November 6, 2008

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: Inadequate NEPA Compliance with a Proposal to Amend the Section 7 Regulations of the Endangered Species Act, 73 *Fed. Reg.* 63667-68 by the Departments of Interior and Commerce

Dear Mssrs. Lecky, Verhey, Hall and Rauch:

Introduction

On behalf of the Center for Biological Diversity ("Center"), Greenpeace, Friends of the Earth, Conservation Northwest, Endangered Species Coalition, Sierra Club, The Lands Council, American Lands Alliance, Environmental Defense Center, Cascadia Wildlands Project, Xerces Society, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Friends of San Jacinto Valley, San Bernardino Valley Audubon Society, International Forum on Globalization, Turtle Island Restoration Network, Friends of Santa Clara River, Los Padres ForestWatch, Adirondack Council, Olympic Forest Coalition, California Chaparral Institute, Alleghany Defense Project, Wildlands CPR, RESTORE: The North Woods, Environmental Protection Information Center, Alameda Creek Alliance, Spirit of the Sage Council, Marine Mammal Project of Earth Island Institute, Mojave Desert Land Trust, International Center for Technology Assessment, The Center for Food Safety, Public Employees for Environmental Responsibility, EnviroDefenders, Wildlife Alliance of Maine, Western Watersheds, Friends of Blackwater, Friends of Merrymeeting Bay, Western Nebraska Resources Council, Wild Heritage Planners, Tri-County Conservation League, Grand Canyon Trust, Glen Canyon Institute, Friends of Riverside's Hills, Friends of Spring Mill Ponds (Indiana), Desert Survivors, Ocean Outfall Group, and the San Miguel County, Colorado, Board of Commissioners, we hereby submit these comments on the Draft Environmental Assessment (EA), under the National

Environmental Policy Act (NEPA), regarding the proposed rule to amend the regulations governing Section 7 of the Endangered Species Act, 73 Fed. Reg. 45383 (August 5, 2008), which the Center and many other groups have already commented upon and incorporate by reference.[1] Several groups also incorporate by reference other submitted comments on this same Draft EA. The signers of these particular comments represent millions of citizens and affected individuals.

The previous comments on the ESA proposal itself focused not only upon the large magnitude of the proposed changes on federally listed species and their habitat, but also upon the illegality of the proposed rule. As detailed below, this Draft EA is unlawful in numerous respects, particularly with regard to the lack of adequate public involvement, substantial information and analysis gaps, limited alternatives and failure to prepare a full environmental impact statement. The general theme of these comments is the abject failure of the agencies to take a "hard look," as NEPA requires, at the massive impact this proposal will have upon the conservation of threatened and endangered species, and their habitats.

Public and Agency Involvement

As a preliminary matter, the process by which this EA was produced is troubling in several key respects. As has been recently communicated to Interior and Commerce by many of the groups signed to this letter, a ten-day comment period is woefully inadequate to respond to the major issues raised by this Draft EA.[2] The agencies' remark that "neither NEPA nor its implementing regulations require that EAs be made available for public comment", 73 *Fed. Reg.* at 63668, used as a way to deflect this ridiculously small public comment period, is disingenuous and off the mark. See 40 C.F.R. § 1506.6(c) ("Agencies shall … Solicit appropriate information from the public"); 1506.6(b) § ("Agencies shall … notice by mail to national organizations reasonably expected to be interested in the matter). See also Hanly v. Kleindienst, 471 F.2d 823, 836 (2d Cir. 1972); Sierra Club v. Hodel, 848 F.2d 1068, 1094 (10th Cir. 1988); Save our Ecosystems v. Clark, 747 F.2d 1240, 1247 (9th Cir. 1983); Anderson v. Evans, 371 F.3d 475, 487

[1] See, e.g., Letter to Departments of Interior and Commerce from Michael Senatore, Kassie Siegel and Brendan Cummings, Center for Biological Diversity et al. (October 14, 2008).

[2] By law, the comment period must be longer for this document. See 5 U.S.C. Secs. 801, 804; Exec. Order 12866, 58 Fed. Reg. 51735 (October 4, 1992).

(9th Cir. 2004) (all requiring public comment on EAs).[3] See also 40 C.F.R. § 1501.4(b). Further, communication with agency staff at both agencies indicated that professionals involved in endangered species work were cut out of the process in preparing this Draft EA, raising the specter of improper political interference and agency bad faith that will be demonstrated by affidavit in future litigation if necessary.

Basic Requirements of NEPA

NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA has twin aims: to ensure "that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" and to guarantee "that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." Dep't of Transp. v. Public Citizen, 541 U.S. 752, 768 (2004).

These dual objectives require that environmental information, including that related to endangered and threatened species, be disseminated "early enough so that it can serve practically as an important contribution to the decisionmaking process and *will not be used to rationalize or justify decisions already made*." 40 C.F.R. § 1502.5 (emphasis added). Under NEPA, federal agencies must prepare an Environmental Impact Statement (EIS) prior to taking "major Federal actions[4] significantly affecting the quality" of the environment." 42 U.S.C. § 4332(2)(C). See also 40 C.F.R. § 1508.27 (definition of "significantly" which includes the "degree to which the effects on the quality of the human environment are likely to be highly controversial" and "may establish a precedent" and "may adversely affect an

[3] Although neither the statute nor the regulations prescribe any length or scope of public comment on a draft environmental assessment, courts have granted injunctive relief based on a likelihood of success on the merits of NEPA challenges to similar proposals lacking NEPA public comment procedures. See Fund for Animals v. Glickman, Civil Action No. 99-245, Tr. Hr'g Mot. for T.R.O. at 59-60 (Feb. 12, 1999) (holding that, where an environmental assessment was prepared in six days, and the public comment period was approximately eight working days, "*those kinds of time frames do not allow for any meaningful input even though a couple of dedicated people may have managed.*") (emphasis added); Friends of Walker Creek Wetlands, Inc. v. Bureau of Land Mgmt., 19 Envtl. L. Rep. 20852, 20852 (D. Or. 1988) (holding that the agency failed to provide for any public participation in the EA process and ordering 45 day period for public comment on EA).

[4] NEPA "Actions include … new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. Sec. 1508.18(a).

endangered or threatened species or its habitat"). An environmental document such as an EA or EIS must contain "sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a *'hard look'* at the environmental factors, and to make a reasoned decision." Izaak Walton League v. Marsh, 655 F.2d 346, 371 (D.C. Cir. 1981) (emphasis added).

NEPA requires lead agencies to consider a range of alternatives to the proposed action in order to identify options that can serve the purported purposes and needs of the action while lessening (or eliminating) the negative environmental impact of the action. The term "range of alternatives" in 40 C.F.R. § 1505.1(e) "refers to the alternatives discussed in environmental documents" such as a Draft EA. Answer to Question 1, Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 *Fed. Reg.* 18026 (1981). "The 'alternatives' section is the heart of the EIS. This section rigorously explores and objectively evaluates all reasonable alternatives including the proposed action." Id., Answer to Question 7. Agencies are to "(r)igorously explore and objectively evaluate all reasonable alternatives," including a meaningful discussion of the no action alternative and other reasonable courses of action."[5] 40 C.F.R. §§ 1502.14(a), 1508.25(b)(2). Case law supports this notion. See, e.g., Alaska Wilderness v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995); NRDC v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972).

The Draft EA for this Action is Gravely Flawed

The Draft EA fails to consider information that is vital to proper and thorough analysis of the proposed action at hand. 40 C.F.R. § 1500.1(b) (information generated by the NEPA process must be of "high quality" and "(a)ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA"). In other words, the "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Motor Vehicles Mfr. Ass'n v. State Farm, 463 U.S. 29, 43

[5] It should be noted here that the agencies' reliance on the 2004 GAO Report "More Federal Management Attention is Needed to Improve the Consultation Process" (GAO 04-93) is completely misplaced. Draft EA at 4. Nowhere in that report does GAO recommend a regulatory change that would empower action agencies, reduce the authority of the Services, or weaken the definitions of various environmental "effects." In fact, that report, inter alia, explicitly recommends better information and transparency in the Section 7 process, a plank neither the proposed rule nor the Draft EA addresses.

(1983). "NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action." 40 C.F.R. § 1500.1(c).

The Draft EA fails to disclose, discuss or include information pertaining to past experiences in giving action agencies more control under Section 7 of the ESA, nor does it include even the most basic information relating to the proposed action and affected natural resources (including listed species and their habitat). This EA neglects to mention the failure of a proposal to allow E.P.A. to approve pesticides that impact federally listed species under Section 7 without proper Services involvement. Washington Toxics v. Interior, 457 F.Supp.2d 1158 (W.D. Wash. 2006). Similarly, despite attaching the documents as appendices to the Draft EA, nowhere is the abysmal failure of the Forest Service and Bureau of Land Management to self-consult under the National Fire Plan discussed and analyzed in connection with this new Section 7 proposal. Furthermore, nowhere do the agencies analyze comprehensive reports by Professor Oliver Houck, World Wildlife Fund, and others on how Section 7 has actually worked in practice.[6] The absence of this crucial information and accompanying analysis is the definition of arbitrary and capricious agency behavior.

The second bundle of information and analysis failures pertains to the agencies' failure to adequately consider global warming and climate change's profound impact upon threatened and endangered species. Numerous already listed species are impacted by global climate change, including but certainly not limited to the Sonoran pronghorn, piping plover, tidewater goby, grizzly bear, Quinto checkerspot butterfly, desert tortoise, and Pitcher's thistle.[7] Numerous recovery plans explicitly mention global warming as a threat to the listed species in question, and prescribe identified recovery actions directly related to climate change. For example, in the 2006 Revised Recovery Plan for Hawaiian Forest Birds, the Fish and Wildlife Service has stated: "Work to stop global climate change. (Priority 1). Global warming and local climate change are a serious threat to listed species in Hawai`I primarily because of the potential for movement of disease carrying mosquitoes into higher elevation avian refugia currently free of mosquito breeding sites. *This work will require cooperation by appropriate agencies and entities to develop agreements and technologies*

[6] See, e.g., Kristen Boyles, Self-Consultation under ESA Section 7: Removing Checks and Balances, ENDANGERED SPECIES AND WETLANDS REPORTER at 6-7 (July-August 2003).

[7] See, e.g., Jimerfield, S., M. Waage and W. Snape, Global Warming Threats and Conservation Actions in Endangered Species Recovery Plans: A Preliminary Analysis (Center for Biological Diversity, 2007).

needed to slow greenhouse gas emissions, a significant factor contributing to global climate change." Id. at 4-66 (emphasis added). Similarly, the 2000 Recovery Plan for the Bighorn Sheep in Peninsular Ranges of California states: "Unpredictable changes in global climate warrant retention of future options in habitat conservation." Id. at 75. There are other many examples, all excluded from the EA and all incorporated by reference in this letter via the studies cited in these comments.

The agencies entirely ignore this published recovery information on global warming's impact upon listed species. Because the proposed regulations purport to exempt greenhouse pollution from ESA consideration, it is unlawful for the EA to fail to include *any* information on emissions or global warming, and their impacts upon listed and candidate species. This purposeful blind eye is unquestionably unlawful given the main purpose of the ESA: to recover listed species. See, e.g., 16 U.S.C. §§ 1531, 1536. Thus, the Draft EA's failure to consider the conservation of threatened and endangered species also violates NEPA by neglecting to include "conservation" as a purpose and need of the document. Every federal agency, and particularly the Secretaries of Interior and Commerce for the listed species under their jurisdiction, must conserve endangered and threatened plants and animals. Indeed, despite the fact that the new proposed definitions and treatment of "effects," "indirect effects," and "cumulative effects" would unquestionably carve out most if not all considerations of climate change's causes, the cynical result is that all agency actions – from new highway and forest roads to new water diversion projects and pollution controls – would now more easily escape Section 7 consultation (again, the very purpose of Section 7 is conservation, or recovery). Yet, this fact is not analyzed even though the agencies themselves possess the very consultation data in question.[8] Speed, apparently, trumps thoughtfulness and reason at this point for this Administration.

Legal precedent and the agencies' own policies reinforce the lawlessness of the attempt to exclude consideration of global warming considerations from Section 7 consultation, a failure this Draft EA illegally

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[8] Compare Draft EA at 13 ("there is no precise basis for calculating the nature of such increases" with the no action alternative, which would keep the regulations in tact) with 40 C.F.R. § 1502.22 ("If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the EIS."

perpetuates. The Council on Environmental Quality (CEQ) has identified greenhouse gases as a cumulative effects issue. See CEQ, Considering Cumulative Effects under NEPA (1997). See also 40 C.F.R. § 1508.7 (cumulative impacts under NEPA are those which result "from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency … or person undertakes such actions."). This type of analysis, lacking from the current Draft EA, is also required by Interior Secretarial Order 3226, which states that there "is consensus in the international community that global climate change is occurring and that it should be addressed in governmental decision making." The Order continues: "Each bureau and office of the Department will consider and analyze potential climate change impacts when undertaking long-range planning exercises … when making major decisions regarding the potential utilization of resources under the Department's purview." Id.

Federal court cases that have analyzed global warming under NEPA have upheld the principle that the federal agencies such as Interior and Commerce must take greenhouse gas emissions into account when assessing the environmental impact of their actions. See, e.g., Center for Biological Diversity v. National Highway Transportation Safety Administration, 508 F.3d 508 (9th Cir. 2007) (rule regarding fuel efficiency standards for automobiles); Border Power Plant Working Group v. Dep't of Energy, 260 F.Supp.2d 997 (S.D. 2003) (trans-boundary electric transmission lines); Mid States Coalition v. Surface Transportation Board, 345 F.3d 520 (8th Cir. 2003) (EIS required to examine effects in increased coal consumption resulting from proposed construction of rail lines to coal mines).

Cumulative Impacts Are Ignored

Because the proposed regulation purports to exempt greenhouse gas emissions from ESA Section 7 consultation, at a bare minimum the NEPA analysis must discuss the greenhouse emissions that will result from the proposed exemption and those emissions' direct, indirect, and cumulative impacts on ESA listed species and other affected resources. The EA fails utterly to do so. It fails to analyze other cumulative impacts upon listed species as a result of this proposed rule as well.

The EA's discussion (beyond brief boilerplate language) of cumulative impacts is not only grossly inadequate, but is in fact nonexistent.

A cumulative impact is defined under NEPA as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. Congress and the Courts have repeatedly recognized the critical importance of the cumulative impacts analysis under NEPA. *Inexplicably, this EA does not even have a section or true analysis on cumulative impacts, rendering it inadequate on its face.*

The EA's failure to adequately analyze the cumulative impact of the proposed action is particularly egregious given the ESA's underlying statutory scheme to protect listed plants and animals and afford them the highest of priorities. In overturning an improper interpretation of Section 7 by the National Marine Fisheries Service, the Ninth Circuit stated recently "a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide into oblivion is one of the very ills that the ESA seeks to prevent." National Wildlife Fed'n. v. NMFS, 524 F.3d 917, 929 (9th Cir. 2008). The NEPA analysis must be conducted in consideration of, and consistent with, the underlying statutory scheme, particularly here where the proposal would weaken and change the definition of cumulative impacts under the ESA itself. The EA's failure to conduct a thorough, objective analysis of the cumulative impact of the proposed regulation on ESA listed species and other affected resources is completely inconsistent with the ESA's structure and purpose and is arbitrary, capricious, and contrary to NEPA's statutory mandate.

The EA also fails to provide objective and factual analysis but instead present's the administration's self-serving and factually incorrect interpretation of the effect of the proposed regulations. This flaw is compounded by the fact that the EA was also prepared as post-hoc rationalization for a pre-determined outcome. The result is a facially invalid document which fails to comply with any of NEPA's requirements.

The Alternatives in the Draft EA are Illegally Limited

When read together, it is evident from the proposed rule and the Draft EA that the agencies only seriously looked at the preferred alternative of amending the well-established and largely successful Section 7 regulations. As noted, the law requires agencies to take a hard look at the no action

alternative as well as other reasonable alternatives. 40 C.F.R. § 1502.14. Most interesting in this regard is Alternative C in the Draft EA, at 24-25, which while summarily dismissed by the agencies and inadequate in its own right, is nonetheless revealing about what the preferred alternative of amending the ESA regulations does *not* do. Your agencies tacitly admit that the Services will not track "action agencies' implementation of the revised applicability standards." Your agencies tacitly admit that it will be difficult to impossible for the Services to "engage prior to an agency decision to act" if the action agency chooses to utilize one of the consultation loopholes created by the new proposed rule. Your agencies tacitly admit that it will be difficult to impossible to facilitate "consistency across agencies in implementation of the proposed regulatory measures." And your agencies tacitly admit that the Services do not at present have a plan to track "the number of and type of agency actions that proceed via the revised applicability criteria." Id.

Flying blind may satisfy certain ideology, but it is not acceptable under NEPA. Instructive in this regard is Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000), where the Secretary of Commerce's EA regarding resumption of whaling by the Makah tribe of Washington state was held to be illegal. There, the court found that Commerce officials were "predisposed" to finding that the whale proposal had no significant environmental impacts, that the agency's decision not to prepare an EIS lacked a "convincing statement of reasons," and that an agency cannot avoid the hard look requirement "through subterfuge designed to rationalize decisions already made." Id. at 1146, 42. The root of these problems, present here as well, was the agencies' failure to start the NEPA process "at the earliest possible time" in order to ensure that all planning and decisions reflected full environmental values." Consideration of "alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process." Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988). Consideration of alternatives should be "more than an exercise in frivolous boilerplate." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978).

The Agencies Must Prepare a Draft EIS to Better Understand the Environmental Consequences of Their Action

The standard for determining whether the implementation of a proposal would significantly affect the human environment, and thus trigger

the need for a full EIS, is whether the proposed project "*may*" significantly degrade the human environment. Foundation for North American Wild Sheep v. USDA, 681 F.2d 1172, 1177-78 (9th Cir. 1982) (emphasis added). In other words if "*substantial questions*" are raised about whether the agency action will have a significant environmental impact, an EIS must be prepared. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (emphasis added). The significance of the proposed action to reduce the number of Section 7 consultations is reflected in the Draft EA itself:

> (R)equests to the Services for technical assistance or section 7 consultations increased from 41,000 requests in 1999 to over 68,000 requests in FY 2006. In 2006, 39,346 requests for technical assistance, 26,762 were for informal consultations, and 1,936 were for formal consultations.

The sheer magnitude of federal agency involvement in the ESA Section 7 process, and the agencies own admission that their goal is to greatly reduce these consultations, by itself necessitates the issuance of a draft EIS and fuller understanding of the impacts of this proposed rule. The consequences of this proposed rule would be massive, affecting over 1000 listed species threatened with extinction, and many million acres of imperiled wild habitat. The scope of this rule change cannot be overstated in very real practical terms.

A review of the "significance" factors under CEQ's NEPA regulations reinforces the clear need for an EIS for this proposed rule. 40 C.F.R. § 1508.27.[9] In terms of "context," it is noteworthy that Section 7's reach not only covers all states and U.S. lands & waters, but it also covers U.S. agency actions that occur on the high seas, the global commons and even foreign countries. In terms of "intensity," the fact that Section 7 applies to all federal agencies for "any" federal agency action, with the consultation numbers quoted supra, is highly compelling. Equally compelling is the fact that *all ten intensity factors* in the NEPA regulations are triggered by this proposed rule change. Id. It is the height of arbitrary and capricious agency behavior not to do an EIS for this proposal, and it is the agencies' duty to accomplish the task of examining those important significance factors.

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[9] Under NEPA, the term 'human environment' "shall be interpreted comprehensively to include the natural and physical environment and the relationship of people to that environment." 40 C.F.R. Sec. 1508.14.

Indeed, one is hard pressed to imagine an ESA regulatory change more significant than what has been proposed. The law demands a full EIS. The public demands it. The environment and our endangered species need it.

Conclusion

We appreciate due consideration of these comments. We remind you that you cannot do administratively what the legislative branch of the federal government has not permitted. U.S. Const. art I, § 1. Not only are these regulations contrary to statutory law and mandate, but this Draft EA must also be immediately withdrawn and replaced with a Draft EIS.

Sincerely,

/s/

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