

COPY

RECEIVED
FILED
DEC 11 PM 2:21
SUPERIOR COURT
SANTA CRUZ COUNTY
CALIFORNIA

E-filing

MHP

CV 08

5546

1 Lisa T. Belenky (CA Bar No. 203225)
2 CENTER FOR BIOLOGICAL DIVERSITY
3 351 California Street, Suite 600
4 San Francisco, CA 94104
5 Telephone: (415) 436-9682 x 307
6 Facsimile: (415) 436-9683
7 Email: lbelenky@biologicaldiversity.org

8 Michael Senatore, application for *pro hac vice* pending
9 CENTER FOR BIOLOGICAL DIVERSITY
10 1601 Connecticut Ave. N.W., Suite 701
11 Washington, D.C. 20009-1056
12 Telephone: 301-466-0774
13 Email: msenatore@biologicaldiversity.org

14 Eric Glitzenstein, application for *pro hac vice* pending
15 Meyer Glitzenstein & Crystal
16 1601 Connecticut Avenue, N.W., Suite 700
17 Washington, D.C. 20009
18 Telephone: (202) 588-5206
19 Email: eglitzenstein@meyerglitz.com

20 Jason Rylander, application for *pro hac vice* pending
21 Defenders of Wildlife
22 1101 17th Street, N.W.
23 Washington, D.C. 20036
24 (202) 682-9400
25 Email: jrylander@defenders.org

26 Attorneys for Plaintiffs (additional attorneys on signature page)

27 UNITED STATES DISTRICT COURT
28 NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, a) Case No.

non-profit corporation, GREENPEACE, INC.,)

a non-profit corporation, and DEFENDERS)

OF WILDLIFE, a non-profit corporation,)

Plaintiffs,)

vs.)

DIRK KEMPTHORNE, Secretary, United)

States Department of the Interior, CARLOS)

GUTIERREZ, Secretary, United States)

Department of Commerce, DALE HALL,)

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

1 Director, United States Fish and Wildlife)
2 Service, and JAMES BALSIGER, Acting)
3 Assistant Administrator, National Marine)
4 Fisheries Service,)
5 Defendants.)

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION

1
2 1. This case challenges the U.S. Department of the Interior's ("DOI") and U.S.
3 Department of Commerce's ("DOC") (collectively "Departments") final Regulations Amending
4 the Endangered Species Act Section 7 Implementing Regulations ("Final Regulations" or
5 "Regulations"). The Regulations violate the Endangered Species Act ("ESA"), will inevitably
6 contribute to the extinction of endangered and threatened species, and have been hastily
7 promulgated in derogation of the public's right, under the Administrative Procedure Act
8 ("APA"), to have a meaningful opportunity to comment on, and thereby influence, substantive
9 regulations, particularly those that work fundamental changes in public policy and longstanding
10 agency practice.

11 2. The Regulations will eliminate the requirement that federal agencies consult with
12 the U.S. Fish and Wildlife Service ("FWS") or National Marine Fisheries Service (collectively,
13 "the Services") – the mechanism enacted by Congress to ensure that federal agency actions do
14 not jeopardize the recovery of endangered and threatened species or adversely modify their
15 critical habitat – on potentially thousands of federal actions that may adversely affect listed
16 species or their critical habitat. The Regulations also drastically weaken long-established
17 regulatory standards (adopted by the Reagan Administration in 1986) that have governed the
18 section 7 consultation process, by replacing those standards with vague, incoherent, and
19 undefined terms that will invariably lead to inconsistent application, agency confusion, increased
20 litigation, and, most important, decreased protection for species already on the brink of
21 extinction.

22 3. Notwithstanding the fact that the Final Regulations provide federal action
23 agencies with unprecedented authority to unilaterally assess the impact of their own actions on
24 listed species and critical habitat, including agencies with poor or limited track records of
25 complying with the ESA's section 7 consultation regulations, the Services have failed to require
26 that agency personnel even undertake any training or establish even the most minimal scientific
27 qualifications or competency before exercising the expansive new authority over endangered and
28 threatened species afforded by the Regulations. Moreover, the Regulations do not even establish

1 any oversight or monitoring procedures to allow the Services to ensure that action agencies are
2 administering these new standards correctly and are adequately protecting listed species and
3 critical habitat, nor do they require such agencies to even document when they invoke the new
4 regulations and forgo section 7 consultation in reliance on them.

5 **II. JURISDICTION AND VENUE**

6 4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5
7 U.S.C. § 702 (APA).

8 5. Venue is proper in the Northern District of California pursuant to 28 U.S.C. §
9 1391(e), as this civil action is brought against an agency of the United States and officers and
10 employees of the United States acting in their official capacities and under the color of legal
11 authority, no real property is involved in this action, and at least one Plaintiff resides in this
12 judicial district.

13 **III. INTRADISTRICT ASSIGNMENT**

14 6. Pursuant to Local Rules 3-5(b) and 3-2(c) and (d), assignment of this case to the
15 San Francisco or Oakland Division is appropriate because Plaintiffs are located in San
16 Francisco County.

17 **IV. PARTIES**

18 7. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a non-
19 profit 501(c)(3) corporation with offices in San Francisco and Joshua Tree, California, as well
20 as in Arizona, New Mexico, Oregon, and Washington, D.C. The Center for Biological
21 Diversity works through science, law, and policy to secure a future for all species, great or
22 small, hovering on the brink of extinction. The Center is actively involved in species and
23 habitat protection issues throughout the United States and the world, including protection of
24 plant and animal species from the impacts of global warming. The Center has over 40,000
25 members throughout the United States and the world.

26 8. The Center brings this action on its own institutional behalf and on behalf of its
27 members, many of whom regularly enjoy and will continue to enjoy educational, recreational,
28 and scientific activities regarding endangered and threatened species and critical habitats

1 impacted by these regulations. The interests of the Center and its members in observing,
2 studying, and otherwise enjoying endangered and threatened species and their critical habitats,
3 and in obtaining and disseminating information regarding the survival of endangered and
4 threatened species and their critical habitats, have been harmed by defendants' actions regarding
5 these Regulations. In particular, the Regulations will increase the likelihood that many of the
6 endangered and threatened species and critical habitats that the Center's members observe,
7 study, photograph, and otherwise enjoy, will be adversely affected by federal agency actions,
8 including those that contribute to global warming.

9 9. As a result of the Regulations, many federal agency actions affecting the
10 Center's and its members' interests in particular species and habitats will no longer be subject to
11 the safeguards of the ESA section 7 consultation process at all; and for those actions that are
12 subject to the process, the Center's and its members' interests will also be impaired because the
13 action agency and the Service are foreclosed by the Regulations from adequately addressing the
14 full range of direct, indirect, and cumulative effects of agency actions on listed species and their
15 critical habitats. For example, by declaring categorically that the impacts of any agency actions
16 on greenhouse gas emissions (and hence on species threatened with extinction because of global
17 climate change) are adverse effects that "need not be considered in any consultation," 73 Fed.
18 Reg. 47872, the Regulations significantly increase the likelihood that species harmed by global
19 climate change and as to which the Center and its members have recreational, aesthetic,
20 scientific, and other concrete interests, will be driven to extinction.

21 10. The Center and its members are further injured by defendants' failure to prepare
22 an Environmental Impact Statement and/or to prepare an adequate Environmental Assessment
23 pursuant to the National Environmental Policy Act ("NEPA"). By failing to prepare a NEPA
24 document that adequately discloses and discusses all of the adverse environmental impacts that
25 will likely result from the Regulations, including those related to greenhouse gas emissions and
26 climate change, defendants have further undermined the Center's and its members' interests in
species and habitats affected by the Regulations.

27 11. For example, the Center submitted comments to the FWS urging it to address the
28

1 direct, indirect and cumulative impacts to threatened and endangered species from federally-
2 permitted coal fired power plants. One such proposed project is the Desert Rock coal power
3 plant in New Mexico. This plant will produce greenhouse gas emissions and climate change
4 impacts as well as other effects on threatened and endangered species that will receive
5 inadequate section 7 consultation under the Regulations. Comments submitted by the Center to
6 the FWS explained that the Desert Rock power plant could result in adverse impacts to
7 federally-listed species including Colorado pikeminnow, razorback sucker, southwestern willow
8 flycatcher, elkhorn and staghorn coral, Quino checkerspot butterfly and other species as to
9 which the Center and its members have recreational, aesthetic, scientific and other concrete
10 interests

11 12. Another example is the proposed White Pine coal fired power plant in Nevada.
12 Once completed this project will result in the emission of greenhouse gases and will likely
13 directly and indirectly impact threatened and endangered species. Yet under the Regulations
14 impacts from the White Pine project to endangered and threatened species as to which the
15 Center and its members have recreational, aesthetic, scientific and other concrete interests,
16 including the desert tortoise, will not be adequately addressed or even considered. *Id.* at 2.

17 13. The Center and its members are also injured by defendants' hasty promulgation
18 of the Regulations in a manner that has effectively nullified the public's right to comment under
19 the APA on substantive regulations. By issuing the Regulations in a matter of weeks following
20 the receipt of hundreds of thousands of public comments – the vast majority of which are
21 severely critical of the rule – defendants have abridged the Center's and its members'
22 procedural rights to meaningfully influence a rulemaking that threatens to undermine their
23 concrete interests in many endangered and threatened species and critical habitats.

24 14. The Center and its members are further injured by the Regulations because the
25 Regulations will render it extremely difficult, if not impossible, for the Center and its members
26 even to effectively monitor and hence learn about when the Regulations are being invoked to
27 bypass or limit section 7 consultations with respect to particular projects. The Regulations do
28 not impose on action agencies or defendants themselves any obligation to routinely maintain

1 and make available to the public in a timely fashion a data base reflecting what projects the
2 action agencies have determined may have effects on listed species but nonetheless may avoid
3 any consultation with defendants. Consequently, there is no effective means by which the
4 Center and its members may even learn about agency actions affecting species and habitats in
5 which plaintiffs have concrete interests but that are being excluded from consultation, let alone
6 challenge those actions in a timely fashion.

7 15. Plaintiff GREENPEACE, INC. ("Greenpeace") is a California non-profit
8 corporation with offices in San Francisco, San Diego, Los Angeles, San Jose, Costa Mesa, as
9 well as cities in 18 other states and the District of Columbia. Its mission is to raise public
10 awareness of environmental problems and promote changes that are essential to a green and
11 peaceful future. There are approximately 250,000 current Greenpeace members in the United
12 States. Since the 1980's, Greenpeace has been a lead advocacy organization working to raise
13 awareness of global warming and the protection of wildlife, and to advocate for serious cuts in
14 greenhouse gas emissions through local, national, and global action. For the past decade,
15 Greenpeace has campaigned on the causes and impacts of climate change in the Arctic,
16 including the impacts on species which are threatened by continued Arctic warming.

17 16. Greenpeace brings this action on its own institutional behalf and on behalf of its
18 members, many of whom regularly enjoy and will continue to enjoy educational, recreational,
19 and scientific activities regarding endangered and threatened species and critical habitats
20 impacted by the Regulations. The interests of Greenpeace and its members in observing,
21 studying, and otherwise enjoying endangered and threatened species and their critical habitats,
22 and in obtaining and disseminating information regarding the survival of endangered and
23 threatened species and their critical habitats, are harmed by defendants' actions in adopting the
24 Regulations. In particular, the Regulations will increase the likelihood that many of the
25 endangered and threatened species and critical habitats that Greenpeace's members enjoy,
26 including the beluga whale and Stellar sea lion will be adversely affected by federal agency
27 actions, including those that contribute to global warming.

28 17. As a result of the Regulations, many federal agency actions affecting

1 Greenpeace's and its members' interests in particular species and habitats will no longer be
2 subject to the safeguards of the ESA section 7 consultation process at all; and for those actions
3 that are subject to the process, Greenpeace's and its members' interests will also be impaired
4 because the action agency and the Service are foreclosed by the regulations from adequately
5 addressing the full range of direct, indirect, and cumulative effects of agency actions on listed
6 species and their critical habitats. For example, by declaring categorically that the impacts of
7 any agency actions on greenhouse gas emissions (and hence on species threatened with
8 extinction because of global climate change) are adverse effects that "need not be considered in
9 any consultation," 73 Fed. Reg. 47872, the Regulations significantly increase the likelihood that
10 species harmed by global climate change and as to which Greenpeace and its members have
11 recreational, aesthetic, scientific, and other concrete interests, will be driven to extinction.

12 18. Greenpeace and its members are further injured by defendants' failure to prepare
13 an Environmental Impact Statement and/or to prepare an adequate Environmental Assessment
14 pursuant to the National Environmental Policy Act ("NEPA"). By failing to prepare a NEPA
15 document that adequately discloses and discusses all of the adverse environmental impacts that
16 will likely result from the Regulations, including those related to greenhouse gas emissions and
17 climate change, defendants have further undermined Greenpeace's and its members' interests in
18 species and habitats affected by the Regulations.

19 19. Greenpeace and its members are also injured by defendants' hasty promulgation
20 of the Regulations in a manner that has effectively nullified the public's right to comment under
21 the APA on substantive regulations. By issuing the Regulations in a matter of weeks following
22 the receipt of hundreds of thousands of public comments – the vast majority of which are
23 severely critical of the rule – defendants have abridged Greenpeace's and its members'
24 procedural rights to meaningfully influence a rulemaking that threatens to undermine their
25 concrete interests in many endangered and threatened species and critical habitats.

26 Greenpeace and its members are further injured by the Regulations because the Regulations will
27 render it extremely difficult, if not impossible, for Greenpeace and its members even to
28 effectively monitor and hence learn about when the Regulations are being invoked to bypass or

1 limit section 7 consultations with respect to particular projects. The Regulations do not impose
2 on action agencies or defendants themselves any obligation to routinely maintain and make
3 available to the public in a timely fashion a data base reflecting what projects the action
4 agencies have determined may have effects on listed species but nonetheless may avoid any
5 consultation with defendants. Consequently, there is no effective means by which Greenpeace
6 and its members may even learn about agency actions affecting species and habitats in which
7 plaintiffs have concrete interests but that are being excluded from consultation, let alone
8 challenge those actions in a timely fashion.

9 20. Plaintiff DEFENDERS OF WILDLIFE ("Defenders") is a non-profit 501(c)(3)
10 organization headquartered in Washington, D.C. with field offices in Alaska, California,
11 Colorado, Florida, Idaho, Montana, New Mexico, Oregon, Canada and Mexico. Founded in
12 1947, Defenders is a science-based conservation organization with more than 1,000,000
13 members and supporters nationwide.

14 21. Defenders is dedicated to the protection of all native wild animals and plants in
15 their natural communities, and the preservation of the habitat on which they depend. Defenders
16 advocates new approaches to wildlife conservation that will help keep species from becoming
17 endangered, and it employs education, litigation, research, legislation and advocacy to defend
18 wildlife and their habitat.

19 22. Defenders is one of the nation's leading advocates for endangered species and
20 has been involved in issues of ESA implementation for more than 30 years. Recently
21 Defenders testified before Congress on the importance of the consultation process for wildlife
22 and the impacts of these regulations on critical checks and balances established by Congress
23 through section 7 of the ESA. Defenders also submitted detailed comments on the proposed
24 regulations and the environmental assessment, stressing how the regulatory changes undermine
25 the ESA section 7 consultation process and the failure of defendants to prepare an adequate
26 Environmental Assessment. A leading voice on the impacts of global warming on wildlife,
27 Defenders released in November 2008 a new report, *Beyond Cutting Emission: Protecting
28 Wildlife and Ecosystems in a Warming World*, that advocates a national strategy for addressing

1 global warming.

2 23. Defenders brings this action on its own institutional behalf and on behalf of its
3 members and staff who derive scientific, aesthetic, recreational, and spiritual benefit from the
4 endangered and threatened species and their habitats that will be impacted by these regulation.
5 The interests of Defenders in observing, studying, and otherwise enjoying endangered and
6 threatened species and their critical habitats, and in obtaining and disseminating information
7 regarding the survival of endangered and threatened species and the critical habitats have been
8 harmed by defendant's actions regarding these regulations. In particular, these regulations will
9 increase the likelihood that many of the endangered and threatened species and critical habitat
10 that Defenders' members observe, study, photograph, and otherwise enjoy will be adversely
11 affected by federal agency actions, including those that contribute to global warming.

12 24. As a result of the Regulations, many federal agency actions affecting Defenders'
13 and its members' interests in particular species and habitats will no longer be subject to the
14 safeguards of the ESA section 7 consultation process at all; and for those actions that are subject
15 to the process, Defenders' and its members' interests will also be impaired because the action
16 agency and the Service are foreclosed by the Regulations from adequately addressing the full
17 range of direct, indirect, and cumulative effects of agency actions on listed species and their
18 critical habitats. For example, by declaring categorically that the impacts of any agency actions
19 on greenhouse gas emissions (and hence on species threatened with extinction because of global
20 climate change) are adverse effects that "need not be considered in any consultation," 73 Fed.
21 Reg. 47872, the Regulations significantly increase the likelihood that species harmed by global
22 climate change and as to which Defenders and its members have recreational, aesthetic,
23 scientific, and other concrete interests, will be driven to extinction.

24 25. Defenders and its members are further injured by the Regulations because the
25 Regulations will render it extremely difficult, if not impossible, for Defenders and its members
26 even to effectively monitor and hence learn about when the Regulations are being invoked to
27 bypass or limit section 7 consultations with respect to particular projects. The Regulations do
28 not impose on action agencies or defendants themselves any obligation to routinely maintain

1 and make available to the public in a timely fashion a data base reflecting what projects the
2 action agencies have determined may have effects on listed species but nonetheless may avoid
3 any consultation with defendants. Consequently, there is no effective means by which
4 Defenders and its members may even learn about agency actions affecting species and habitats
5 in which plaintiffs have concrete interests but that are being excluded from consultation, let
6 alone challenge those actions in a timely fashion.

7 26. Defenders and its members are also injured by defendants' hasty promulgation of
8 the Regulations in a manner that has effectively nullified the public's right to comment under
9 the APA on substantive regulations. By issuing the Regulations in a matter of weeks following
10 the receipt of hundreds of thousands of public comments – the vast majority of which are
11 severely critical of the rule – defendants have abridged Defenders' and its members' procedural
12 rights to meaningfully influence a rulemaking that threatens to undermine their concrete
13 interests in many endangered and threatened species and critical habitats.

14 27. Defenders and its members are further injured by defendants' failure to prepare
15 an Environmental Impact Statement and/or to prepare an adequate Environmental Assessment
16 pursuant to the National Environmental Policy Act ("NEPA"). By failing to prepare a NEPA
17 document that adequately discloses and discusses all of the adverse environmental impacts that
18 will likely result from the Regulations, including those related to greenhouse gas emissions and
19 climate change, defendants have further undermined Defenders' and its members' interests in
20 species and habitats affected by the Regulations.

21 28. Defendant DIRK KEMPTHORNE, United States Secretary of the Interior, is the
22 highest ranking official within the U.S. Department of the Interior and, in that capacity, has
23 ultimate responsibility for the administration and implementation of the ESA with regard to
24 terrestrial endangered and threatened species, and for compliance with all other federal laws
25 applicable to the Department of the Interior. He is sued in his official capacity.

26 29. Defendant CARLOS GUTIERREZ, United States Secretary of Commerce, is the
27 highest ranking official within the U.S. Department of Commerce and, in that capacity, has
28 ultimate responsibility for the administration and implementation of the ESA with regard to

1 most marine endangered and threatened species, and for compliance with all other federal laws
2 applicable to the Department of Commerce. He is sued in his official capacity.

3 30. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is a federal
4 agency within the Department of the Interior authorized and required by law to protect and
5 manage the fish, wildlife and native plant resources of the United States, including enforcing
6 and implementing the ESA. The Service has been delegated primary authority for day-to-day
7 administration of the ESA with respect to terrestrial species.

8 31. Defendant NATIONAL MARINE FISHERIES SERVICE is a federal agency
9 within the Department of Commerce authorized and required by law to protect and manage
10 marine resources of the United States, including enforcing and implementing the ESA. NMFS
11 has been delegated primary authority for day-to-day administration of the ESA with respect to
12 most marine species.

13 V. STATUTORY AND REGULATORY FRAMEWORK

14 A. The Endangered Species Act

15 32. Recognizing that all of the country's "species of fish, wildlife, and plants are of
16 aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and
17 its people," 16 U.S.C. § 1531(a)(3), Congress enacted the ESA with the express purpose of
18 providing both a "means whereby the ecosystems upon which endangered and threatened
19 species depend may be conserved, [and] . . . a program for the conservation of such endangered
20 species." 16 U.S.C. § 1531(b).

21 33. The ESA "is the most comprehensive legislation for the preservation of
22 endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S.
23 153, 180 (1978). The Supreme Court's review of the ESA's "language, history, and structure"
24 convinced the Court "beyond a doubt" that "Congress intended endangered species to be
25 afforded the highest of priorities." *Id.* at 174. As the Court found, "the plain intent of Congress
26 in enacting this statute was to halt and reverse the trend toward species extinction, whatever the
27 cost." *Id.* at 184.

28 34. Principal responsibilities for implementing the Act have been delegated to the

1 FWS, an agency within the Department of the Interior, and to the National Marine Fisheries
2 Service ("NMFS"), an agency within the Department of Commerce.

3 35. A "species" is defined by the Act to include "any subspecies of fish or wildlife or
4 which interbreeds when mature . . ." 16 U.S.C. § 1532(16). Before a species may receive
5 protection under the ESA, it must be listed by the Services as "endangered" or "threatened."

6 36. A species is "endangered" if it "is in danger of extinction throughout all or a
7 significant portion of its range." 16 U.S.C. § 1532(6). A species is "threatened" if it is "likely
8 to become an endangered species within the foreseeable future." 16 U.S.C. § 1532(20).

9 37. When the Services list a species as endangered or threatened, they generally
10 must also designate critical habitat for that species. Section 4(a)(3)(A)(i) of the ESA states that,
11 "to the maximum extent prudent and determinable," the Services, "shall, concurrently with
12 making a determination . . . that a species is an endangered species or threatened species,
13 designate any habitat of such species which is then considered to be critical habitat . . ." 16
14 U.S.C. § 1533(a)(3)(A)(i); *see also id.* at § 1533(b)(6)(C).

15 38. Critical habitat is defined by Section 3 of the ESA as: "(i) the specific areas
16 within the geographical area occupied by a species, at the time it is listed in accordance with the
17 [ESA], on which are found those physical or biological features (I) essential to the conservation
18 of the species and (II) that may require special management considerations or protection; and
19 (ii) specific areas outside the geographical area occupied by a species at the time it was listed . .
20 . upon a determination by the Secretary that such areas are essential for the conservation of the
21 species." 16 U.S.C. § 1532(5)(A).

22 39. For any "endangered species," the ESA makes it unlawful for any person to
23 "take any such species within the United States." 16 U.S.C. § 1538(a)(1)(B). The term "take"
24 includes "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to
25 attempt to engage in any such conduct. 16 U.S.C. § 1532(19).

26 40. Under section 7(a)(2) of the Act, each federal agency "shall, in consultation with
27 the Secretary, insure that any action authorized, funded, or carried out by such agency [] is not
28 likely to jeopardize the continued existence of any endangered species or threatened species or

1 result in the destruction or adverse modification” of the species’ designated critical habitat. 16
2 U.S.C. § 1536(a)(2). Further, “[t]o facilitate compliance with the requirements of subsection
3 (a)(2), each Federal agency shall . . . request of the Secretary information whether any species
4 which is listed or proposed to be listed may be present in the area of such proposed action.” *Id.*
5 § 1536(c).

6 41. Section 7 and its implementing regulations, as adopted in 1986, set forth a
7 detailed process that must be followed before agencies take or approve actions that may harm a
8 species or impair its critical habitat. Initially, the “action agency” may be required to prepare a
9 “Biological Assessment” “concerning listed [] species and designated and proposed critical
10 habitat that may be present in the action area . . .” 50 C.F.R. § 402.02; *see also* 16 U.S.C. §
11 1536(c)(1).

12 42. Under the 1986 regulations, if the contemplated action “may affect listed species
13 or critical habitat,” then the agency and the Secretary must pursue “formal consultation,” 50
14 C.F.R. § 402.14(a), that requires the action agency to submit extensive information to the
15 Services, including “the best scientific and commercial data available or which can be obtained
16 during the consultation for an adequate review of the effects that an addition may have upon
17 listed species or critical habitat.” *Id.* § 402.14(d).

18 43. The Services’ “responsibilities during formal consultation” include
19 “[r]eview[ing] all relevant information provided by the Federal agency or otherwise available,”
20 including “an on-site inspection of the action area,” “[e]valuat[ing] the effects of the action and
21 cumulative effects on listed species or critical habitat,” and then producing a Biological
22 Opinion (“BO”) that must contain a “detailed discussion of the effects of the action on listed
23 species or critical habitat,” and determine “whether the action, taken together with cumulative
24 effects, is likely to jeopardize the continued existence of listed species or result in the
25 destruction or modification of critical habitat.” *Id.* at §§ 402.14(g), (h)(2).

26 44. If “jeopardy” or “destruction or adverse modification of critical habitat” is likely
27 to occur, then the Services must prescribe in the BO “reasonable and prudent alternatives” to
28 avoid these results. *Id.* The BO must also include a written statement (referred to as the

1 “Incidental Take Statement”) specifying “the impacts of such incidental taking on the species,”
2 any “reasonable and prudent measures that the [Services] consider[] necessary or appropriate to
3 minimize such impact,” and the “terms and conditions” that the agency must comply with in
4 implementing those “measures.” 16 U.S.C. § 1536(b)(4).

5 45. With regard to actions that “may affect” listed species or critical habitat, the
6 Services’ longstanding regulations implementing section 7 of the ESA allow formal
7 consultation and the issuance of a BO to be avoided only when the Services issue a “written
8 concurrence” that the proposed action “is not likely to adversely affect any listed species or
9 critical habitat.” 50 C.F.R. § 402.13(a). During this “informal consultation” between the action
10 agency and the Services, the Services not only decide whether to “concur” that formal
11 consultation may be avoided, but may also “suggest modifications to the action that the Federal
12 agency and any applicant could implement to avoid the likelihood of adverse effects to listed
13 species or critical habitat.” *Id.* § 402.13(b).

14 46. When the section 7 consultation regulations were promulgated in 1986, the
15 Services stated that they “properly and accurately implement[]” the ESA and “afford[] the
16 protection mandated by section 7 of the ESA.” 51 Fed. Reg. 19927 (1986). The Services also
17 stated that the “purpose” of the regulations was to “streamline the consultation process while
18 maintaining the protections afforded species under section 7.” *Id.* The preamble to the 1986
19 regulations further explained that the “Service believes that informal consultation is extremely
20 important and may resolve potential conflicts (adverse effects) and eliminate the need for
21 formal consultation. Through informal consultation, the Service can work with the Federal
22 agency and any applicant and suggest modifications to the action to reduce or eliminate adverse
23 effects” to the species or its critical habitat. *Id.* at 19949.

23 **B. The National Environmental Policy Act**

24 47. NEPA is “our basic national charter for protection of the environment.” 40
25 C.F.R. § 1500.1(a). It was enacted in 1970 to put in place procedures to insure that, before
26 irreversibly committing resources to a project or program, federal agencies “encourage
27 productive and enjoyable harmony between man and his environment,” “promote efforts which
28

1 will prevent or eliminate damage to the environment,” and “enrich understanding of the
2 ecological systems and natural resources important to the Nation.” 42 U.S.C. § 4321.

3 48. NEPA seeks to guarantee that: (1) agencies take a “hard look” at the
4 environmental consequences of their actions before these actions occur by ensuring that the
5 agency carefully considers detailed information concerning significant environmental impacts;
6 and (2) agencies make the relevant information available to the public so that it may also play a
7 role in both the decision making process and the implementation of that decision. *See, e.g.* 40
8 C.F.R. § 1500.1.

9 49. NEPA and the regulations promulgated thereunder by the Council on
10 Environmental Quality (“CEQ”) require that all federal agencies must prepare an environmental
11 impact statement (“EIS”) for all “major federal actions significantly affecting the quality of the
12 human environment.” 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4.

13 50. The fundamental purpose of an EIS is to force the decision-maker to infuse the
14 policies and goals defined in NEPA into the actions of the federal government. 40 C.F.R.
15 § 1502.1. An EIS analyzes the potential environmental impacts, alternatives and mitigation
16 opportunities for major federal actions.

17 51. An EIS must provide a detailed statement of: (1) the environmental impact of the
18 proposed action; (2) any adverse environmental effects that cannot be avoided should the
19 proposed action be implemented; (3) alternatives to the proposed actions; (4) the relationship
20 between local short-term uses of the environment and the maintenance and enhancement of
21 long-term productivity; and (5) any irreversible and ir retrievable commitments of resources that
22 would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(C).

23 52. An EIS must “inform decision-makers and the public of the reasonable
24 alternatives which would avoid or minimize adverse impacts or enhance the quality of the
25 human environment.” 40 C.F.R. § 1502.1. NEPA also requires federal agencies to analyze the
26 direct, indirect, and cumulative impacts of the proposed action. 40 C.F.R. §§ 1508.7 & 1508.8.
27 In addition to alternatives and impacts, NEPA requires agencies to consider mitigation measures
28 to minimize the environmental impacts of the proposed action. 40 C.F.R. § 1502.14

1 (alternatives and mitigation measures); *id.* at § 1502.16 (environmental consequences and
2 mitigation measures).

3 53. An agency may first prepare a detailed Environmental Assessment (“EA”) to
4 determine whether the project *may* significantly affect the environment and requires a full EIS.
5 42 U.S.C. § 4332(2)(C); 40 C.F.R. §.1508.9. An EA is “a concise public document” that serves
6 to “provide sufficient evidence and analysis for determining whether to prepare an
7 environmental impact statement or a finding of no significant impact.” *Id.* As with any
8 document prepared under NEPA, an environmental assessment is intended to “ensure that
9 environmental information is available to public officials and citizens before decisions are made
10 and before actions are taken.” 40 C.F.R. § 1500.1(b).

11 54. Significance is based upon the “intensity” and “context” of the action. 40 C.F.R.
12 § 1508.27. “Context” refers to the geographic and temporal scope of the agency action and the
13 interests affected. *Id.* at § 1508.27(a). “Intensity” addresses the severity of the impacts. *Id.* at §
14 1508.27(b). Factors relevant to intensity include: the degree to which the effects on the quality
15 of the human environment are likely to be highly controversial; the degree to which the action
16 may adversely affect an endangered or threatened species or its critical habitat; the presence of
17 “uncertain impacts or unknown risks;” whether the action is “related to other actions with
18 individually insignificant but cumulatively significant effects;” and whether the project
19 “threatens a violation” of other laws. *Id.* at § 1508.27(b).

20 55. If, after preparing an EA, the agency determines an EIS is not required, the
21 agency must provide a “convincing statement of reasons” why the project’s impacts are
22 insignificant and issue a Finding of No Significant Impact or “FONSI.” 40 C.F.R. §§ 1501.4,
23 1508.9 & 1508.13.

24 C. The Administrative Procedure Act

25 56. The Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, provides
26 general rules governing the issuance of proposed and final regulations by federal agencies.
27 Fundamental to the APA’s procedural framework is the requirement that, except in narrow
28 circumstances, a federal agency publish as a proposal any rule that it is considering adopting

1 and allow the public a reasonable opportunity to submit written comments on the proposal. 5
2 U.S.C. § 553.

3 57. A “rule” is defined by the APA as “the whole or a part of an agency statement of
4 general or particular applicability and future effect designed to implement, interpret, or
5 prescribe law or policy or describing the organization, procedure, or practice requirements of an
6 agency....” 5 U.S.C. § 551(4).

7 58. Specifically, the APA provides that all federal agencies must give “general
8 notice” of any “proposed rule making” to the public by publication in the Federal Register. The
9 publication must, at a minimum, include “(1) a statement of the time, place, and nature of public
10 rule making proceedings; (2) reference to the legal authority under which the rule is proposed;
11 and (3) either the terms or substance of the proposed rule or a description of the subjects and
12 issues involved.” 5 U.S.C. § 553(b).

13 59. In addition, the APA requires that “the agency shall give interested persons an
14 opportunity to participate in the rule making through submission of written data, views, or
15 arguments with or without opportunity for oral presentation. After consideration of the relevant
16 matter presented, the agency shall incorporate in the rules adopted a concise general statement
17 of their basis and purpose.” 5 U.S.C. § 553(c).

18 60. An agency may only short-circuit the public notice and comment requirements of
19 the APA if it finds, “for good cause,” that “notice and public procedure thereon are
20 impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b).

21 VI. FACTUAL AND PROCEDURAL BACKGROUND

22 A. The Proposed Regulations

23 61. On August 15, 2008, the Services issued Proposed Regulations Amending the
24 Endangered Species Act’s Section 7 Regulations (“Proposal”). *See* 73 Fed. Reg. 47868, August
25 15, 2008. Notwithstanding the fact that the Proposal represented the most significant changes
26 to the ESA’s implementing regulations in more than 20 years, the public was initially provided
27 with just 30 days in which to comment.

28 62. In summarizing the Proposal, the Services explained that they “are proposing

1 these changes to clarify several definitions, to clarify when the section 7 regulations are
2 applicable and the correct standards for effects analysis, and to establish time frames for the
3 informal consultation process.” 73 Fed. Reg. at 47868.

4 63. More specifically, according to the Services, the regulatory changes would
5 “reduce the number of unnecessary consultations,” by “allow[ing] a Federal action agency to
6 make a ‘not likely to adversely affect’ determination without the concurrence from the
7 Services” in a wide variety of circumstances that previously required some form of consultation
8 with the Services. *Id.* at 47871. The Services, however, did not identify even a single
9 “unnecessary” consultation nor did they adequately justify how eliminating the requirement that
10 the Services concur on “not likely to adversely affect” determinations will improve the
11 conservation of endangered and threatened species. The Services stated that they “believe that
12 Federal action agencies are fully qualified to make these determinations,” yet they provided no
13 evidence establishing such qualifications, nor did they propose to adopt any requirement that
14 agency personnel authorized to make these determinations must, in fact, be so qualified. The
15 Services also noted that they “have determined that actions satisfying these [proposed] criteria
16 will not cause adverse effects on listed species,” but they failed to explain in any coherent
17 fashion how such a finding could reasonably be predetermined with respect to potentially
18 thousands of different future federal actions producing a wide range of adverse effects on listed
19 species and critical habitats.

20 64. In addition, the Services “propose[d] to clarify the appropriate causation standard
21 to be used in determining the effects of agency actions” and to make what the Services
22 characterized to the public in the preamble as “relatively minor procedural changes to
23 ‘informal’ consultations, including inserting time frames into the informal consultation
24 process.” *Id.* at 47869. In reality, contrary to the Services’ characterization, the proposed
25 changes would severely limit the kinds of direct, indirect, and cumulative effects that must be
26 addressed in section 7 consultations, and would also result in a plethora of actions harmful to
27 listed species proceeding without the Services’ input or involvement merely because the
28 Services lacked adequate time or resources to respond within the mandatory time frames

1 imposed by the regulations.

2 65. The Services did not propose any system for monitoring how the new regulations
3 are implemented. In fact, the Proposal did not even require action agencies to document when
4 they are forgoing section 7 consultation under the new standards. The Services also did not
5 propose any standards or process for determining which personnel within action agencies would
6 be equipped to evaluate the impacts of projects on listed species, or even for training such
7 personnel as to the correct understanding and implementation of crucial terms and phrases never
8 previously employed in the context of implementation of section 7 of the ESA.

9 66. The Services proffered several justifications for the Proposal, none of which
10 suggested any genuine urgency in modifying the section 7 process that has been in place for
11 decades, much less how the proposed regulatory changes would advance the conservation of
12 endangered and threatened species. First, the Services noted that “[s]ince [the 1986 section 7
13 consultation] regulations were issued, much has happened.” *Id.* at 47868. For example, “[t]he
14 Services have gained considerable experience implementing the Act, as have other Federal
15 agencies, States, and property owners” *Id.* However, the Services’ Proposal did not
16 demonstrate that “[f]ederal agencies, States, and property owners” have the requisite biological
17 expertise, neutrality, resources, or other attributes necessary to make accurate assessments as to
18 the likely impact of their own projects on listed species, let alone to apply the entirely new
19 concepts incorporated into the Regulations.

20 67. Second, the Services announced that they were proposing “these regulatory
21 changes in response to new challenges we face with regard to global warming and climate
22 change.” *Id.* at 47869. However, the proposal did not explain why entirely excluding global
23 climate change effects from the section 7 process is consistent with the language and purposes
24 of the ESA, nor why it makes any sense to list a species as endangered or threatened due to
25 global climate change, but then to entirely ignore in the section 7 process the very impacts that
26 resulted in the species’ listing and are contributing to its extinction. Finally, the Services stated
27 that the Regulations somehow respond to a 2004 GAO report on section 7 consultation which
28 found, among other things, “that although the Services had made improvements to the

1 consultation process, it remained contentious between the Services and action agencies.” *Id.*
2 The Proposal did not acknowledge, however, that the “GAO concluded that, given the unique
3 requirements and circumstances of different species, a ‘healthy dose of professional judgment’
4 from the Services would always be required, meaning there will always be some
5 disagreements.” *Id.*

6 68. On September 15, 2008, in response to strenuous objections to the truncated
7 rulemaking process by members of Congress, conservation organizations, and many others, the
8 Services agreed to extend the public comment period on the Proposal by only 30 days.

9 69. The Services received nearly 300,000 comments on the Proposal, the vast
10 majority of which strongly objected to the proposed regulations on the grounds that they are
11 both unlawful and devastating to the conservation of the nation’s imperiled wildlife.

12 70. By letter dated October 14, 2008, plaintiff Center for Biological Diversity and
13 other conservation organizations urged the Services not to adopt the Proposal. In their letter the
14 Center advised the Services that “[t]he Proposal arbitrarily and unlawfully upends the ESA’s
15 longstanding and successful regulatory regime for ensuring that endangered and threatened
16 species and their critical habitats are adequately protected from the effects of literally tens of
17 thousands of federal projects each year.” The Center also pointed out that the “[t]he Services
18 have failed to put forth any rational bases for these drastic changes including, most important,
19 any coherent explanation of how this Proposal will advance the purposes of the ESA and the
20 conservation of endangered and threatened species . . .” Instead, the Center commented that the
21 Proposal “will foster confusion, inconsistent application, increased litigation and drastically
22 weakened protections for listed species.”

23 71. Regarding the Proposal’s stated intent to “respond to new challenges we face with
24 regard to climate change,” the Center responded that “the proposed regulations attempt to create
25 an exemption for greenhouse gas emissions to the definitions of direct, indirect, and cumulative
26 impacts and other changes in the consultation procedures.” The Center also explained that “[t]he
27 proposed changes are illegal and conflict with the plain language of the statute” and that “given
28 the preeminent threat of global warming to plants and animals, ignoring greenhouse gas

1 emissions in Section 7 consultations cannot possibly contribute to the conservation of listed
2 species.”

3 72. Plaintiffs Defenders of Wildlife and Greenpeace echoed and further elaborated on
4 these objections to the regulations’ legality and wisdom, as did many other commenters. For
5 example, 80 environmental law professors from around the country submitted a 67-page
6 comment letter delineating various legal flaws in the rulemaking, bemoaning the “hushed and
7 hurried manner” in which it was being adopted, and explaining that, if adopted, it would “place[]
8 some of the most important decisions federal agencies can make about the management of
9 protected species and their ecosystems in the hands of agencies that have a basic conflict of
10 interests and often have no knowledge or expertise regarding either species or habitat.”

11 73. The Services issued a Draft Environmental Assessment (“Draft EA”) regarding
12 the Proposal concluding, among other things, that “none of the individual proposed changes are
13 anticipated to have any significant environmental impacts” and also that “the proposed changes
14 collectively will not have any environmental impacts.” Draft Environmental Assessment for the
15 Proposed Modifications to Regulations Implementing Interagency Cooperation Under the
16 Endangered Species Act, at 25. The Services also asserted that “the substantive standards that
17 protect listed species and designated habitat proposed by these regulations are not changed by the
18 proposed action” and that the Regulations “only involve process modifications to
19 implementation of section 7 of the ESA.” *Id.*

20 74. On October 27, 2008, the Services reopened the comment period on the Proposal
21 for just 10 days so that the public could comment on the Draft EA. By letter dated November 6,
22 2008, the Center and many other conservation organizations submitted comments addressing
23 numerous flaws with the Draft EA. Thus, for example, the Center noted that “a ten-day
24 comment period is woefully inadequate to respond to the major issues raised by this Draft EA.”
25 Moreover, the Center explained that the “Draft EA fails to consider information that is vital to
26 proper and thorough analysis of the proposed action at hand,” including information regarding
27 “global warming and climate change’s profound impact upon threatened and endangered
28 species.” The Center also noted that the Draft EA fails to adequately address cumulative effects,

1 including those pertaining to climate change, and failed to consider a reasonable range of
2 alternatives. Finally, the Center explained that given the Proposal's significant impact on
3 endangered and threatened species and critical habitats the Services were required to complete an
4 EIS.

5 **B. The Final Regulations**

6 75. On December 11, 2008, the defendants announced that "today they published
7 joint final regulations" amending the ESA's section 7 interagency cooperation regulations.¹
8 Notwithstanding that most of the hundreds of thousands of comments submitted by the public
9 were strongly opposed to the Services' proposed changes to the Section 7 regulations, the
10 Services largely adopted the Proposal, although they also added a new basis for avoiding
11 consultation that was never previously made available for public comment.

12 76. The Regulations provide that section 7 consultation may be avoided entirely with
13 regard to effects of agency actions that may in fact adversely affect listed species or critical
14 habitats but are determined by action agencies themselves to be "manifested through global
15 processes" and that meet certain criteria. This new exclusion from the safeguards of the ESA, as
16 to which the public had no opportunity to comment before the rule was adopted, does not further
17 define what is meant by "global processes," nor does it provide any guidance as to how agencies
18 should apply the criteria for excluding actions from the consultation process.

19 77. The Regulations further provide that action agencies may avoid consultation
20 entirely with regard to actions that may affect species or critical habitats but as to which the
21 action agencies themselves determine that the effects of the action "[a]re not capable of being
22 meaningfully identified or detected in a manner that permits evaluation" or are regarded by the
23 action agency as "wholly beneficial." The Regulations do not further define these phrases, nor
24 do they provide any other meaningful guidance to action agencies as to how they should be
25 interpreted and applied.

26 78. To the extent an action agency decides to forgo any consultation with the Services
27 on an action that may affect listed species, the Regulations fail to explain how the agency can

28 ¹ Plaintiffs' descriptions of the Final Regulations are all based on information and belief.

1 then meet its statutory duty to “request of the Secretary information whether any species which is
2 listed or proposed to be listed may be present in the area of such proposed action.”

3 79. The Regulations further provide that, even after initiating consultation with the
4 Services because an action may in fact affect listed species or critical habitat; an action agency
5 may nonetheless “terminate consultation” and proceed with the action without obtaining any
6 written (or other) concurrence from a Service that the action is not likely to adversely affect
7 listed species or critical habitat. Under the Regulation, consultation is terminated and the
8 “consultation provision in section 7(a)(2) is satisfied” – even if there has actually been no
9 “consultation” whatsoever – simply because 60 days has passed with no input by the Service.

10 80. Even with regard to those agency actions that continue to be subject to a genuine
11 consultation requirement under the Regulations, the Regulations codify definitions of the
12 “effects” of actions that will exclude from consideration by the Services and action agencies
13 many adverse impacts on listed species and critical habitats. With regard to “cumulative effects”
14 that must be considered, the Regulations provide that such effects “do not include future Federal
15 activities that are physically located within the action area of the particular Federal action under
16 consideration,” and, even with respect to “future State or private activities” that must be
17 considered, only effects that are “reasonably certain to occur within the action area” need be
18 addressed. With regard to “indirect effects” that must be considered, the Regulations define such
19 effects as “those for which the proposed action is an essential cause,” without defining what that
20 term means, and again provide that “[r]easonably certain to occur is the standard used to
21 determine the requisite confidence that an effect will occur.”

22 81. In adopting the Regulations, the Services failed to provide a more coherent
23 rationale for them than the Services did at the proposal stage. Instead, the Services offered
24 several objectives the regulations are meant to accomplish, all of which are arbitrary and/or fail
25 to justify the regulatory changes made in the Regulations. First, the Services state that the
26 Regulations “amend [] the cumulative effects language [] to clarify and distinguish the term
27 ‘cumulative effects’ under the ESA from the term ‘cumulative effects’ under NEPA” – which
28 requires consideration of prospective federal, as well as state and private, actions -- and that the

1 Regulation “clarifies the current regulatory definition of cumulative effects and distinguishes it
2 from the definition of ‘cumulative effects’ in NEPA.” The Services, however, fail to provide a
3 coherent rationale for adopting a regulatory definition of “cumulative effects” under the ESA
4 that is far narrower than the definition of “cumulative effects” under NEPA; nor do the Services
5 explain how excluding foreseeable federal actions from the definition of cumulative effects
6 advances the conservation of endangered and threatened species.

7 82. According to the Services, the Regulation also “clarifies” the term “reasonably
8 certain to occur” in the terms “effects of the action” and “cumulative effects” and rejects a more
9 protective “reasonably foreseeable” standard as used in NEPA analysis. The Services’
10 explanation is that “NEPA is designed to insure that a decision maker has a full complement of
11 information about the possible environmental effects of the decision before making it” and hence
12 “that the more information the decision maker has, the better the decision is likely to be,” but
13 that “[t]he ESA, on the other hand, is designed to insure the accomplishment of a particular
14 substantive objective, i.e., that Federal actions are not likely to jeopardize the continued
15 existence of listed species or adversely modify or destroy critical habitat,” and “[u]nlike NEPA,
16 the prohibition in the ESA can stop an otherwise worthwhile Federal project from going
17 forward.” “For that reason,” the Services assert that “it makes sense” to adopt the less protective
18 “reasonably certain to occur” standard in lieu of one that encompasses all “reasonably
19 foreseeable” effects in determining the impacts of agency actions on listed species and critical
20 habitats. This explanation, however, essentially concedes the illegality of a standard that, by the
21 Services’ own admission, does not and cannot ensure that the Services or action agencies will
22 have a “full complement of information about the possible environmental effects” of agency
23 actions on listed species or critical habitats. Indeed, given the ESA’s strict statutory prohibition
24 on any federal actions likely to result in jeopardy to species or adverse modification of critical
25 habitats, a standard that requires the assessment of all “reasonably foreseeable” effects is far
26 more consistent with the language and purpose of the ESA than one that only requires agencies
27 to examine effects “reasonably certain to occur.”
28

1 83. In adopting the Regulations, the Services also explain that the Final Rule “is
2 intended to assist agencies in determining when consultation is necessary under section 7(a)(2),”
3 including by exempting a plethora of potential federal actions from the section 7 consultation
4 requirements. Accordingly, throughout the Final Rule the Services repeatedly assert that
5 “[a]ction agencies and agency personnel have struggled periodically to determine when informal
6 and formal consultation is required” and that “this rule assists action agencies in determining
7 when consultation is necessary in the very narrow circumstances of agency actions involving
8 effects that are manifested through global processes.” Yet the Final Rule fails to provide any
9 coherent explanation for how eliminating any section 7 consultation between the Services and
10 action agencies on potentially tens-of-thousands of actions annually that may affect listed species
11 or critical habitat could possibly help such agencies, including those with little if any expertise
12 conserving endangered species or administering the ESA, to determine when consultation is
13 required. Moreover, the assertion that the rule only applies “in the very narrow circumstances of
14 agency actions involving effects that are manifested through global processes” is patently
15 inconsistent with the Regulation itself, which also applies to effects that “are not capable of
16 being meaningfully identified or detected in a manner that permits evaluation,” and that have
17 nothing to do with so-called “global processes.”

18 84. The public was never afforded an opportunity to comment on the exception from
19 the consultation requirement of effects “manifested through global processes” because it was not
20 part of the Services’ original proposal. The Final Rule also fails sufficiently to define “global
21 processes,” beyond climate change effects, nor does it provide a rational basis for excluding such
22 effects from the consultation process.

23 85. The Services also point to their increased section 7 consultation workload to
24 justify the Regulation’s new consultation exceptions. For example, the Services state that
25 “requests to the Services for technical assistance or section 7 consultations increased from
26 41,000 requests in 1999 to over 68,000 requests in fiscal year 2006,” and that “[i]n 2006, there
27 were 39,346 requests for technical assistance, 26,762 requests for informal consultations, and
28 1,936 requests for formal consultations.” The Services do not explain, however, whether

1 endangered and threatened species have benefited or suffered as a result of these increased
2 consultations and requests for “technical assistance,” nor do they explain why devoting
3 additional resources to the consultation process rather than adopting wholesale exclusions from it
4 would not be a more reasonable and appropriate response to the Services’ increased consultation
5 workload in light of the ESA’s overarching species-protection purposes.

6 86. The preamble to the Final Rule also suggests that exempting action agencies from
7 having to consult pursuant to section 7 regarding myriad federal actions that may affect listed or
8 critical habitat is justified because “Congress left it to the Services to craft the consultation
9 process, including the interpretation of the reach of the statute and the development of an
10 appropriate trigger for formal and informal consultation.” The Services, however, entirely fail to
11 address comments discussing the ESA’s extensive legislative history that plainly establishes that
12 Congress did not leave it to the Services to define consultation. Rather, the legislative history
13 clearly provides, consistent with the ESA’s longstanding section 7 regulations, that Congress
14 ratified a requirement that section 7 consultation occur with respect to every federal action that
15 “may affect” listed species or critical habitat in any manner.

16 87. In adopting the Regulations, the Services also incorrectly rely on Supreme Court
17 rulings to buttress their argument that they have essentially unfettered discretion to define when
18 consultation is required, or to define away the consultation obligation entirely. Although the
19 Services cite *See Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 515 U.S.
20 687, 708 (1995)), nothing in that decision supports the Services’ assertion that Congress
21 delegated to the Services the authority to “interpret[] the reach of the statute and the development
22 of an appropriate trigger for formal and informal consultation.” The Services also erroneously
23 assert that under *National Association of Home Builders v. Environmental Protection Agency*,
24 127 S. Ct. 2518 (2007) (“*NAHB*”), “[t]he Supreme Court recently upheld the Services’
25 determination that no further consultation is required once an agency determines that their action
26 is non-discretionary,” and hence that the Services have sweeping authority to interpret the
27 section 7 obligation as they see fit. In reality, however, *NAHB* simply addressed the narrow
28 situation in which ambiguity exists because compliance with section 7 would repeal by

1 implication a non-discretionary statutory duty established prior to enactment of the ESA.

2 Nothing in *NAHB* supports the Services' decision to dispense with the consultation obligation in
3 any other context, and the case plainly does not stand for the proposition that action agencies
4 may avoid consultation when they take discretionary actions that may affect listed species or
5 critical habitats.

6 88. The Services also assert that they have vast discretion to define "consultation"
7 because "the mandatory term 'shall' in section 7(a)(2) refers to the obligation of the action
8 agency to avoid jeopardy or destruction or adverse modification of critical habitat, not to a
9 requirement to consult on each and every action." This interpretation of the ESA is contrary to
10 the plain language of section 7(a)(2) which expressly provides that each federal agency "shall"
11 avoid jeopardy and adverse modification, and consult with the Services with respect to "any
12 [federal] action authorized, funded, or carried out,"

13 89. With respect to the Services' proposal to afford action agencies authority to
14 forgo consultation on actions that may affect listed species or critical habitat, many commenters
15 raised concerns regarding the ability of federal agencies to accurately assess the impact of their
16 actions on listed species without the assistance of the Services. In adopting the Regulations, the
17 Services disagreed by asserting that "[m]ost major action agencies already have well-qualified
18 staff that support their ESA compliance." This assertion essentially concedes that at least some
19 federal agencies do not have sufficiently qualified staff to ensure ESA compliance, but the
20 Regulations do not distinguish between qualified and unqualified agencies and staff, and do not
21 even require that before taking advantage of these new consultation exemptions that such
22 qualifications be established. Moreover, the Regulations fail to support the assertion that "most"
23 action agencies have the requisite expertise to make the biological determinations entrusted to
24 them by the Regulations, and also fail to provide any coherent explanation of how substituting
25 self-consultation for interagency consultation comports with Congress' concern that action
26 agencies could not be reliably trusted to place the protection of endangered and threatened
27 species above their primary missions.
28

1
2
3
4
5
6
7
8
9

**First Claim for Relief
(Violations of the APA)**

93. In hastily adopting the Regulations and Final Environmental Assessment without providing the public with an adequate opportunity in which to comment on the Proposal and Draft EA; in issuing a final rule with new provisions that are not a logical outgrowth of the proposed rule and for which the public was not afforded an opportunity to comment; and in failing to adequately consider and respond to the hundreds of thousands of public comments submitted, defendants have violated the APA and abrogated the public's right under the APA to a meaningful opportunity to influence the development of substantive regulations.

10
11

**Second Claim for Relief
(Violations of the ESA/APA)**

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

94. In adopting the Final Regulations, the defendants have violated section 7 of the ESA, and have also acted arbitrarily and capriciously and contrary to law, in violation of the APA. First, the Regulations are contrary to section 7 because they authorize myriad agency actions that may have adverse impacts on listed species and critical habitats to proceed in the absence of any "consultation" with the Services, 16 U.S.C. § 1536(a)(2), or information from the Services regarding whether any listed species "may be present in the area of such proposed action." *Id.* § 1536(c). Second, they "jeopardize the continued existence" of listed species, and will "result in the destruction or adverse modification" of critical habitats, by unlawfully and illogically delimiting the direct, indirect, and cumulative effects – including effects on global climate change -- that may be considered by the Services and action agencies in making section 7 determinations. *Id.* Third, the Regulations are not themselves based on the "best available" science, and will also make it impossible for action agencies and the Services to rely on the best available science when making determinations under section 7, including determinations regarding the appropriate biological baseline for affected species. *Id.* Fourth, the Regulations are arbitrary and capricious because they establish standards that are not supported by any rationale that is consistent with the purposes of the ESA, and will undermine safeguards for endangered and threatened species without accomplishing any countervailing benefits for such

1 species. Finally, the Regulations are arbitrary and capricious because the need for them is not
2 coherently explained or established by the rulemaking record but, to the contrary, is contradicted
3 by the record.

4 **Third Claim for Relief**
5 **(Violations of NEPA/APA)**

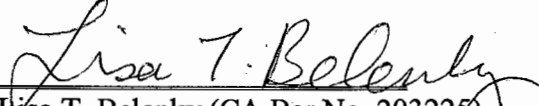
6 95. In failing to prepare an EIS and/or an adequate EA in connection with the Final
7 Regulations, defendants have violated NEPA and the APA. In addition, the Regulations violate
8 NEPA, the NEPA implementing regulations, and the APA by affording the public an inadequate
9 opportunity to comment on the Services' draft EA. In failing to prepare an EIS on the
10 Regulation, defendants have also unreasonably delayed and unlawfully withheld agency action,
11 in violation of section 706(1) of the APA.

12 **Fourth Claim for Relief**
13 **(Violations of Regulatory Flexibility Act/Executive Order 12866/APA)**

14 96. The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* ("RFA"), provides that
15 agencies must prepare and make available for public comment a regulatory flexibility analysis
16 that describes the effect of a proposed rule on small entities, unless the agency certifies that the
17 rule will not have a significant economic impact on a substantial number of small entities.
18 Similarly, Executive Order ("E.O.") 12866, issued on October 4, 1993, provides that for all
19 "significant regulatory action[s]" an agency must prepare, and make available to the public, a
20 detailed evaluation of the effects of the action, including an "assessment of the potential costs
21 and benefits of the regulatory action," an "assessment, including the underlying analysis, of costs
22 anticipated from the regulatory action (such as, but not limited to, the direct cost both to the
23 government in administering the regulation . . . and any adverse effects on . . . the natural
24 environment"), and an "explanation of why the planned regulatory action is preferable" to
25 "potential alternatives." A "significant regulatory action" is defined by the Executive Order to
26 include any regulatory action that "[r]aises novel legal or policy issues arising out of legal
27
28

- 1 3. award plaintiffs their costs and attorneys' fees; and
2 4. grant plaintiffs such other and further relief as this Court may deem just and
3 proper.

4
5 DATED: December 11, 2008


Lisa T. Belenky (CA Bar No. 203225)
CENTER FOR BIOLOGICAL DIVERSITY
351 California Street, Suite 600
San Francisco, CA 94104
Telephone: (415) 436-9682 x 307
Facsimile: (415) 436-9683
Email: lbelenky@biologicaldiversity.org

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
Brendan Cummings (CA Bar No. 193952)
Kassie Siegel (CA Bar No. 209497)
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 549
Joshua Tree, CA 92252
Telephone: (760) 366-2232
Facsimile: (760) 366-2669
Email: bcummings@biologicaldiversity.org
ksiegel@biologicaldiversity.org

Michael Senatore; application for *pro hac vice*
pending
CENTER FOR BIOLOGICAL DIVERSITY
1601 Connecticut Ave. N.W., Suite 701
Washington, D.C. 20009-1056
Telephone: 301-466-0774
Email: msenatore@biologicaldiversity.org

Eric Glitzenstein, application for *pro hac vice*
pending
Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, N.W., Suite 700
Washington, D.C. 20009
Telephone: (202) 588-5206
Email: eglitzenstein@meyerglitz.com

Jason Rylander, application for *pro hac vice*
pending
Defenders of Wildlife
1101 17th Street, N.W.

Washington, D.C. 20036
(202) 682-9400
Email: jrylander@defenders.org

Attorneys for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28