THE WILDERNESS SOCIETY

Public Comment Processing
Attention: 1018-AT50
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
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Dear Secretary Kempthorne and Secretary Gutierrez,

These comments are submitted in response to the Federal Register Notice on Interagency Cooperation Under the Endangered Species Act. Federal Register, Volume 73, No. 159, pages 47868-47875. The Wilderness Society has a strong interest in federal land management, cooperation between agencies guiding said management, and the Endangered Species Act (ESA), as well as the effects of global warming / climate change. All are significantly affected by this proposed rule. We welcome this opportunity to comment.

We have a number of issues, concerns and questions regarding the proposed changes to interagency cooperation under the ESA. The proposal seems to continue this administration's disturbing and unfortunate trend towards undermining the Endangered Species Act (ESA). Though the Administration defines these changes as "narrow", they are anything but. If finalized they would have far reaching impacts on listed species and their habitat.

Secretary Kempthorne announced that he would propose "common sense modifications" to provide "greater clarity and certainty" in adapting the ESA to challenges presented by new and more complex issues such as global warming. This objective is understandable. However, the proposed rule would not meet this goal. In fact, it directly undermines it by redefining certain terms such that the effects of global warming will rarely, if ever, be considered. The

International Panel on Climate Change (IPCC) has estimated that across the planet as many as 30 percent of species alive today will become extinct if global warming continues unabated. Under the proposed regulations, the effects of global warming on these species will never have been assessed before their demise. In addition, the proposed regulations would ignore the effects of a host of other impacts, as many effects would no longer qualify as such and would not be assessed. Overall, the proposed rule directly undermines the ESA and would result in severe impacts to listed species and their habitat.

Our concerns are described in detail below.

Definition Changes

The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (hereafter collectively referred to as "Services") propose changes to the definitions of "biological assessment", "cumulative effects" and "effects of the action." The change in the definition of biological assessment is addressed later in our comments. The impacts of the changes in the other two definitions are addressed here.

Cumulative Effects

Proposed Definition: Cumulative Effects Do Not Include Future Federal Activities

The proposed rule states,

> "In fact, the preamble to the current regulations notes that 'Since all future Federal actions will at some point be subject to the section 7 consultation process pursuant to these regulations, their effects on a particular species will be considered at that time and will not be included in the cumulative effect analysis.'"
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> Federal Register, Vol. 73, No. 159 at pg. 47869.

First of all, the proposed rule negates the above statement. Under the proposed rule, all future federal actions will not necessarily be subject to section 7 consultation. In allowing action agencies to make the determination as to whether their activities will have effects without contacting the Services (i.e. allowing agencies to decide if [informal] consultation is even needed), the Services are in effect declaring a whole host of activities outside the consultation process. Action agencies can declare that types of activities will not have effects and never have to contact the Services. A case in point is the recent proposed directive by the Forest Service declaring that their land management plans have no effect under ESA and hence are not subject to consultation (discussed further below).

Secondly, in eliminating consideration of future Federal activities in cumulative effects analysis, the Services ensure that some critical effects, perhaps adverse, will never be known. There is an additive nature to effects analysis embodied in the term "cumulative" effects. A single action by itself may not have an adverse effect. But cumulatively, a number of actions together can result in adverse impact. By allowing the action agencies to analyze only the Federal action at hand, while at the same time allowing them to declare other Federal activities (even those reasonably certain to occur) without effect – and hence outside the consultation process – the Services lose control of the ability to assess cumulative effects and understand the potential for take of listed species or adverse modification of habitat.

Effects of the Action

The term "effects of the action" has been redefined in the proposed rule. Slight modifications are made earlier in the definition, but the main body of language added to the current definition is as follows:

> "If an effect will occur whether or not the action takes place, the action is not a cause of the direct or indirect effect. Reasonably certain to occur is the standard used to determine the requisite confidence that an effect will happen. A conclusion that an effect is reasonably certain to occur must be based on clear and substantial information."
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> Federal Register, Vol. 73, No. 159 at pg. 47874.

This redefinition is problematic for a number of reasons. First, important terms are left undefined. "Reasonably certain to occur" is said to be narrower than the NEPA term "reasonably foreseeable", but is not otherwise defined, despite promises to provide more guidance to ensure consistent application. The rule states that "…the preamble language cited above also establishes that the standard of "reasonably certain to occur" is an essential factor for both cumulative effects and indirect effects." Federal Register, Vol. 73, No. 159 at pg. 47869. If this term is so indispensible to the rule it should be more clearly defined. Otherwise, given its primacy in both the analysis of effects and the attendant need for consultation, its definition will be determined in a thousand different ways at each unit of each Federal agency. The term "clear and substantial information" is also undefined and faces the same potential for inconsistent application.

The meaning of these terms is explained a bit more in the Supplementary Information section of the proposed rule. However, once the comment period has passed for the proposed rule and the final rule has been published, the action agencies will most likely rely solely on the Code of Federal Regulations (CFR) for their direction as to consultation requirements and the analysis of effects. Given that the effect of the proposed rule is to free action agencies from requirements for consultation, the Services will in many cases not have the ready ability to understand how the agencies are interpreting the definitions. Any terms deemed essential to consistent implementation of the Act should appear in the regulations themselves.

Secondly, the new definition sets an unreasonably high bar for the consideration of effects, especially for indirect effects.

Redefining Indirect Effects

The new definition of "effects of the action" is also problematic in that it redefines indirect effects to the point that the term is swallowed by the definition. In other words, by narrowly characterizing indirect effects as "those for which the proposed action is an essential cause, and that are later in time, but still are reasonably certain to occur", the Services essentially narrow the scope of indirect effects to those which are in fact direct. The only difference between the two terms seems to be in the timing with which they occur. Given that "direct effects" and "indirect effects" and "essential cause" are not defined in § 402.02, and the likelihood that any explanation in the Supplementary Information section will be lost to the action agencies over time, the Services should 1) explain the difference between direct and indirect effects and 2) define these three terms in the definition section of the regulations themselves.

The Applicability Test and Global Warming

The Services appear to have responded to Secretary Kempthorne's intent to provide greater clarity and certainty to the consultation process by redefining terms and constructing an applicability test at § 402.03 that effectively eliminates the consideration of greenhouse gas (GHG) emissions or any other contribution to global warming and its associated impacts on listed species. The applicability test presents an almost insurmountable barrier to consideration of these effects. Because of the action agency ability to define "insignificant", the factor at § 402.03(b)(2) ("such action is an insignificant contributor") together with a determination that take will not result, could eliminate from consideration most contributions to global warming and associated impacts on species.

This is irresponsible on the part of the Services, and by extension the Administration. By definition, global warming is a problem so large and so global that every individual act of greenhouse gas emissions is arguably "insignificant." Yet every local emission does indeed contribute to this global threat, and it is only by assessing the cumulative effects of these emissions that the potential impact on species and critical habitat can be understood. The Services have acknowledged the complex nature of the issue, yet appear to avoid having to tackle this complex issue by defining all aspects of it as outside the reach of the Act. Global warming will still have effects even though the Services and action agencies have decided they don't need to address its effects. The Services must reject the proposed rule or modify it to include consideration of global warming.

Informal Consultation Requirements and Applicability

The proposed changes in when and how informal consultation is conducted seem meant to solve a problem that has not been fully or accurately identified. The 2004 GAO Report cited in the proposed rule concluded that not enough information had been collected by the Services or the action agencies to make definitive judgment about the timeliness of consultations. Further explanation is needed as to why the proposed rule is necessary.

NLAA Determination and Consultation

The "not likely to adversely affect" (NLAA) determination is the point at which most informal consultation pivots: the Services can concur with the action agency's determination and consultation is ended, or the Services can decide they do not agree with the action agency's determination and formal consultation is initiated. As such it is most likely to be the point of contention between the Services and the agencies during the consultation process. But that is no reason to undermine the Services' role in implementing the ESA.

The Services argue that agencies have gained more experience in implementing the ESA. The rule also states that the 2004 GAO Report found the consultation process was still contentious between the Services and the action agencies. This finding would seem to undermine the rule's statement about the action agency's experience. Increased experience should tend to decrease contentiousness. Consultation should have been proceeding more smoothly as action agencies more clearly understood the Services' NLAA threshold. That contentiousness has not decreased is an indication that agency experience is not sufficient to loosen the consultation requirements. The proposed rule then becomes more likely to result in determinations with which the Service would not agree.

Undermining the Services

The proposed rule seems to directly undermine the Services' role in implementing the ESA. It would appear that the Services are proposing to tie their own hands. The FWS and NMFS like all federal agencies face declining budgets and shrinking workforces. While it might seem that giving action agencies the power to decide if formal consultation is needed would reduce the Services' workload it is much more likely to have the opposite effect.

First of all, as described above, if consultations are still contentious, the proposed rule will only make them less so because the action agencies would have the to power to decide consultation wasn't warranted for those types of activities that were the source of the former contentiousness. This could proceed without oversight on the part of the Services. Hence, there would likely be a lack of consultation on those very activities where the Services and the action agencies would disagree on effects. Secondly, the proposed rule would leave the Services scrambling to understand the baseline conditions as they would no longer even know about a host of agency activities. The ability to assess cumulative effects and decide the level of

acceptable take would be severely reduced. This would likely leave the Services more vulnerable to litigation due to overestimating acceptable take.

The change in definition for biological assessments (BA) also leaves the Services at a disadvantage. Instead of requiring the action agencies to supply the required information in a consistent format, Service staff would spend time trying to assess whether the various document formats submitted met its requirements. Add timelines to the process, and the combined effect is to trap Service staff in a perpetual race to understand the impacts of the proposed activities and respond by the deadline. Surely the intent of the authors of the Act was not to allow risks to the very existence of species because the Services were underfunded, understaffed and couldn't meet (self-imposed) deadlines.

Effects on Action Agencies

The proposed rule makes the case that action agencies have gained experience in implementing the Act such that continued oversight by the Services for NLAA determinations is not necessary. This ignores a number of pertinent facts. First, the action agencies all face declining budgets and shrinking workforces. The federal workforce is also quite old; a large percentage of this workforce is currently eligible for retirement. Replacements with younger employees have not kept pace with retirements. Many land management agencies that formerly had wildlife specialists at each unit are struggling to maintain staffing levels. Most land management agencies have never had qualified botanists on staff. Whatever experience the action agencies have attained is quickly disappearing as employees retire.

Secondly, the proposed rule fails to address the situation at agencies without wildlife or botanical staff in house. The rationale for the proposed rule would be most applicable to a fully staffed land management agency, but the rule makes no such distinctions. As proposed in the changes in § 402.03 on applicability, any Federal agency would be able to makes its own NLAA determination and forego any consultation, formal or informal, if it felt its actions met the test at § 402.03(b), regardless of whether it had any staff on hand qualified to make the determination. The Services would never even know about these determinations unless someone brought suit over likely take.

Third, the proposed rule could actually increase the action agencies' exposure to litigation. The informal consultation that takes place over NLAA determinations serves a number of purposes. On the one hand, it prevents the action agency from choosing a course of action which clearly should warrant formal consultation. On the other hand, Service concurrence or issuance of an incidental take statement insulates the action agency from litigation. Without the informal consultation process acting as a kind of gatekeeper on Federal action, agencies are much more likely to face litigation in those cases in which they went ahead with activities without Service concurrence.

Self-Consultation is Not Consistent with the ESA

The proposed rule argues that "there have been many judicial decisions regarding almost every aspect of section 7 of the Act and its implementing regulations." Federal Register, Vol. 73, No. 159 at pg. 47868. But the Services seem to have ignored at least one case in their review. In 2003, the Bush administration imposed "joint counterpart regulations" allowing agencies to approve new pesticides without asking the government's expert scientists whether threatened or endangered species and habitats might be affected. In the case of *Washington Toxics Coalition v. U.S. Dep't of the Interior*, 457 F. Supp. 2d 1158 (W.D. Wash. 2006), the federal court later overturned the pesticide rule. The court rejected the notion that such "self-consultation" by the action agencies is consistent with Section 7(a)(2) of the ESA.

The Services need to explain how this proposed rule is any different. Not only would the action overturned by the court in the case above be allowed, but a whole host of other actions would be permissible under the self-consultation provisions of this rule. As long as the action agency determined that its actions met the test at § 402.03(b), it could go ahead without any consultation, save that with itself.

NEPA Compliance

The proposed rule states, "The Services will conduct an analysis pursuant to the National Environmental Policy Act prior to finalizing these proposed regulations." Federal Register, Vol. 73, No. 159 at pg. 47873. First of all, we question the timing of this proposed rule in light of the stated commitment to conduct analysis under NEPA. A more appropriate action would have been to place a notice of intent to prepare an environmental impact statement in the Federal Register and begin the scoping process. By beginning with the proposed rule and failing to explicitly request comment on possible alternatives and impacts of the proposal, we question the Services commitment to "take a hard look" at impacts as required under NEPA and to propose and consider a reasonable range of alternatives. This notice makes it appear that the outcome of any NEPA analysis is already a foregone conclusion. Please explain the timing of this rulemaking process with the required analysis under NEPA.

An Environmental Impact Statement Is Required For This Proposal

Secondly, we believe an environmental impact statement (EIS) must be prepared as the proposed rule constitutes a major federal action.

This proposal meets the definition of major federal action, defined in part as:

> "Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies or procedures, and legislative proposals…

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedures Act….

40 CFR 1508.18

Council on Environmental Quality (CEQ) regulations further state,

Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

40 CFR 1502.4(b)

CEQ provides further direction in its 40 Questions:

24a. **Environmental Impact Statements on Policies, Plans or Programs.** When are EISs required on policies, plans or programs?

A. An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive. Section 1508.18. In addition, the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedure Act, treaties, conventions, or other formal documents establishing governmental or agency policy which will substantially alter agency programs, could require an EIS. Section 1508.18. In all cases, the policy, plan, or program must have the potential for significantly affecting the quality of the human environment in order to require an EIS. It should be noted that a proposal "may exist in fact as well as by agency declaration that one exists." Section 1508.23.

The proposal at hand does have the potential to significantly affect the quality of the human environment and as such should be analyzed in an EIS. The proposed rule substantively changes practices for all federal agencies in fulfilling their obligations under the ESA.

Cumulative Effects: Concurrent USDA Forest Service ESA Proposal

The proposed rule states, "…we coordinated development of these regulations with appropriate resource agencies throughout the United States." Federal Register, Vol. 73, No. 159 at pg. 47873. We question then why the proposed rule did not take into account the Forest Service's proposed changes to its directives implementing the ESA.

Prior to publication of this proposed rule, the Forest Service published an Interim Directive that asserts both that forest plans under the 2008 NFMA planning rule "typically will have no effect on listed species or designated critical habitat under the [ESA]," 73 Fed. Reg. at 46243, and that such plans are not themselves actions within the meaning of the ESA. Id. To the best of our ability to ascertain these facts, it does not appear that the Forest Service even consulted with the FWS on this interim directive. Though we believe the above Forest Service assertions have no basis in law or in fact and must be rejected as inconsistent with the clear meaning of the ESA, they should be important to the Services in consideration of this proposed rule.

First of all, the Forest Service's interim directive must be considered when examining the cumulative effects of this proposed rule under NEPA. Secondly, the Forest Service's proposal should serve as a wake-up call to the Services as to the extent to which an action agency will go in deciding that its actions have no effects and hence consultation is not required. The Forest Service has in effect jumped the gun on actions that would likely be allowed under the proposed rule. Yet in this case they are arguing that broad plans covering suitable activities on hundreds of thousands and even millions of acres are not subject to consultation under ESA and will have no effect on listed species or their habitat.

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Overall, we are concerned that the Departments of Commerce and Interior seem intent on undermining the ESA and ensuring that impacts - of global warming and a host of other activities – never have to be assessed for their effects on listed species and their habitat. The proposed rule goes too far in narrowing the scope of the ESA and should be withdrawn.

We look forward to continued discussion of this proposed rule. Should you have any questions or need clarification on these comments, please contact David Moulton (202-429-2681; david_moulton@tws.org) or Mary Krueger (978-342-2159; mary_krueger@tws.org) at the Wilderness Society. Thank you for your time and consideration.

Sincerely,

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