit of the Sage Council and Wildlands CPR.

INTRODUCTION

The Proposal arbitrarily and unlawfully upends the ESA's longstanding and successful regulatory regime for ensuring that endangered and threatened species and their critical habitats are adequately protected from the effects of literally tens of thousands of federal projects each year. As discussed in greater detail below, the Proposal is contrary to: the plain language of the ESA; Congress' clearly expressed intent that federal agencies consult with the U.S. Fish and Wildlife Service ("FWS") or National Marine Fisheries Service ("NMFS") (collectively "the Services") on "any" action that "may affect" listed species or critical habitat; longstanding agency regulations and practice; and common sense. The Services have failed to put forth any rational basis for these drastic changes including, most importantly, any coherent explanation of how this Proposal will advance the purposes of the ESA and the conservation of endangered and threatened species, and, instead, have proposed an entirely new regulatory scheme that will foster confusion, inconsistent application, increased litigation and drastically weakened protections for listed species. Accordingly, we urge the Services to scrap this Proposal in its entirety.

I. THE PROPOSAL VIOLATES THE ESA AND WILL HARM ENDANGERED AND THREATENED SPECIES

Section 7(a)(2) of the ESA requires that:

> [e]ach Federal agency shall, *in consultation with* and with the assistance of the [Services], insure that *any action* authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat . . . .

16 U.S.C. § 1536(a)(2) (emphasis added). This provision of the ESA imposes both substantive and procedural obligations on federal agencies, and plainly contemplates an exceedingly close working relationship of consultation and cooperation between action agencies and the Services to ensure that endangered and threatened species are "afforded the highest of priorities." *T.V.A. v. Hill*, 437 U.S. 153, 174 (1978); *see id*. at 194 ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'")

To this end, the Services' long-standing section 7 implementing regulations require each federal agency to involve the Services at the earliest stages of any federal action to ensure that *any* potential risks to listed species and critical habitat are adequately considered and addressed. Thus, each federal must initiate formal section 7 consultation with the Services whenever it is determined that a proposed federal action "may affect listed species or critical habitat," unless, "the Federal agency determines, *with the written concurrence of the [Services]*, that the proposed action is not likely to adversely affect any listed species or critical habitat." 50 C.F.R. § 402.14(a)(b) (emphasis added). Discussions and communications occurring between the Services and action agencies in the course of the Services determining that an action "may affect, but is not likely to adversely affect" any listed species or critical habitat, are referred to as "informal consultation."

Section 7(c) additionally provides that "[i]f the [Services] advise[], based on the best scientific and commercial data available, that [endangered or threatened] species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered or threatened species which is likely to be affected by" an agency action. 16 U.S.C. § 1536(c)(1).

During consultation the *Services* are required to conduct a "detailed discussion of the effects of the action on listed species or critical habitat," and determine "whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. §§ 402.14(g), (h). The "effects of the action" means the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with the action, that will be added to the environmental baseline." Id. § 402.02. "Indirect effects are those caused by the action, and that are later in time, but still are reasonably certain to occur." *Id*.

The Proposal replaces the existing regulatory scheme governing interagency consultation and cooperation with one that largely removes the Services from their statutory duty to closely work with federal agencies to ensure that no federal action jeopardizes any endangered or threatened species or destroys or adversely modifies critical habitat.

A. The Proposal Illegally Authorizes Action Agencies to Forgo Interagency Consultation with the Services on Actions that "May Affect" Endangered and Threatened Species and Critical Habitat

Under the Proposal federal actions which *will* affect listed species or critical habitat will escape interagency consultation with the Services altogether if the action agency unilaterally determines that such effects are "insignificant," cannot be "meaningfully identified or detected," are "wholly beneficial," or the "potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote." Proposal at 47,874. It is simply impossible to reconcile this regulatory scheme, which would eliminate *any* interagency consultation with the Services on potentially tens of thousands of federal actions each year that "may affect" endangered and threatened species, with section 7's "institutionalized caution" and statutory mandate that federal agencies consult with the Services on "any action" to ensure that listed species are not jeopardized and critical habitat is not adversely modified. This approach is also in direct conflict with the ESA's legislative history which is replete with expressions of Congress' clear intent that interagency consultation occur regarding any federal action that "may" affect listed species or critical habitat. Congress has explained that:

> in addition to requiring Federal agencies to ensure that their actions do not adversely impact endangered species, the section *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 affected endangered species . . . . A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980*, at 735 (1982) (hereafter "Leg. Hist.") (emphasis added);
>
> 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 744 (emphasis added);
>
> it is the responsibility of each agency to review its activities or programs to identify any such activity or program that *may affect* listed species or their habitat. *If a Federal agency determines that its activities or programs may affect listed species or their habitat, the agency should request assistance from the Secretary*. *Id.* at 743 (emphasis added);
>
> the efficient operation of the Department's consultation teams is vital if future conflicts between endangered species and Federal development projects are to be avoided. *The committee does not believe that part-time personnel can adequately perform the difficult task of consulting with other Federal agencies on projects that may result in species or habitat degradation. Id*. at 736 (emphasis added);

> Under the current section 7 regulations, 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. *Id.* at 944 (emphasis added).

Indeed, during debates on amendments to section 7 of the ESA, Congress expressly rejected an amendment that would have allowed federal agencies to forgo consultation with the Services. Senator John Chafee explained that:

> *Section 7 requires that Federal agencies consult with the Fish and Wildlife Service when their proposed activities or programs may affect a listed species* . . . . Conflicts between the Endangered Species Act and other Federal activities are being resolved through this administrative process. The result of consultation is that in almost all cases Federal agencies have found that for both proposed and ongoing projects, modifications or alternatives can be designed which avoid conflict with the Act. Senator Stennis' amendment fails in my judgment to recognize this fact. It seeks to avoid conflicts by outright exemptions 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*.

Id. at 994-995 (emphasis added).

In providing for interagency consultation and cooperation on any action that "may" affect listed species or critical habitat, it is also clear that Congress did not trust federal agencies with the authority to unilaterally assess whether their actions would adversely affect listed species or critical habitat. Thus, Senator Chafee noted that:

> *[E]ach of my colleagues is fully aware of the commitment that many line agencies have to the completion of proposed projects*, in many instances with less than appropriate attention to other important factors such as endangered species . . . They want to get the projects built. To allow a single agency head to determine the advisability of destroying a species *or completing the agency's project as proposed, seems a bit like putting the fox in charge of the henhouse*.

Id. at 995 (emphasis added).

Hence, it was exactly because Congress did not want the "fox in charge of the henhouse" that it demanded that "conflicts between the Endangered Species Act and Federal actions" be "resolved by full and good faith consultation between the project agency and the Fish and Wildlife Service or the National Marine Fisheries Service." *Id*. at 943-44; *see also id*. at 1012 (noting that the rejected amendment would "not allow us even to go through the consultation process," but would relegate judgments on species impacts to an action agency "whose basic problem in life is not endangered species *but the efficient carrying out of whatever that agency is designed to do*") (emphasis added).

B. The Proposal is Inconsistent with the Services' Prior Interpretation of the Language and Purpose of Section 7

The "may affect" threshold triggering interagency consultation is exceedingly low. As the Services explained in promulgating the 1986 section 7 regulations, "[*a]ny possible* effect, whether *beneficial, benign, adverse or of undetermined character*, triggers the formal consultation requirement . . . ." 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (emphasis added). In fact, the Reagan Administration explicitly rejected raising the threshold triggering consultation to "may *adversely* affect" because such a standard "*yielded too much discretion to action agencies*" and would not have preserved the Services' role in determining which actions are "likely to have an adverse effect[]." *Id*. at 19,949 (emphasis added). The Services further explained that "[t]he threshold for formal consultation must be sufficiently low to allow Federal agencies to 'insure' under section 7(a)(2)." *Id.* at 19,949.

In requiring action agencies to enter into formal consultation unless the Services expressly concur in a "not likely to adversely affect" determination, the Services stated that the regulations "*properly and accurately implement*[]" the ESA and "*afford[] the protection mandated by section 7 of the ESA*," *id*. at 19,927 (emphasis added), precisely because the process "utiliz[ed] the *expertise of the Service* to evaluate the [action] agency's assessment of potential effects or to suggest modifications to the action to avoid potential adverse effects." *Id.* at 19,949 (emphasis added). Prior to 1986, whenever an agency determined that its action "may affect" a listed species, it was required to initiate formal consultation and obtain a full Biological Opinion from the Service. *Id*. at 19,948. The 1986 regulations retained this low "trigger" for formal consultation, but created an "exception" for situations where the action agency could convince the Services that the action could be carried out without harming listed species. *Id*. at 19,949 ("*the burden is on the Federal agency* to show the absence of likely, adverse effects to listed species or critical habitat as a result of its proposed action in order to be *excepted from the formal consultation obligation*") (emphasis added).

The Services also stated that the "purpose" of the 1986 regulations allowing agencies to consult with the Services "informally" to determine whether projects might adversely affect species – and hence necessitate formal consultation – was to "streamline the consultation process *while maintaining the protections afforded species under section* 7." *Id.* at 19,927 (emphasis added). The preamble to the 1986 regulations further explained that the

> *Service believes that informal consultation is extremely important and may resolve potential conflicts (adverse effects) and eliminate the need for formal consultation.* Through informal consultation, *the Service can work with the Federal agency* and any applicant and suggest modifications to the action to reduce or eliminate adverse effects.

Id. at 19,949 (emphasis added). Likewise, in their "Section 7 Consultation Handbook" issued in 1998, the Services stressed that informal consultations protect species because they

> clarify whether and what listed species, proposed, and candidate species or designated or proposed critical habitats may be in the action area; determine what effect the action may

> have on these species or critical habitats; explore ways to modify the action to reduce or remove the adverse effects to the species or critical habitats; determine the need to enter into formal consultation . . . ; and explore the design or modification of an action to benefit the species.

Section 7 Consultation Handbook (March 1998), at 3-1. In addition, the informal consultation process is important because it serves to help "uncover data gaps which may complicate the section 7 analysis and to identify additional studies which may be necessary "to improve the data base upon which a biological assessment, or . . . a biological opinion is developed." *Id*.

By unreasonably raising the threshold for initiating consultation and imposing an arbitrary 60-120 day time limit on informal consultations, literally tens of thousands of federal actions each year that otherwise would receive some level of interagency consultation under the existing regulatory scheme, will under this Proposal escape any expert scrutiny by the Services. In the absence of meaningful informal consultation, the Services will be precluded from analyzing and recommending modifications to thousands of federal actions which otherwise will have some affect on listed species and critical habitat.

Plainly, by eliminating *any* consultation – including the "informal" consultations designed to "streamline" the process while also protecting species – with regard to thousands of potentially harmful projects, the Services have also contravened their own prior – and far more reasonable – interpretation of the meaning and function of section 7(a)(2) of the ESA.[1]

C. The Wisdom of this Proposal is Further Undermined by the Services' Previous Regulations Allowing Action Agencies to Self-Consult

It is telling that this Proposal makes no mention of the Services' prior rules amending the "may affect" threshold for interagency consultation, one of which of was declared unlawful and set-aside, *see Washington Toxics Coalition v. Secretary of the Interior*, 457 F.Supp.2d 1158 (W.D. Wash. 2006), and the other, dealing with the National Fire Plan, *see* Section 7 Counterpart Regulations for Projects that Support the National Fire Plan ("NFP Rule"), 50 C.F.R. § part 402 subpart C, has proven based on available monitoring data to be a failure. Regarding the NFP Rule, the Services' first monitoring report on that rule's implementation is a devastating indictment of giving action agencies authority to unilaterally consult on actions that may affect

[1] While the original section 7 regulations issued in 1986 authorize the Services to adopt "counterpart" regulations, *see* 50 C.F.R. § 402.04, such regulations were intended simply to "allow individual Federal agencies to 'fine tune' the general consultation framework to reflect their particular program responsibilities and obligations." 51 Fed. Reg. 19937. Thus, the Services did not remotely suggest that such a "counterpart" regulation could simply dispense with the consultation process completely, with respect to an entire category of agency actions. To the contrary, the Services made clear that any "[s]uch counterpart regulations *must retain the overall degree of protection afforded listed species by the Act and these regulations*," *id*. (emphasis added).

listed species or critical habitat. *See Use of the ESA Section 7 Counterpart Regulations for Projects that Support the National Fire Plan, Program Review: Year One*, National Marine Fisheries Service, U.S. Fish and Wildlife Service and Bureau of Land Management (Attachment "A").

Of the 10 projects evaluated by NMFS, *none* of the documents prepared by the Forest Service or Bureau of Land Management satisfied the criteria established by the Services for a scientifically and legally valid "not likely to adversely affect" determination. In fact, *none* of agency determinations adequately "identifie[d] . . . the action's direct and indirect environmental effects;" *none* identified the "Action Area clearly;" *none* identified "all threatened and endangered species and any designated critical habitat that may be exposed to the proposed action;" and *none* made a "[d]etermination [] based on the best available scientific and commercial information." *Id*. at 12.

The FWS evaluated 50 projects and concluded that "only 19 of the 50 [assessments or evaluations] submitted on projects that were determined not likely to adversely affect listed species *could be confirmed to have used the best scientific and commercial data available to FS or BLM*." *Id*. at 19 (emphasis added). Thus, with regard to more than 60% of the projects reviewed by FWS, the action agency had failed to rely on the ESA's bedrock best available scientific data requirement. It is clear from this data that even the Forest Service and Bureau of Land Management, two agencies with far more experience in dealing with the ESA than most of the agencies covered under this Proposal, are insufficiently qualified or capable of unilaterally administering the requirements of section 7.

The failure of the Forest Service and Bureau of Land Management to properly assess the impacts of their action on listed species should be no surprise given that when proposed the NFP Rule was soundly rejected by FWS regional offices. *See* Attachment "B." For example, the FWS's Regional Director in Albuquerque, New Mexico, made clear that the proposal conflicts with the letter and purpose of section 7 of the ESA because:

> Section 7(a)(2) requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence or any listed species, or result in the destruction or adverse modification of critical habitat. *The key to [this] paragraph[] is that [it is] carried out in consultation with the assistance of the Service. We serve as an outside and independent agency to review projects, and use our biological knowledge and experience with similar activities to assist in developing appropriate measures that will minimize effects . . . The counterpart regulations as proposed will diminish the Service's role in Section 7 consultation*.

Id., Region 2's comments to the proposed Joint Counterpart Endangered Species Act Section 7 Consultation Regulations at 2 (emphasis added). These comments further explained that, in addition to their lack of "independen[ce]" from timber sales or other potentially harmful projects, action agencies like the Forest Service and BLM

> do not have the range-wide information on species status, knowledge of past consultations with other Federal agencies that have evaluated project effects on species, or a broad view of threats faced by the species throughout its range. *Thus, the action agencies would have a difficult time assessing the effects of their actions in the appropriate context*.

Id. at 3 (emphasis added).

The FWS's Region 2 Director also criticized the proposal's failure to "provide definitions of key terms" – such as "what projects would fall under the NFP," *id*. at 2 – and took issue with the proposal's unsupported rationale that the elimination of consultation with the FWS was needed to expedite necessary projects:

> Funding through the NFP has enabled the [FWS] to hire and dedicate many biologists in order to expedite consultations related to the NFP. Funding these positions has *successfully streamlined and expedited fire-related consultations, while allowing the Service to continue its assistance to agencies implementing these projects. Thus, informal consultations are generally completed within 30 days or less*. . . . Considering the other regulatory processes (such as the National Environmental Policy Act, consultation with the State Historic Preservation Office, and Native American consultation), *these regulations are unlikely to reduce the time frame for decisions.*

Id. at 1 (emphasis added).

These concerns were echoed by other Regional Directors and offices. The FWS's Regional Director of Region 5 in Massachusetts, stated that "we have significant concerns about the regulation as proposed," Attachment 2, Region 5's Comments on Proposed Joint Counterpart Endangered Species Act Section 7 Consultation Regulations at 1, including because the "basic design of this regulation as proposed is based on flawed premises and is unlikely to achieve any net efficiencies in processing time for [not likely to adversely affect determinations]," and because "*Action Agencies will be challenged to maintain biological objectivity in light of differences in primary agency missions*." *Id*. at 2 (emphasis added); *see also id*. at 3 ("[W]ildlife biology applied in the context of the ESA is a highly specialized field in which no other agency has equivalent expertise . . . The Service's expertise is constantly evolving based on assimilation of new information by Service biologists.").

II. THE PROPOSAL LACKS ANY RATIONAL OR COHERENT JUSTIFICATION AND ESTABLISHES A NEW REGULATORY SCHEME WITH VAGUE AND UNDEFINED STANDARDS

A. The Services' Justifications for Radically Changing Longstanding and Proven Section 7 Regulations Are Significantly Flawed and Baseless

The Services offer three justifications for this Proposal, none of which upon close examination remotely warrants such drastic changes to the ESA's section 7 regulatory scheme.

First, the Services state that they are proposing these changes because "much has happened" since the current regulations were issued in 1986. Proposal at 47,868. Specifically, the Services point out that "[t]he Services have gained considerable experience in implementing the Act, as have other Federal agencies, States, and property owners." *Id*. at 47,871 ("Many Federal action agencies have now had decades of experience with section 7.") Plainly, however, the Services' "considerable experience in implementing the Act" strongly *supports* maintaining their close working relationship with other federal agencies as Congress intended and the existing section 7 regulations ensure. And while action agencies may have experience implementing the 1986 section 7 regulations *in consultation with the Services*, they have absolutely no experience whatsoever implementing them unilaterally, much less implementing an entirely new regulatory scheme.

The Services also suggest that "[f]ederal action agencies are fully qualified to make these determinations in the limited circumstances provided for in the proposed rule." *Id*. 47,871. This claim, however, is unsupported by any evidence establishing the qualifications of federal agencies or their personnel to accurately assess the impacts of effects on listed species and critical habitat without the expert assistance of the Services and is, therefore, patently conclusory without any basis in fact or reality whatsoever. As discussed above, the available data regarding action agency self-consultation unequivocally demonstrates that federal agencies are *not* sufficiently qualified to unilaterally make these determinations, which, of course, is entirely in-line with Congress' wisdom in requiring interagency consultation on any action that "may affect" listed species or critical habitat.[2]

The Services further assert that this Proposal is necessary "[i]n light of the tremendous workload and consumption of resources that consultation requires." Again, however, the Services fail to provide any empirical support to even remotely suggest that the Services' existing caseload is undermining their mandate to conserve endangered and threatened species, nor do they explain why existing streamlining procedures, including the informal consultation process, are insufficient to address any legitimate workload concerns.

Second, the Services state that these proposed regulatory changes are made "in response to new challenges we face with regard to global warming and climate change" and will "provide greater clarity and certainty to the consultation process." *Id.* at 47,869. As a threshold matter, the Services have utterly failed to explain why the current consultation process is flawed or otherwise ill-suited to address the impacts of climate change on listed species and critical habitat. Indeed, this Administration appears more concerned that the current consultation process if implemented properly may actually help address climate change impacts, which explains its proposal to eliminate entirely the causes of climate change and its impacts on listed species as "effects" that must be addressed under section 7.

Third, the Services assert that this Proposal responds to a 2004 GAO report on section 7 interagency consultation recommending that the consultation process could be improved and that

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[2] It is also noteworthy that this Proposal lacks even the basic safeguard provided in the NFP Rule limiting the authority to make self-consultation determinations to specific agency personnel who have demonstrated a minimal level of competence and qualification.

the Services and other Federal agencies "resolve disagreements about when consultation is needed . . . ." *Id*. at 47,869. The Services further point out that the consultation process can be "contentious between the Services and action agencies," and that "action agencies consider the consultation process burdensome." *Id*. As a threshold matter, the fact that there are some contentious disagreements between the Services and action agencies, the overwhelming majority of which are resolved expeditiously through the informal consultation process is, if anything, evidence that the current interagency consultation process is working exactly as Congress intended. As discussed above, Congress emphatically did not trust action agencies to put the interests of endangered and threatened species above those of their primary missions, which is precisely why it required agencies to consult with the Services on "any" action that may affect listed species. The Services' approach here for "resolv[ing] disagreements" is apparently to just eliminate the opportunity for them to arise altogether by foreclosing any interagency consultation on thousands of agency actions each year. This is hardly a rational solution much less one that is consistent with the ESA and Congressional intent. Indeed, as the Services note, the GAO concluded that "given the unique requirements and circumstances of different species, a 'healthy dose of professional judgment' *from the Services would always be required*, meaning that there would always be some disagreements." *Id*. (emphasis added). The Services' Proposal, unfortunately, would eliminate this statutorily mandated "professional judgment" from the overwhelming majority of agency actions that currently undergo section 7 consultation.

B. The Proposal Replaces the Proven Existing Consultation Regulations with an Illogical and Arbitrary Scheme that Will Serve Only to Undermine the Conservation of Endangered and Threatened Species

The Proposal replaces well-established and effective regulatory standards and procedures, including the "may affect" standard for triggering interagency consultation, with standards and procedures that are defined poorly or not at all, and which will create confusion, inconsistent decisions, uncertainty, increased litigation and drastically reduced protection for endangered and threatened species.

1. Applicability

The Proposal states that it "reiterates the constraint that section 7 only applies to discretionary agency actions" which the Supreme Court recently "upheld" in *National Association of Home Builders v. Environmental Protection Agency*, 127 S. Ct. 2518 (2007). The Supreme Court, however, only upheld the Services' regulation in an exceedingly narrow context – where section 7 was being applied to a statutory requirement that existed prior to enactment of the ESA, thus motivating the Court to address whether section 7 implicitly repealed the earlier enacted provision. In that limited context, the Court held that the Services *could* resolve the ambiguity created by the presumption against implied repeals by limiting section 7's scope to "discretionary" actions. However, there is nothing in the Court's ruling that suggests that the plain terms of section 7 do not apply to provisions enacted *after* the ESA and, indeed, in that context the principle that implied repeals are discouraged should work in favor of broadly interpreting the scope of section 7.

Accordingly, the Services should promulgate regulations or guidance rejecting the non-discretionary limitation entirely or, at the very least, expressly limiting the exemption for non-discretionary action to those that are based on statutory obligations *proceeding* passage of the ESA. Moreover, even as to the kind of non-discretionary actions to which *National Association of Home Builders* applies, at a minimum, the Services should clarify that section 7 safeguards come into play when an agency action – no matter how characterized – may jeopardize the continued existence of any listed species or adversely modify critical habitat.

The Proposal replaces the legally mandated "may affect"standard – which requires consultation regarding "any possible effect" to listed species or critical habitat -- with a new multi-criteria and exceedingly confusing standard. As best we can understand, agencies will not be required to consult on actions that will affect listed species or critical habitat if the "direct and indirect effects" of the action "are not anticipated to result in take *and*:" such action has either "no effect on listed species or critical habitat; *or* "is an *insignificant contributor* to any effects on a listed species or critical habitat; *or* the effects of such action on a listed species or critical habitat (i) [a]re not capable of being *meaningfully identified or detected in a manner that permits evaluation*; (ii) [a]re wholly beneficial; or (iii) [a]re such that the potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is *remote*." Proposal at 47,874 (emphasis added).

The Services' new approach appears to be driven by the mistaken belief that "[t]he Services have the authority to determine what constitutes 'consultation' and when consultation is triggered." Proposal at 47,871. While the Services are correct that "the Act does not define "consultation," the ESA plainly requires that "consultation" between the Services and action agencies occur with respect to "any" action that may affect listed species or critical habitat. The term "consultation" is commonly defined to mean "a meeting arranged to consult." Oxford American Dictionary of Current English, Oxford Publishing, 2002. The term "consult" means to "seek information or advice from." *Id*. The Services' Proposal, where action agencies are authorized to forgo having to seek the expert advice of the Services altogether on tens of thousands of actions that will impact endangered and threatened species -- i.e., to forgo any form of consultation whatsoever -- does not under any accepted theory of statutory interpretation or reasonable stretch of the English language comport with section 7's interagency consultation requirement. The Services are also incorrect that Congress left it within their discretion to establish the trigger for consultation. As previously discussed, the legislative history is crystal clear that Congress intended the threshold to be exceedingly low and for consultation to occur with respect to any action that "may affect" listed species or critical habitat in any manner whatsoever.

An additional flaw with the Services' Proposal is that for many agency actions it appears to shift the authority to evaluate the nature and extent of effects to listed species or critical habitat, including the potential for take and likelihood of jeopardy, from the Services to action agencies. Thus, the Proposal provides that "Federal agencies are not required to consult on an action when the *direct and indirect effects of that action are not anticipated to result in take.*" Proposal at 47,874. Under the ESA and the current regulatory scheme, the *Services* are charged during the consultation process with analyzing the direct and indirect effects of agency actions and, based on that analysis, determining whether take or jeopardy is likely to occur. *See* 50

C.F.R. §§ 402.14(g), (h). Once again, if Congress believed that federal agencies had the scientific expertise and could be trusted to responsibly and accurately evaluate the impacts of their actions on endangered and threatened species on their own, it would not have required consultation with the Services.

Because the Proposal establishes a new regulatory scheme with insufficiently defined standards and terms for which action agencies have no experience unilaterally interpreting and administering, there will almost certainly be vast discrepancies between agencies as they struggle to determine whether an effect is an "insignificant contributor," "not capable of being meaningfully identified or detected in a manner that permits evaluation," or is too "remote" to trigger consultation with the Services. This situation will be made only worse by the Proposal's failure to impose even minimal safeguards, as those provided in the NFP Rule, including restricting the authority to make such determinations to trained and qualified federal employees, programmatic oversight by the Services, and a requirement that action agencies document their determinations and findings in writing.

The Services' justification for this radically new approach also directly contradicts well established agency definitions, which will only lead to greater confusion. The Proposal equates agency effects "which are so inconsequential, uncertain, unlikely or beneficial that they are, as practical matter, tantamount to having *no effect*." Proposal at 47,870 (emphasis added). Yet, the Services have for more than 20 years considered such potential effects sufficient to trigger consultation. *See* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (defining "may affect" as "[*a]ny possible* effect, whether *beneficial, benign, adverse or of undetermined character*." (emphasis added). The Services state that this new scheme "broadly tracks language from the Services' joint consultation handbook. Yet, that handbook, which has been in place for 10 years, states that "the appropriate conclusion when a proposed action may pose **any** effects on listed species," is "may affect," not "no effect." Final ESA Section 7 Consultation Handbook (March 1998) at xvi (emphasis in original).

2. Effects of the Action

The Proposal amends the regulatory definition of "effects of the action" by adding several new terms which are intended to "reduce the number of unnecessary consultations." *Id*. at 47,871. Nowhere in the Proposal, however, do the Services provide any empirical data or evidence establishing that any past consultation has been unnecessary, nor do they define in any coherent fashion what is meant by "unnecessary." As already discussed, Congress plainly considered consultation with the Services on actions that "may affect" listed or critical habitat as critically necessary and legally required.

As discussed previously, under the existing statutory and regulatory scheme it is the duty of the *Services* to evaluate the "effects of the action" and to determine from that analysis whether jeopardy or adverse modification will result. Yet, it is unclear whether that responsibility remains with the Services as it legally must or now has shifted to allow action agencies to unilatally conduct effects analysis and determine if their actions will result in take, jeopardy or adverse modification. *See id*. at 47,874 (providing that "Federal agencies *are not required to consult* on an action when the *direct and indirect effects of that action* are not anticipated to

result in take and . . . [] [s]uch action is an insignificant contributor to any effects . . . or; [] [t]he effects of such action . . . [] [a]re not capable of being meaningfully identified or detected . . .; or [] [a]re such that the potential risk of jeopardy . . . is remote"); *see also id.* at 47,870 ("if an effect would occur regardless of the action, then it is not appropriate to require *the action agency* too consider it an effect of the action") (emphasis added). This concern is further heightened by the use of similar terms triggering consultation, for example, "insignificant contributor," and those which should come into play when the "effects of the action" are analyzed during consultation by the Services, for example, "essential cause." The Proposal fails to sufficiently explain the difference, if any, between an action that is an "insignificant contributor" to an effect from one that is not an "essential cause." Moreover, it is almost universally the case that action agencies are incapable of assessing the cumulative effects of past and present actions from other agency actions as is required in evaluating the "effects of the action" because they are for the most part only tracking their own actions. This presents particular concerns for species that occur across multiple land ownerships, including spotted owls, lynx, wolves and salmon.

The Proposal adds the restriction that before an "indirect effect" can be considered an "effect of the action," it must be an "essential cause" of that effect. *Id*. at 47,870. The Services explain that the addition of the word "essential" is meant "to capture the requirement that in some instances there needs to be more than a technical 'but for' connection" as is currently the case. *Id*. To illustrate this new requirement the Services provide the example of a Corps' permit that is "*necessary* to allow a lengthy pipeline to cross a narrow waterway." *Id*. (emphasis added). The Services explain that "one could argue that 'but for' the Corps' permit to cross the waterway, the pipeline could not be constructed and none of the future effects from the construction or operation of that lengthy pipeline would occur." *Id*. Yet, under the Services' proposed definition of "indirect effects," the Corps permit would not be considered an "effect of the action" because "the permitted crossing is *not essential* to the entire pipeline." *Id*. (emphasis added). This makes little sense. If the Corps' permit is "necessary" for a pipeline project -- i.e., the project could not be completed and effects to listed species or critical habitat would not occur in the absence of the Corps permit -- then the permit is by definition an "essential cause" of any impacts to listed species or critical habitat. Accordingly, it is not at all clear what is meant by "essential cause," and, in any case, the Services present no rationale for limiting the ability to influence federal actions that are "but for" causes of impacts on listed species or critical habitat. What if there were likely to be effects to threatened or endangered species or critical habitat in the waterway – i.e., those flowing directly from the Corps permitted action; under the Services' Proposal would these be considered "effects of the action?" What if the pipeline would adversely modify riparian critical habitat immediately adjacent to the waterway; would these impacts require consultation? Addition of the term "essential cause" will create additional unnecessary confusion and unreasonably and needlessly restrict the analysis of effects to listed species and critical habitat that result from agency actions.

The Services also propose to require that for an effect to be considered "reasonably certain to occur" there must be "clear and substantial information" that the effect will happen. *Id.* at 47,870. This unreasonably high evidentiary burden is patently inconsistent with the ESA's requirement that "[i]n fulfilling the requirements of [section 7] each agency shall use the *best scientific and commercial data available*." 16 U.S.C. § 1536(a)(2) (emphasis added). The Services also emphasize that "'reasonably certain to occur' is not the equivalent of the National

Environmental Policy Act's ("NEPA") reasonably foreseeable standard. It is a narrower standard." *Id*. There is no coherent rationale for imposing a "narrower standard" when evaluating impacts to endangered or threatened under the ESA versus analysis of environmental impacts under NEPA. This new standard will greatly weaken protections for listed species and critical habitat and certainly will not advance the purposes of the ESA.

3. Cumulative Effects

The Services "clarify that cumulative effects do not include future Federal activities" and that the ESA cumulative effects analysis is narrower than that under NEPA. Proposal at 47,869. But, from the standpoint of conserving listed species and critical habitat, and the purposes and goals of the ESA, there is no rational basis for excluding Federal actions that are reasonably certain to occur from the analysis of cumulative effects during the consultation process. It makes even less sense given that the overwhelming majority of federal actions that currently undergo interagency consultation will under this Proposal escape future consultation and Services review entirely. And as discussed previously, to the extent this Proposal will authorize action agencies to unilaterally evaluate the "effects of the action" together with "cumulative effects," they will invariably only be focused on their own future actions and not the actions of other federal agencies.

III. THE PROPOSAL ARBITRARILY EXCLUDES THE CAUSES OF CLIMATE CHANGE AND ITS IMPACTS ON THREATENED AND ENDANGERED SPECIES AND CRITICAL HABITAT FROM CONSIDERATION UNDER SECTION 7

The Services in the regulatory preamble assert that one of the purposes of this Proposal is to "reinforce the Services' 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)." *Id*. at 47,872. The Services, however, have articulated only this intent in the preamble, without actually addressing greenhouse gas emissions in the proposed regulations themselves. Instead, the proposed regulations attempt to create an exemption for greenhouse gas emissions through the changes to the Section 7 regulations discussed herein, including changes to the definitions of direct, indirect, and cumulative impacts and other changes in the consultation procedures. The proposed changes are illegal and conflict with the plain language of the statute as discussed throughout. Moreover, given the preeminent threat of global warming to plants and animals, ignoring greenhouse gas emissions in Section 7 consultations cannot possibly contribute to the conservation of listed species. This unprecedented attempt to wholly exempt an entire class of actions and impacts from the requirements of the ESA by fiat is flatly contrary to the ESA and otherwise textbook arbitrary and capricious, and completely divorced from the scientific reality of global warming's impact on biodiversity in general and ESA listed species in particular.

The Services' proposal fails to account for the physical facts relevant to the management of listed species in a world warming rapidly due to anthropogenic climate change. Leading climate scientists warn that we must find a way to reduce atmospheric greenhouse gas concentrations from their current level of 385 parts per million (ppm) back to below 350 ppm in

order to avoid unacceptable climate change impacts. *See* James Hansen, et al., *Target Atmospheric CO2: Where Should Humanity Aim?*, Submitted to OPEN ATMOSPHERIC SCIENCE JOURNAL (2008), *available at*: http://arxiv.org/abs/0804.1126 (last visited October 14, 2008) (Attachment "C"). If we do not do so quickly and retreat from the precipice of a planetary "point of no return," we will commit ourselves to living on what Dr. James Hansen, the nation's top climate scientist, has called "a different planet." James Hansen, et al., *Global Temperature Change*, 103 Proc. Natl. Acad. Sci. 14293, 14293 (2006) (Attachment "D").

The warming that has already occurred, the positive feedbacks that have been set in motion, and the additional warming in the pipeline together have brought us to the precipice of a planetary tipping point. We are at the tipping point because the climate state includes large, ready positive feedbacks provided by the Arctic sea ice, the West Antarctic ice sheet, and much of Greenland's ice. Little additional forcing is needed to trigger these feedbacks and magnify global warming. If we go over the edge, we will transition to an environment far outside the range that has been experienced by humanity, and there will be no return within any foreseeable future generation. Casualties would include more than the loss of indigenous ways of life in the Arctic and swamping of coastal cities. An intensified hydrologic cycle will produce both greater floods and greater droughts. In the US, the semiarid states from central Texas through Oklahoma and both Dakotas would become more drought-prone and ill suited for agriculture, people, and current wildlife. Africa would see a great expansion of dry areas, particularly southern Africa. Large populations in Asia and South America would lose their primary dry season freshwater source as glaciers disappear. A major casualty in all this will be wildlife. *See* James Hansen, *Tipping Point: Perspective of a Climatologist*, in 2008-2009 STATE OF THE WILD: A GLOBAL PORTRAIT OF WILDLIFE, WILDLANDS, & OCEANS 7, 9 (Wildlife Conservation Society 2008) (Attachment "E").

To date, the National Marine Fisheries Service has listed the staghorn and elkhorn corals due to climate change and the Fish and Wildlife Service has listed the polar bear. The polar bear listing in particular illustrates that it is entirely feasible to evaluate the threat to a species from global warming in order to add it to the list of protected species. The final listing decision clearly and unambiguously adopts the consensus view of the world's scientists on global warming and Arctic melting, and rejects arguments propounded by a tiny number of industry-funded spokespeople. *See*, e.g., 73 FED. REG. at 28219-28234 (discussion of Arctic sea ice and climate change); 73 FED. REG. at 28246 ("We have consistently relied on synthesis documents [such as the IPCC's Fourth Assessment Report and the Arctic Climate Impact Assessment] that present the consensus view of a very large number of experts on climate change from around the world. We have found that these synthesis reports, as well as the scientific papers used in those reports or resulting from those reports, represent the best available scientific information we can use to inform our decision and have relied upon them and provided citation within our analysis"). The portions of the rule dealing with climate science and polar bear biology are well written, and clearly articulate the urgent threat that anthropogenic greenhouse pollution poses to the polar bear.

The connection between greenhouse gas emissions and sea ice reductions -- and the effect that sea ice decline has on polar bears -- is supported by voluminous scientific literature

and, indeed, is the central reason for the decision to place the polar bear on the list of threatened and endangered species. Having clearly acknowledged that anthropogenic greenhouse gas emissions are the leading threat to the survival and recovery of the polar bear, the FWS now has an obligation to examine the impact of federal agencies' emissions on the polar bear, and ways to reduce those emissions. The Services' attempt to exempt greenhouse gas emissions is legally, scientifically, and logically flawed. Moreover, it is an attempt to overturn decades of scientific and legal progress in the understanding and mitigation of environmental harm from cumulative impacts. Global warming is the quintessential example of a cumulative impact, where disastrous consequences flow from the accumulation of a great number of individual sources of varying size. The fact that total emissions, and the scale of the problem, are enormous cannot be used as a justification to ignore federal agency emissions, but rather mandates the opposite result. The larger the scale of the problem, the harder the Services must work to reduce all sources of emissions.

The Services' attempt to exempt greenhouse gas emissions based on convoluted arguments about causation and individual sources must fail. Just as there is no requirement to link the thinning of any particular bald eagle egg to any particular molecule of DDT to demonstrate that authorization of the use of DDT may result in a taking of bald eagles, there is no requirement to link any particular molecule of carbon dioxide or other greenhouse pollutant to the death of an individual bear. As the Supreme Court stated in *TVA v. Hill*, Section 7 "admits of no exception," and affords endangered species "the highest of priorities." 437 U.S. at 173-174. When it comes to greenhouse gas emissions, the issue of causation is quite simple: all sources contribute to the climate crisis and the take of listed species, and the larger the source, the larger the contribution to the problem.

The section 7 consultation process in fact presents a fabulous opportunity for federal agencies, which are responsible for a large portion of the country's overall emissions, to analyze and implement solutions to reduce those emissions. There is absolutely no reason why we should not require these agencies to adopt all feasible measures to reduce emissions immediately through the section 7 process. These consultations are particularly important and relevant today, because Congress has yet to pass comprehensive climate legislation and the Bush administration has blocked the implementation of the Clean Air Act which would regulate most major greenhouse emission sources in the U.S. if only it were enforced. Yet the ESA section 7 process will also retain its relevance and importance once Congress does act. Even the best climate legislation will not result in instantaneous reductions, and emissions reductions on the scale now required will be extremely challenging in any event. We absolutely must require the analysis and adoption of solutions in every context available.

Section 7 consultations that consider not only carbon dioxide, but also short-lived greenhouse pollutants including black carbon, methane, and ozone are desperately needed today if we are to save the polar bear. The bad news is that a tipping point has almost certainly been crossed in the Arctic, and that it is not possible to save the Arctic sea ice and the bear through carbon dioxide emissions reductions alone, even if those cuts were deep and rapid. The good news is that with up to about half of the warming in the Arctic attributable to the short-lived or "non-CO_2" pollutants, it is possible to achieve a short term climate benefit in the Arctic through immediate reductions in black carbon, methane, and ozone. *See* James E. Hansen, et al., *Climate*

Change and Trace Gases, 365 PHIL. TRANS. R. SOC. A 1925 (2007) (attached); James Hansen & Makiko Sato, *Global Warming: East-West Connections* (September 2007), *available at*: www.columbia.edu/~jeh1/2007/EastWest_20070925.pdf (Attachment "F").

Black carbon has a particularly strong warming impact in the Arctic, and unlike carbon dioxide, within-Arctic and near-Arctic sources have a much stronger warming impact there than sources further away. The Section 7 consultation process for polar bears is currently one of the best regulatory mechanisms for controlling black carbon, and truly a critically important part of saving the species from extinction.

While it is abundantly clear that the ESA itself requires the Services to consider the best available scientific information relating to climate change with regard to the proposed regulations, we note that the Services have an additional duty to consider the climate science and its impact in this and other proposed regulatory changes through the Global Change Research Act in 1990. 15 U.S.C. §2931(a)(2) ("GCRA"). The purpose of the GCRA is "to provide for development and coordination of a comprehensive and integrated United States research program which will assist the Nation and the world to understand, assess, predict, and respond to human-induced and natural processes of global change." 15 U.S.C. § 2931(b).

To this end, the GCRA requires the Climate Change Science Program ("CCSP") to prepare, not less frequently than every 4 years, a scientific assessment which:

> (1) integrates, evaluates, and interprets the findings of the Program and discusses the scientific uncertainties associated with such findings;
> (2) analyzes the effects of global change on the natural environment, agriculture, energy production and use, land and water resources, transportation, human health and welfare, human social systems, and biological diversity; and
> (3) analyzes current trends in global change, both human-[induced] and natural, and projects major trends for the subsequent 25 to 100 years.

15 U.S.C. § 2936.

This scientific assessment is to be used by "all Federal agencies and departments" in "responding to human-induced and natural processes of global change pursuant to other statutory responsibilities." 15 U.S.C. § 2938(b)(2). The Services, then, are under a clear duty to use the most recent scientific assessment, released in May 2008 in the regulations setting process. The scientific assessment, as well as a number of more detailed assessment products, are available at http://www.climatescience.gov and must be considered by the Services in the current process and included in the administrative record for this rulemaking.

The Services proposed across-the-board programmatic exemption has absolutely no legal foundation whatsoever in the ESA. As already discussed, section 7 requires consultation on "any action" whatsoever that "may affect" listed species or critical habitat. Accordingly, if it is determined based upon the "best scientific and commercial data available" that a federal permit, authorization, expenditure or any action otherwise carried out by a federal agency "may affect" listed species or critical habitat, including by contributing to climate change – which virtually the

entire scientific community has concluded is threatening the very existence of thousands of plants and animals, including the polar bear – then the ESA mandates that such action undergo consultation with the Services.

Finally, even if the ESA authorized this type of categorical exclusion from the requirements of section 7, which it clearly does not, the Services' climate change exemption would still be illegal because, as a general matter, the best scientific and commercial data unequivocally establishes that climate change is threatening the very existence of plant and animal life on this planet, including, as the FWS itself has determined, the polar bear. Accordingly this attempt to exempt climate change entirely from section 7 of the ESA is not in any way scientifically based but is, instead, politically motivated and directly contrary to the ESA. The ESA's statutory text mandates that the Services greenhouse gases emissions in section 7 consultations just as they address any other threat to listed species. The proposed regulatory changes purport to override this critically important statutory mandate and must be rescinded.

IV. THE SERVICES MUST COMPLETE REVIEW PURSUANT TO THE NATIONAL ENVIRONMENTAL POLICY ACT BEFORE FINALIZING THESE OR OTHER REGULATORY CHANGES TO THE ENDANGERED SPECIES ACT

The National Environmental Policy Act ("NEPA") is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). The purpose of NEPA is to "help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id*. at § 1500.1(c). NEPA's fundamental purposes are to guarantee that: (1) agencies take a "hard look" at the environmental consequences of their actions *before* these actions occur by ensuring that the agency carefully considers detailed information concerning significant environmental impacts; and (2) agencies make the relevant information available to the public so that it may also play a role in both the decisionmaking process and the implementation of that decision. *See, e.g.* 40 C.F.R. § 1500.1.

NEPA and its implementing regulations require that all federal agencies must prepare an environmental impact statement ("EIS") for all "major federal actions significantly affecting the quality of the human environment."[3] 42 U.S.C. § 4332 (2)(C); *see also* 40 C.F.R. § 1501.4. An EIS protects the environment by providing to both the public and decisionmakers a detailed statement of: (1) the environmental impact of the proposed action; (2) any adverse environmental effects that cannot be avoided should the proposed action be implemented; (3) alternatives to the proposed actions; (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it

[3] An agency may first prepare a detailed Environmental Assessment ("EA") to determine whether the project *may* significantly affect the environment and requires a full EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9. If the EA shows that the proposed action will have no significant impact, the agency may issue a finding of no significant impact ("FONSI") and then execute the action. 40 C.F.R. § 1508.13. If, however, the EA shows that the proposed activity will have a significant impact, the federal agency must prepare an EIS *before* proceeding with the proposed activity. 42 U.S.C. § 4332(2)(C).

be implemented. 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.1. NEPA also requires federal agencies to analyze the direct, indirect, and cumulative impacts of the proposed action, as well as mitigation measures to minimize the environmental impacts of the proposed action. 40 C.F.R. §§ 1508.7, 1508.8, 1502.14, 1502.16. Congress has directed that NEPA be interpreted to apply to all federal actions "to the fullest extent possible." 42 U.S.C. § 4332; *Jones v. Gordon*, 792 F.2d 821, 826 (9th Cir. 1986).

Whether there may be a significant effect on the environment requires consideration of two broad factors: "context and intensity." *See* 40 C.F.R. § 1508.27; 42 U.S.C. § 4332(2)(C). The factors the Services must consider include the degree to which the proposed action affects public health or safety, the degree to which the effects on the quality of the human environment are likely to be highly controversial, the degree to which the possible effects on the human environment are highly uncertain, whether the action is related to other actions with individually insignificant but cumulatively significant impacts, the degree to which the action may adversely affect an endangered or threatened species or its critical habitat, and other factors. 40 C.F.R. § 1508.27.

Here is it clear that the Services must prepare an EIS before proceeding with the proposed regulatory changes. As discussed throughout, the proposal would reverse decades of protections to listed species and the environment and purports to create an exemption for greenhouse gas emissions that would otherwise be controlled through Section 7. These aspects alone mandate preparation of an EIS. Other factors, including the massive public controversy generated by the proposal and the novelty and scope of the issues presented also mandate an EIS.

Should the Services decide to proceed with the regulatory process despite its fatal flaws, we further note that the Services must evaluate a reasonable range of alternatives in the EIS. The evaluation of alternatives is the "heart of the environmental impact statement," and is designed to "sharply" define the issues and provide a "clear basis for choice among options by the decisionmaker and the public . . . ." 40 C.F.R. § 1502.14. The Ninth Circuit has held that "[t]he existence of a viable but unexamined alternative renders an [EIS] inadequate." *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (citations omitted). Moreover, an agency is not permitted "to disregard alternatives merely because they do not offer a complete solution to the problem." *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972). NEPA "does not permit the agency to eliminate from discussion or consideration a whole range of alternatives, merely because they would achieve only some of the purposes of a multi-purpose project." *Town of Matthews v. U.S. Dep't of Transp.*, 527 F. Supp. 1055, 1057 (W.D.N.C. 1981). Agencies are to "[r]igorously explore and objectively evaluate all reasonable alternatives" and discuss the no-action alternative and other "reasonable courses of action." 40 C.F.R. §§ 1502.14(a), 1508.25(b)(2).

The Center and the public are unable to fully comment on the proposed regulatory changes until the full environmental review required by NEPA is completed and made available. Should the Services decide to proceed, we will submit further comments at that time. Nonetheless, we urge the Services in the strongest possible terms to abandon these ill-conceived and illegal proposed regulatory changes.

Sincerely,

/s/

Michael Senatore
Kassie Siegel
Brendan Cummings

attachments