



NATIONAL ENDANGERED SPECIES ACT
REFORM COALITION

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March 28, 2011

Regulatory Review
Office of the Executive Secretariat and Regulatory Affairs
Department of the Interior
1849 C Street, N.W.
Mail Stop 7328
Washington, DC 20240

Re: Comments on Improving DOI Regulations – Docket No. DOI-2011-0001

Dear Sir/Madam:

The National Endangered Species Act Reform Coalition (“NESARC”) appreciates the opportunity to provide comments on ways to improve the Department of Interior (“DOI”) regulations in response to President Obama’s Executive Order 13563, “Improving Regulation and Regulatory Review.” In E.O. 13563, President Obama affirmatively stated that the federal regulatory system:

...must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative and least burdensome tools for achieving regulatory end. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent written in plain language and easy to understand. It must measure, and seek to improve the actual results of regulatory requirements. (*E.O. 13563, Sec. 1(a)*)

Further, the President’s Executive Order reaffirmed the principles and implementation of Executive Order 12866, “Regulatory Planning and Review,” which was issued by President Clinton on September 30, 1993. (*Id., Sec. 1(b)*)

NESARC recommends that DOI apply these principles to a review and modification of the existing regulations implementing the Endangered Species Act (“ESA”). NESARC is the country’s only broad-based, national coalition dedicated solely to achieving improvements to the ESA. NESARC members include rural irrigators, municipalities, farmers, homebuilders, energy and mining companies, and many other individuals, organizations and businesses that are directly affected by the ESA. NESARC has long sought and supported updates to ESA implementation regulations that maintain core protections of the Act. Improvements to the ESA implementing regulations must focus on clarifying and making more efficient the existing procedures and also changing the culture of the ESA implementation and enforcement to be more collaborative.

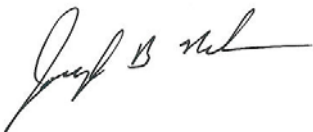
One key set of existing ESA regulations that can and must be reviewed and updated govern implementation of the consultation process under Section 7 of the ESA. On May 4, 2009, this Administration withdrew a previous promulgation of improvements to the Section 7 consultation regulations. In doing so, the U.S. Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) also requested comments on ways to improve the Section 7 regulations while retaining the purposes and policies of the ESA.¹ NESARC and many of its individual member organizations, as well as other stakeholders throughout the regulated community, submitted detailed comments in August 2009 on ways to improve the consultation process. Yet, almost two years later, no regulatory improvements to the Section 7 consultation process have been announced or implemented by DOI and/or FWS. A copy of NESARC’s 2009 comments is attached; we continue to support the need for the improvements detailed therein.

In a related matter, on October 1, 2010 CropLife America submitted a petition for rulemaking to clarify and improve the role of applicants and States within the Section 7 consultation process. NESARC has previously communicated its support of that petition to DOI. NESARC once again expresses its support for CropLife’s petition and respectfully requests that DOI take all actions necessary for FWS to expeditiously act on the improvements outlined in the CropLife petition.

The need for immediate action on improvements to the ESA implementing regulations is underscored by the principles adopted and reaffirmed in E.O. 13563. Particularly, a majority of the ESA implementing regulations were promulgated prior to, and have not been substantively revised since, the September 30, 1993 issuance of E.O. 12866. As President Obama noted in his most recent order, E.O. 12866 emphasizes the need for federal agencies to make a reasoned determination that the benefits of the proposed regulation (1) justify its costs; (2) be tailored to impose the least burden on society; (3) maximize net benefits, including potential economic, environmental, public health and safety benefits; (4) include specific performance objectives where possible; and (5) identify and assess available alternatives to direct regulation. In addition to the application of these principles and factors, *any* action on improvements to the ESA implementing regulations must emphasize the use of the best available science and promote public participation.

In closing, NESARC appreciates the opportunity to reiterate our strong support for immediate action by DOI on improvements to the Section 7 consultation regulations consistent with the comments that we have previously submitted to DOI and FWS and the recent petition of CropLife.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph B. Nelson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Joseph B. Nelson
NESARC Counsel

¹ 74 Fed. Reg. 20421, 20422 (May 4, 2009).

National Endangered Species Act Reform Coalition

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August 3, 2009

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National Stone, Sand and Gravel
Association

Northwest Horticultural Council

Tri-State Generation &
Transmission Association, Inc.

Nancy Macan McNally
Executive Director

Dear Sir/Madam:

The National Endangered Species Act Reform Coalition (“NESARC”) appreciates the opportunity to provide comments on ways to improve the section 7 consultation process while retaining the purposes and policies of the Endangered Species Act (“ESA” or “Act”). NESARC is the country’s only broad-based, national coalition dedicated solely to achieving improvements to the ESA. NESARC members include rural irrigators, municipalities, farmers, homebuilders, forest products, energy and mining companies, and many other individuals, organizations and businesses that are directly affected by the ESA. In particular, NESARC members routinely seek federal permits or authorizations and also are directly affected by federal agency operations that must comply with the requirements of ESA, section 7.

In the May 4, 2009 withdrawal of previously promulgated section 7 consultation regulations, the U.S. Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) (collectively the “Services”) also requested comments on ways to improve the section 7 regulations while retaining the purposes and policies of the ESA.¹ We appreciate the opportunity to provide these comments.

NESARC has long sought and supported updates to the section 7 consultation process that maintain its core protections of the ESA. Improvements to the consultation process must focus on clarifying and making more efficient the existing procedures and also changing the culture of the consultation process to be more collaborative. We urge the Services to expeditiously implement each of the following regulatory and administrative improvements.

¹ 74 Fed. Reg. 20421, 20422 (May 4, 2009).

I. Take All Necessary Action to Ensure that the ESA is Not Used as a Vehicle to Pursue Regulation of Greenhouse Gases

NESARC agrees with the positions taken by the Secretary of the Interior, other Administration officials and the Services² that the ESA is not the appropriate statute by which to regulate greenhouse gas emissions. With the listing of the polar bear by FWS, the elkhorn and staghorn corals by NMFS and other pending petitions seeking to list certain species on the basis of the effects of forecasted changes in climate, there is a continued drumbeat by various interests to use the ESA in general, and the section 7 consultation process, in particular, as leveraging mechanisms to impose limitations on the emission of greenhouse gases. However, there is no scientific basis from which the Services can conclude that changes in the level of an individual's greenhouse gas emissions, e.g., adding, expanding, or removing an individual facility such as a power plant or paper mill (in any location), or revising its permit requirements, will have a detectable effect on the ambient carbon dioxide (CO²) levels—much less an adverse effect on any listed species that may be within the project's action area.

A. The Emission of Greenhouse Gases from Individual Sources Do Not Have the Requisite Causal Link to Pass the "May Affect" Threshold Test

The threshold inquiry for the consultation process is whether a proposed action "may affect listed species or critical habitat."³ The "may affect" determination is not merely one of supposition. Rather, there must be a reasonable basis to conclude that a causal "may affect" link can be shown between individual greenhouse gas emissions and specific effects upon a listed species or its critical habitat. On October 3, 2008, the Solicitor for the Department of the Interior issued Opinion M-37017 which concluded that "where the effect at issue is climate change in the form of increased temperatures, a proposed action that will involve the emission of [greenhouse gases] cannot pass the 'may affect' test and is not subject to consultation under the ESA and its implementing regulations."⁴ This conclusion was based on the presently effective regulations⁵ as well as conclusions reached by the U.S. Geological Survey ("USGS") that the scope of existing science does not allow the Services to identify a specific source of CO₂ emissions and designate it as the cause of specific climate impacts at an exact location.⁶

² See e.g., Statement of the Secretary of the Interior, Kenneth Salazar, Press Release, "*Salazar Retains Conservation Rule for Polar Bears, Underlines Need for Comprehensive Energy and Climate Change Legislation*" (May 8, 2009) ("...the Endangered Species Act is not the proper mechanism for controlling our nation's carbon emissions."); and Hearing Report, Statement of David Hayes, Deputy Secretary of the Interior to the Senate Committee on Energy and Natural Resources at p. 18 (Mar. 12, 2009) ("The Endangered Species Act is not well suited to deal with climate change which is a global phenomenon that has built up over decades.").

³ 50 C.F.R. §402.14(a).

⁴ Solicitor's Opinion M-37017, *Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the Emission of Greenhouse Gases* at p. 7 (Oct. 3, 2008).

⁵ Opinion M-37017 was issued *prior to* the finalization of the now withdrawn changes to the consultation regulations and interprets the consultation regulations in their present form. Thus, the withdrawal of the 2008 final rule did not affect the validity of this opinion.

⁶ USGS, *The Challenges of Linking Carbon Emissions, Atmospheric Greenhouse Gas Concentrations, Global Warming and Consequential Impacts* (May 14, 2008).

As part of its May 2009 decision affirming the continuation of the polar bear section 4(d) rule, the FWS issued a statement, as part of its “Questions and Answers” which provided further, practical guidance to action agencies in line with the conclusions reached in the Solicitor’s Opinion. Notably, FWS stated that:

It is currently not possible to directly link the emission of greenhouse gases from a specific power plant, etc. to effects on specific bears or bear populations. This direct “connect the dots” standard is required under the Act and court rulings. *Therefore, the [FWS] policy guidance to its field staff is not to require such consultations. . . .*⁷

NMFS reached a similar determination in commenting on an EPA analysis that estimated that the maximum mean global temperature increase resulting from a model power plant would occur approximately 50 years after the facility begins operation and, then, only have an infinitesimal modeled impact ranging from 0.00022 to 0.00035 degrees Celsius/0.00037 to 0.00063 degrees Fahrenheit.⁸ NMFS concluded that such a situation “presents at most a remote risk of harm to listed corals or their habitat, given the infinitesimal impact on global temperatures and CO₂ concentrations that [EPA] estimated the action will have.”⁹ Moreover, NMFS determined that such a remote risk does not trigger the “may affect” standard.¹⁰

Recommended Action: NESARC agrees with the conclusions reached by the Solicitor in Opinion M-37017, the October 2008 NMFS memorandum and the May 2009 guidance of FWS with respect to the impracticality of making a “may affect” determination for a federal agency action on the basis of individual greenhouse gas emissions. Moreover, NESARC urges the Services to take all steps necessary to ensure that both the action agencies and Services administer section 7 consultations consistent with this opinion and their existing guidance. In this regard, we believe the agencies should continue applying the Solicitor’s determination that a “may affect” determination cannot be reasonably made with respect to an individual project’s emission of greenhouse gases having specific effects on listed species or its critical habitat within the project’s action area that would trigger the consultation requirement.

B. *Greenhouse Gas Emissions from an Individual Federal Actions are Too Small in Comparison to Worldwide Emissions, and Any Potential Resulting Climate Change Effects are Too Remote and Speculative to Trigger Section 7 Consultation or Qualify as Direct or Indirect Effects*

NESARC agrees with the Services’ conclusion that the emission of greenhouse gases as part of a proposed federal agency action does not trigger the consultation requirements of section 7 or qualify as a direct or indirect effect upon a listed species. As noted earlier, in an October 10, 2008 letter, Mr. James Lecky, Director, Office of Protected Resources at NMFS, stated that “current models do not allow [NMFS] to trace a link between individual actions that contribute

⁷ FWS, *Polar Bear 4(d) rule – Q’s and A’s* at p. 2 (2009) (*emphasis added*) hereinafter “FWS Q’s and A’s.” This document can be located at www.fws.gov/home/feature/2009/pdf/QandApolarbear4drule.pdf.

⁸ Letter of James H. Lecky, Director, Office of Protected Resources, NMFS to Robert J. Meyers, EPA (Oct. 10, 2008).

⁹ *Id.* at p. 2.

¹⁰ *Id.*

to atmospheric carbon levels and localized climate impacts relevant to a consultation.”¹¹ Similarly, in May 2009, the FWS stated that “[p]ending further review and analysis, [FWS] does not believe that a project-by-project ESA review of proposed actions that have the potential to increase greenhouse gas emissions, regardless of where they occur or how much they contribute to global greenhouse gas emissions, is the appropriate tool for addressing climate change impacts.”¹²

As recognized by the Services, climate change science operates at a hemispheric level and climate change models are not capable of analyzing individual emission sources, much less determining how such individual release of greenhouse gas emissions may ultimately affect a listed species in a particular region.¹³ The macro-level of data sets and models currently used in climate change research, as well as the fact that world-wide greenhouse gas emissions are so large, means that incremental effects cannot be attributed to a single source of greenhouse gas emissions—much less an individual project or facility. The present scientific information on climate change available to the federal government and other entities relies primarily on large-scale modeling of potential climate change impacts such as those reported in the Intergovernmental Panel on Climate Change (“IPCC”) Fourth Assessment Report and the Arctic Climate Impact Assessment (“ACIA”). Such large-scale modeling does not provide the level of granularity required to show harm caused by a particular greenhouse gas emission to any specific species population, much less individual populations or members of the species within a particular action area. In fact, the IPCC report specifically notes that the present climate models are not designed to make forecasts for areas smaller than continental regions.¹⁴ Rather, these climate models are accurate only at continental to hemispherical scales. Further, they do not account for climatic cycles such as the Pacific Decadal Oscillation.¹⁵

¹¹ *Id.*

¹² FWS Q’s and A’s at 2.

¹³ Although the greenhouse gas emissions of a particular federal action do not trigger section 7 consultation or qualify as direct or indirect effects, NESARC recognizes that there are certain instances where action agencies and the Services take overall climate change into account as part of the evaluation of the status of the species under environmental baseline conditions and assessment of cumulative effects on the listed species or critical habitat. For example, consultations on federal authorizations for operation of a hydroelectric facility, through issuance of a 30-year license, incorporate present and future hydrologic and climatological conditions into the consultation analysis of baseline conditions and cumulative effects. Importantly, where ESA, section 7 requires consideration of future conditions, it is critical that the Services and action agencies develop procedures, standards and guidance on the level of certainty, data support and analysis that should accompany any consideration of such future climatological or hydrologic conditions that may rely on climate change forecasts. This is particularly important in light of the fact that the monitoring and forecasting of climate change manifestations remains imprecise. See *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, J.B. Ruhl, 88 Boston Univ. L. Rev. 1, 2008) and Peter Cox & David Stephenson, *A Changing Climate for Prediction*, 317 Science 207 (2007).

¹⁴ The IPCC’s Fourth Assessment Report notes that:

There is considerable confidence that climate models provide credible quantitative estimates of future climate change, particularly at continental scales and above. This confidence comes from the foundation of the models in accepted physical principles and from their ability to reproduce observed features of current climate and past climate changes. Confidence in model estimates is higher for some climate variables (e.g., temperature) than for others (e.g., precipitation). (IPCC, AR4,-wgl, chap 8, at p. 600)

¹⁵ Recent Arctic warming may be more pronounced than changes in the global mean due to the Pacific Decadal Oscillation, Arctic Oscillation, and North Atlantic Oscillation all being up in their phases (with increases in both

The Environmental Protection Agency (“EPA”) has confirmed the limitations of climate change modeling and that the impacts of climate change are currently impossible to regulate under the ESA. Specifically, a letter written by Robert J. Meyers, Principal Deputy Assistant Administrator for the Office of Air and Radiation at EPA, found that “[t]he climate change research community has not yet developed the tools specifically intended for evaluating or quantifying end-point impacts attributable to the emissions of GHGs from a single source, and we are not aware of any scientific literature to draw from regarding the climate effects of individual, facility-level GHG emissions.”¹⁶ Further, EPA concluded that “the risk of harm to any listed species, including the listed corals or polar bears, or to the habitat of such species based on the anticipated emissions of [even a large-source CO₂ emitter] or any facility with lower emissions, is too uncertain and remote to trigger ESA section 7(a)(2) obligations. Section 7(a)(2)’s purpose of ensuring no likely jeopardy to listed species and no destruction or adverse modification of designated critical habitat is not implicated by such remote potential risks.”¹⁷

Recommended Action: Merely stating the generally agreed upon principle—that the ESA should not be used to regulate greenhouse gas emissions—is insufficient. The Services must address and ensure that any ambiguities in the consultation regulations are not used to hijack the ESA. Further, the Services should take all necessary steps to confirm and put into place binding guidance and other measures that recognize that the best available scientific information regarding climate change does not have the level of granularity to reach inferences regarding effects of an agency action upon a particular species, much less species and habitat within an action area.

II. The Services Must Clarify the Appropriate Causal Nexus for the Determination of Direct and Indirect Effects

At its core, the section 7 consultation inquiry looks to whether a proposed federal action will jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat.¹⁸ A critical element of this inquiry is establishing the relevant causal nexus between the action and effect. Here, the present consultation regulations are insufficient. Under the present regulations, the Services are to review the “effects of the action” which has a defined scope of the “direct and indirect effects of an action, including those effects that are interdependent or interrelated.”¹⁹ While the causal nexus for “direct effects” is inherently understood, no such clarity exists for the treatment of “indirect effects.” In fact, the Services regulations leave this decidedly ambiguous merely providing that “[i]ndirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain

winds and temperature) for the past 15 years. *See Technical Comments of the National Council for Air and Stream Improvement, Inc. on the proposed designation of the polar bear as threatened under the Endangered Species Act* at p. 2-3 (April 4, 2007).

¹⁶ Letter from Robert J. Meyers, Principal Deputy Assistant Administrator, Office of Air and Radiation, EPA, to H. Dale Hall, Director, U.S. Fish and Wildlife Service, and James Lecky, Director of Protected Resources, National Marine Fisheries Service, on “Endangered Species Act and GHG Emitting Activities” at p. 4 (Oct. 3, 2008)

¹⁷ *Id.* at p. 8.

¹⁸ 16 U.S.C. §1536(a)(2).

¹⁹ 50 C.F.R. §402.02.

to occur.”²⁰ What remains unstated in the regulations, then, is the nexus for determining that an indirect effect is “caused by” the proposed action as well as when such effects are “reasonably certain to occur.”

The Services must clarify and ensure use of a consistent causation standard under section 7. While establishing a causal nexus may be a straightforward task when addressing discrete projects that have a limited action area, some proposed federal agency actions within complex systems, such as a major river system, a county-wide action area or other large-scale landscapes can create significant uncertainties as to the extent and nature of the causal nexus between the proposed actions and anticipated adverse impacts on species—especially when complex computer modeling is integrated into such decisions. The Services’ lack of an articulate and definitive treatment of causation in the regulations is creating a race to the courthouse. Such an outcome not only creates the danger of a piecemeal interpretation of the appropriate causal nexus via litigation but also removes this matter from the more appropriate forum of a notice for public comment and rulemaking process.

Recommended Action: NESARC urges the Services to clarify the “effects of action” inquiry to ensure the application of the principles of “proximate causation” in the required causation analysis. The term “proximate cause” means the “producing cause; primary cause” or the “cause that directly produces an event.”²¹ In addressing the direct or indirect effects of a federal agency action upon a listed species or designated critical habitat, the Services must employ the principles of proximate causation and reasonable foreseeability that the Supreme Court and other federal courts have long recognized for purposes of the ESA.²² Mere speculation about harm to a species from a proposed action is not sufficient. Rather, there must be a close causal connection between the proposed action and an identified direct or indirect effect.

²⁰ *Id.*

²¹ Black’s Law Dictionary 234 (8th ed. 2004).

²² *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). For further discussion of the implications of the *Sweet Home* decision on this point, see Quarles & Lundquist, “When Do Land Use Activities ‘Take’ Listed Wildlife Under ESA section 9 and the ‘Harm’ Regulation?,” Ch. 12 of *Endangered Species Act: Law, Policy, And Perspectives* (Baur & Irvin eds., ABA 2002). Application of a proximate causation inquiry also is consistent with other environmental statutes such as the National Environmental Policy Act (“NEPA”). See *Department of Transportation v. Public Citizen, et al.*, 541 U.S. 752, 767 (2004) stating that:

As this Court held in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774, 75 L. Ed. 2d 534, 103 S. Ct. 1556 (1983), NEPA requires “a reasonably close causal relationship” between the environmental effect and the alleged cause. The Court analogized this requirement to the “familiar doctrine of proximate cause from tort law.” *Ibid.* In particular, “courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.” *Id.*, at 774, n. 7, 75 L. Ed. 2d 534, 103 S. Ct. 1556. See also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 264, 274-275 (5th ed. 1984) (proximate cause analysis turns on policy considerations and considerations of the “legal responsibility” of actors).

III. The Services Must Resolve the Ongoing Uncertainty as to the Appropriate Scope of the Adverse Modification Inquiry

In 2001 and 2004, separate federal circuit decisions held that the “adverse modification” regulation was facially inconsistent with the plain text of section 7 of the ESA.²³ These decisions took issue with (but did not set aside) the Services’ regulatory standard for “adverse modification” which had determined that adverse modification of designated critical habitat occurred when the action affected both the survival *and* recovery of a listed species. In the courts’ view, this regulation “set[] the bar too high” and “read[] the ‘recovery’ goal...out of the inquiry.”²⁴ Moreover, the courts opined that “Congress intended that conservation and survival be two different (though complementary) goals of the ESA.”²⁵

While these decisions were issued well over five years ago, the Services have yet to put forward a new definition of “adverse modification.” Rather, the Services have relied upon guidance, issued in December 2004, as a basis for moving forward with adverse modification inquiries within section 7 consultation processes.²⁶ Under this guidance, the Services have been directed to “rely on the statutory provisions of the ESA” in examining whether a proposed action will result in the destruction or adverse modification of designated critical habitat.²⁷ The Services are to examine the biological and physical features that are essential to the conservation of the species, the primary constituent elements of such critical habitat, the factors responsible for that condition and the conservation role of affected critical habitat units. The “effects of action” inquiry—as it relates to the adverse modification inquiry—is then focused on how the primary constituent elements or habitat qualities essential to the conservation of the species are likely to be affected, and how such effects then influence the form and conservation role of the affected critical habitat units.²⁸ Ultimately, this guidance provides that the conclusion that must be reached is whether “with implementation of the proposed Federal action, critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species, based on the analysis [described above].”²⁹

Recommended Action: NESARC urges the Services to take immediate steps to remove the cloud of uncertainty regarding the definition of “adverse modification” in a manner that comports with the statutory directives of the ESA, can be effectively administered and maintains the appropriate role intended for the section 7 consultation process. We encourage the Services to retain the current regulatory definition of “adverse modification” with only those minor modifications and additional justification necessary to address the courts’ concern. In this

²³ *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 443 (5th Cir. 2001) and *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d. 1059 (9th Cir. 2004).

²⁴ *Gifford Pinchot*, 378 F.3d at 1069.

²⁵ *Id.* at 1070.

²⁶ December 9, 2004, Memorandum from FWS Director to Regional Directors, Regions 1, 2, 3, 4, 5, 6 and 7 and Manager, California-Nevada Operations Office “*Application of the ‘Destruction or Adverse Modification’ Standard Under Section 7(a)(2) of the Endangered Species Act*” (Dec. 9, 2004).

²⁷ *Id.* at p. 2.

²⁸ *Id.* at pp. 2-3.

²⁹ *Id.* at p. 3.

regard, we believe any rule clarifying the definition of “adverse modification” must encompass the following principles:

- (1) *Examination of the effects of an action upon designated critical habitat must focus on the primary constituent elements and habitat qualities that were the basis of the initial designation of the critical habitat.*

“Adverse Modification” must be consistent with the ESA’s biological objective of protecting critical habitat -- those specific areas which contain physical and biological features that are essential to species conservation and may require special management. The designation of critical habitat relies upon the identification of physical and biological features that are essential for the species, and furthermore requires the identification of “primary constituent elements” (“PCEs”). While the Services currently focus their section 7 analyses on these PCEs, any new regulation must continue to emphasize that the “adverse modification” analysis will be triggered only where federal action impacts those identified “primary and constituent elements” that are protected through the critical habitat designation. Furthermore, any new “adverse modification” regulation should likewise shift analysis away from effects to the species’ survival or recovery, and toward the threats to identified “primary constituent elements” within designated critical habitat.

- (2) *Destruction or adverse modification requires permanent or long-lasting impairment to the primary constituent elements/habitat qualities for such critical habitat.*

The “adverse modification” inquiry also must address the temporal aspect of the identified impact and the threshold required for an effect to be considered destruction or adverse modification. Notably, in many cases, temporary disturbances of critical habitat while resulting in some immediate degradation of the habitat will be followed by restoration and often-times improvement of the PCEs/habitat qualities of such parcels. Thus, the adverse modification inquiry must be focused on those activities that cause permanent or long-lasting impairment of habitat that affects the PCEs/habitat quality, not short-term disturbances. Further, this standard, permanent or long-lasting impairment affecting the PCEs/habitat quality of designated critical habitat, addresses the concerns raised by the courts in ensuring a necessary linkage to conservation of the species, since the identified PCEs also represent the physical or biological features that are essential to the conservation of the species.

- (3) *The measures by which to remediate or avoid identified destruction or adverse modification of critical habitat cannot rise to, or become a backdoor means by which, the Services seek to shift the federal government’s assumed responsibility for recovering listed species to municipalities, States or private landowners.*

The consultation process under section 7 of the ESA was never intended to be the mechanism by which the Services reconstruct degraded ecosystems or regenerate degraded species numbers. Rather, the ESA addresses the means for

conservation/recovery efforts under sections 4(f), 5 and 6 of the Act. In contrast, the regulatory provisions of section 7(a)(2) (consultation process), section 9 (take prohibitions), and section 10 (Incidental Take Permits) have separate and more specific purposes. This distinction – between consultations intended to protect against jeopardy to a listed species or destruction/adverse modification of its critical habitat and the separately authorized and directed ESA actions focused on the recovery of listed species—must be retained in any continued implementation of the adverse modification inquiry.

IV. Adoption of Previously Promulgated, Improvements to the Consultation Process

NESARC acknowledges that the Services were limited by the terms of Public Law No. 111-8 in implementing their decision on whether to withdraw or retain the section 7 consultation regulations that had been previously adopted in December 2008. The nature of that enactment and unilateral deadline for action by the Services certainly did not provide sufficient time or flexibility by which individual elements of those regulations could be considered and retained. NESARC urges the Services to take this opportunity to re-adopt as many of the improvements set forth in those regulations as possible. Importantly, there are several clarifications and improvements that were provided under the 2008 regulation that were largely accepted by most commenters as valid improvements to the consultation process. These improvements should be immediately re-adopted by the Services:

Recommended Actions:

- *Adopt the clarification that existing impact analyses can fulfill the requirements necessary for performing a biological assessment for purposes of the section 7 consultation inquiry on a major construction activity.* The purpose of a biological assessment is to evaluate the potential effects of the action on a listed species and its habitat. Blindly requiring the preparation of a separate biological assessment places form over function. Activities ultimately subject to consultation requirements are often the subject of other environmental review requirements under federal or State law, which often require highly structured analysis of impacts on endangered, threatened and/or candidate species. Requiring re-packaging of such analyses or the conduct of redundant assessments provides no demonstrable benefit to the section 7 consultation inquiry.

In order to give full effect to the recognition of alternative analyses, the Services must recognize that biological assessments are often prepared by State and local governmental authorities. Moreover, analyses prepared in the context of National Environmental Policy Act (“NEPA”) review should be clearly accommodated. An appropriate balance should be found so that existing and comprehensive environmental reviews of a federal agency action (including those prepared by a State or local governmental authority) can be employed to meet the requirement to prepare a biological assessment. NESARC proposes that the Services give full effect to its acceptance of separately-prepared assessments by clarifying the definition as follows:

“Biological assessment” means the information prepared by or under the direction of the federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitat. A biological assessment may be a document prepared by or under the direction of the federal agency for the sole purpose of interagency consultation, or it may be a document or documents prepared for other purposes (e.g., an environmental assessment or environmental impact statement) which has been determined by the federal agency to contain the best scientific and commercial data available with respect to information required to initiate consultation.

- *Clarify that cumulative effects “do not include future federal activities that are physically located within the action area of the particular federal action under consultation.”* This clarification is consistent with the Services’ long-held policies and the provisions of the Act. In promulgating the section 7 consultation regulations in 1986, the Services noted that because future federal actions will be separately subject to the section 7 consultation process, “their effects will be considered at that time and will not be included in the cumulative effects analysis.”³⁰ This treatment is further consistent with the 1981 Solicitor’s Opinion for the Department of the Interior regarding “Cumulative Impacts under section 7 of the Endangered Species Act.”³¹ In Opinion M-36938, the Interior Solicitor concluded that a “project-by-project sequential review of federal actions is a more appropriate approach for endangered species consultation.”³² Finally, this treatment is consistent with the consultation provisions of ESA, section 7, which unequivocally focuses on the effects of a singular “federal agency action.” Accordingly, the Services should re-adopt the clarification to the definition of “cumulative effects” under 50 C.F.R.§402.02 to provide that cumulative effects “do not include future federal activities that are physically located within the action area of the particular federal action under consultation.”
- *Adopt the Consultation Handbook Guidance Recognizing that Discountable, Insignificant and Beneficial Effects of Action Do Not Require Consultation.* The Services’ Consultation Handbook advises that formal consultation under ESA section 7 is not required where it is determined that a proposed agency action will have “no effect” or where the effects on the listed species are determined to be discountable, insignificant or completely beneficial.³³ Further, the Consultation Handbook defines each of these terms noting that:

Beneficial effects are contemporaneous positive effects without any adverse effects to the species. **Insignificant effects** relate to the size of the impact and should never reach the scale where take occurs. **Discountable effects** are those extremely unlikely to occur. Based on best judgment, a person would not: (1) be

³⁰ 51 Fed. Reg. 19932, 19933 (1986).

³¹ Opinion M-36938, *Cumulative Impacts Under Section 7 of the Endangered Species Act*, 88 I.D. 903 (1981).

³² *Id.* at 908.

³³ ESA Consultation Handbook at 3-12.

able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur [reference omitted].³⁴

This guidance should be formally adopted in the consultation regulations, with appropriate accompanying language that makes clear that no consultation with the Services is required when such a determination is made by the action agency or Services.

NESARC notes that some parties have raised concerns regarding the ability of the Services to confirm or monitor action agency's determinations that a proposed action will have beneficial, insignificant, discountable or no effects on a listed species. We believe these concerns are misplaced and greatly underestimate the significant expertise and personnel within action agencies who are responsible for ensuring that federal agency actions take into consideration and protect wildlife and their habitat. Moreover, this concern can be concurrently addressed by providing for a reporting requirement by which the action agencies notify the Services of such determination. This revision can be easily undertaken by incorporating the following language into the appropriate provisions of either sections 402.03 or 402.13 of the consultation regulations:

- () The federal agency shall provide written notification to the Services within 30 days of a determination that the agency is not required to consult on a proposed federal agency action on the basis that the proposed action will have either:
 - (i) no effect;
 - (ii) a completely beneficial effect;
 - (iii) a discountable effect; or
 - (iv) an insignificant effect.

V. Deadlines for Completion of Informal Consultations Must be Established

NESARC strongly supports the adoption of a specific deadline for completion of the informal consultation process, and most importantly, timely issuance of any required concurrence by FWS or NMFS that a proposed action will not likely adversely affect a listed species or any designated critical habitat. The lack of a deadline for completion of informal consultation and issuance of the Services' "concurrence" letter to an action agency's not likely to adversely affect finding has been a longstanding concern. In fact, a 2004 General Accounting Office Report assessing section 7 consultations in the Pacific Northwest, noted that a persistent concern expressed by action agencies and others was the inability to timely complete informal consultations.³⁵ Moreover, the absence of a deadline for completion of informal consultations stands in stark contrast to the statutory provisions of section 7 which establish a specific deadline for completion of formal consultations—which require much more extensive engagement by the Services than the informal consultation process.

³⁴ *Id.*

³⁵ GAO Report, *Endangered Species: More Federal Management Attention is Needed to Improve the Consultation Process* (Mar. 2004).

Establishing formal deadlines for completion of informal consultation and issuance of any necessary concurrence letter would not be an instance where a federal action agency is unilaterally seeking to impose a deadline for action upon another agency or party. Rather, the Services would be establishing their own procedures for the conduct of a consultation and effects of their action or inaction.

Recommended Action: At a minimum, the Services should move from the present use of “targets” for completion of informal consultation and issuance of any required concurrence letter to the formal adoption of deadlines. In establishing formal deadlines for the completion of informal consultation, the Services should include the following elements:

- Establish a deadline of sixty (60) days;
- If the established deadline is not met, the Services should report to the action agency on its delay in conclusion of the informal consultation, explain the basis of such delay and provide a completion date (of no more than an additional thirty (30) days) for resolution of the informal consultation;
- The establishment of an officer of oversight within the Offices of the Secretary of Interior and Commerce to whom all delays and proposed completion dates are reported; and
- A procedure by which, if a concurrence letter determination is not timely completed by the Services, then the action agency can proceed with its proposed action upon notification to the relevant officer of oversight.

VI. The Services Should Work With Action Agencies to Develop Additional Counterpart Regulations

The Services have the authority to work with action agencies to develop and implement counterpart regulations for the conduct of consultations with particular agencies and programs.³⁶ For example, the Services have worked with the Bureau of Land Management and U.S. Forest Service to develop and implement counterpart regulations for consultations related to the National Fire Plan. Under these counterpart regulations, an action agency must develop and implement an alternative consultation agreement with one or both of the Services which then guides the action agency’s “may affect” determination. As part of such agreement, the action agency and the Services determine and identify who within the action agency will have authority to make the “may affect” determination; establish specific standards for assessing the potential effects of a National Fire Plan project on a listed species or its critical habitat; agree on a monitoring and evaluation program that covers the action agency’s efforts; and establish a training program for action agency staff on the proper conduct of the “may affect” inquiry.³⁷ In upholding the counterpart regulations for the National Fire Plan, the court in *Defenders of Wildlife v. Kempthorne*, held that the section 7 consultation provisions “leaves room for the

³⁶ See *Defenders of Wildlife v. Kempthorne United States of America*, 2006 WL 2844232 (D.D.C. 2006)

³⁷ See 50 C.F.R. §402.33.

Secretary to determine how, precisely, that consultation should occur.”³⁸ Moreover, these specific counterpart regulations provided for the necessary involvement and oversight by the Services as to ensure consistency with the consultation requirements of ESA, section 7.³⁹ This decision and the National Fire Plan counterpart regulations provide a template for the appropriate development of other counterpart regulation programs that will provide for better implementation of section 7 consultations.

In enacting the 1978 amendments to the ESA that form the present section 7 framework, Congress noted that it intended “to introduce some flexibility into the Act”⁴⁰ and that “consultation procedures must be sufficiently flexible to accommodate the myriad of activities that are authorized, funded or carried out by the federal government.”⁴¹ The Services and action agencies have the ability to realize significant improvements in administrative efficiencies, clarity of process and overall protections to listed species by developing additional counterpart regulations. Importantly, counterpart regulations can address unique aspects of particular agency actions that are covered, rely upon and recognize existing environmental assessments and protections undertaken by the action agencies for certain programs and individually tailor the consultation procedures.

Recommended Action: The Services should work with action agencies and interested stakeholders on the identification of federal agency programs that are candidates for the use of counterpart regulations and timely work to implement such regulations in order to streamline and improve the consultations undertaken for federal agency actions under such programs.

VII. Establish Procedures for Consultations in Light of Emergencies or Imminent Danger

One of the deficiencies in the existing consultation regulations is the lack of any specific procedures to expedite consultations in light of declared emergencies or imminent danger to the public or resources. At present, when such emergencies and/or imminent danger situations exist, action agencies and the affected public are left with no clear process by which to ensure that compliance with ESA does not unnecessarily hinder emergency response efforts and, concurrently, that such emergency responses are protective of listed species and their habitat.

Recommended Action: To address this shortcoming, the Services should implement specific regulations for expedited consultations for emergency response activities as well as responses to imminent danger to the public or resources. Among the measures that should be included in such regulations should be:

- Notice to the Services of an emergency/immediate response activity which includes a description of the immediate threat or emergency posed, the listed species or critical

³⁸ *Id.* at *19.

³⁹ *Id.*

⁴⁰ H.R. Rep. 95-1625.

⁴¹ 124 Cong. Rec. 21,147 (1978) (statement of Senator John Chafee).

habitat potentially affected and the protective measures (for listed species and critical habitat) to be used in conjunction with the agency's emergency response;

- Allowance for threat/emergency actions to take place concurrent to any informal consultation with the Services where it is determined that a threat/emergency has reached a level where there is imminent danger of death, serious injury, serious threats to public health or catastrophic or widespread property/resource damage; and
- For all other instances, designation of an officer within the Office of the Secretary that can consult with the action agency within 24-hours on the proposed action that is responding to an emergency or imminent danger to the public or resources.

VIII. Administrative Improvements to the Consultation Process are Equally Important

Improvements to the section 7 consultation process should not be limited to regulatory changes. Rather, there are a number of administrative improvements that can be made — particularly with respect to achieving efficiencies in the consultation process, promoting collaboration and providing clarity. NESARC urges the Services to consider the following administrative improvements:

Recommended Actions:

- *Update the Consultation Handbook.* The Consultation Handbook was last updated in March, 1998. Increasingly, the Handbook is outdated in that it does not reflect critical court decisions, internal practices and assessment tools that have been developed since 1998 and collective experiences of the Services over the past 10+ years in further administration of the consultation process. While a wholesale re-working of the Handbook is not warranted, NESARC urges the Services to work with the action agencies and the public to identify specific improvements to the Handbook reflecting court decisions and other legal developments as well as reflecting the specific consultation improvements identified in these comments. Through such a focused and efficient updating of the Handbook, the Services can ensure that it will continue to serve as a resource to *all* involved in the consultation process.
- *Develop procedures for the effective identification and public dissemination of those resources, research, data and other information that are determined to be the best available scientific information, in particular for widely affected species/consultation types.* The identification of what is considered to be the best available scientific information is presently undertaken on a consultation by consultation basis. This approach can lead to delays in identification of the information to be used in the consultation process and inconsistency in the use and interpretation of such data. Where possible, the Services should pursue initiatives by which the best available scientific information used in individual consultations is identified and made public available. Further, the Services also should make available any relevant critiques or further interpretation of the information or data that has been used in individual consultations.

Through such efforts, the Services and the public will have more efficient access to information that is potentially relevant to a consultation on a particular project. This effort is especially important for widely affected species or activities, since it will avoid unnecessary duplication of effort and promote the consistent identification of the best available scientific information to be utilized in the consultation process. Further, the Services should ensure that the public dissemination of such data/studies includes making them readily available to the public (on a searchable basis) via the internet.

- *Establish protocol for the use of peer-reviewed data, statutorily mandated scientific reviews and other data in the conduct of section 7 consultations.* In many instances, action agencies and the Services are confronted with the question of the use and weighting of scientific data. The Data Quality Act⁴² directs federal agencies to establish guidelines to ensure the “quality, objectivity, and integrity of information disseminated by federal agencies.”⁴³ Further, the Department of the Interior guidelines for implementing the Office of Management and Budget’s rules enabling the Data Quality Act require that Interior agencies use the “best available science,” rely on “peer-reviewed studies,” and utilize “data collected by standard and accepted methods.”⁴⁴ These guidelines, while providing some general principles, should be further refined for purposes of ensuring the appropriate use of scientific data in the consultation process. The Services should establish ESA-specific guidance and protocols on the use of peer reviewed data, weighting of data sources and identification of other data compilations that can be relied upon during the consultation inquiry.

The Services should acknowledge and utilize in the consultation process those studies and resulting data collected by federal agencies under other statutory mandates. For example, the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”) requires comprehensive analyses of the environmental impacts of a potential registration of chemicals for use as pesticides or herbicides. These reviews often take years to perform, involve the use of verified data sources, monitoring programs and other controlled data inputs which ensure a high level of scientific rigor and integrity. Notwithstanding the comprehensive nature of such assessments, the Services sometimes have placed less weight on the use of such data in a consultation on the sole basis that “peer review” has not been conducted. Such a blind requirement places form over function. The Services should recognize that these statutorily mandated scientific studies meet the critical elements of integrity in collection, scrutiny and verification. Likewise, the Services should identify weighting criteria for other scientific studies and data that will allow for proper consideration of non-peer reviewed data when they meet necessary thresholds for data collection integrity, rigor of examination and verification procedures.

- *Promote and facilitate programmatic consultations.* Processing multiple individual informal and formal consultation inquiries for similar activities within the same region increases the workload for both the action agencies and Services, delays the overall time

⁴² Pub. L. No. 106-554 § 515 (Dec. 21, 2000).

⁴³ *Id.*, section a.

⁴⁴ 67 Fed. Reg. 8452, 8452-54 (Feb. 22, 2002). *See also* U.S. Fish and Wildlife Service Information Guidelines, Part III.

for processing permit applications and leads to the potential for inconsistent application of the consultation requirements. Successful examples of programmatic consultations are increasingly available and can serve as useful guides for ways to effectively administer the consultation process.

The Services should work with action agencies and the public to identify those activities that are more effectively addressed through programmatic consultations.

- *The Services should continue to improve tracking and public availability of consultation determinations.* A continuing concern with the consultation process is the lack of publicly available information on the status of individual consultations and the results of formal consultations, including measures ultimately adopted as part of reasonable and prudent alternatives or reasonable and prudent measures within final biological opinions.

NESARC understands that FWS has worked on the development of a Tracking and Integrated Logging System (“TAILS”) that identifies and tracks all ongoing consultations. This system has been described as a replacement for local, individualized workload tracking systems to allow more consistency and better accountability in reporting accomplishments at the regional and national level.”⁴⁵ Similarly, the NOAA's Pacific Northwest Office has apparently developed two databases: one that lists all completed biological opinions, which is searchable by year, state, agency, permitting number, or title of consultation; and a second database that provides the current status of an individual consultation called the Public Consultation Tracking System or (“PCTS”). Accordingly, the Services should continue improving databases and recordkeeping on the consultation program and ensure that such information is made available to the public on a “searchable” basis.

IX. Next Steps

NESARC respectfully requests that the Services timely consider and act upon improvements to the ESA, section 7 consultation process. Public participation and input into the process of improving the section 7 consultation process should not end with the submittal of these written comments. Implementation of such improvements must continue to be a collaborative effort between the Services, action agencies and the affected public. To facilitate such continued collaboration, we respectfully request that the Services make a further public announcement, via a *Federal Register* notice, that summarizes the comments received, consideration undertaken by the Services of the recommendations for improvement, and information on all steps (including any formal rulemaking) that the Services intend to take for improvements to the consultation process. NESARC requests that such announcement occur no later than October 1, 2009.

⁴⁵ Dept. of the Interior, FWS, Fiscal Year 2008 Budget Justification, page 67.

NESARC greatly appreciates the opportunity to provide these comments to the Services and to initiate a further discussion on ways to improve the ESA consultation process. We hope that the Services will take immediate action to improve the consultation process and that the Services will continue to collaborate with the public on such measures. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph B. Nelson". The signature is written in a cursive style with a long horizontal flourish at the end.

Joseph B. Nelson
Counsel, National Endangered Species Act Reform Coalition



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American Forest and Paper Association
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Idaho Mining Association
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National Association of Home Builders
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National Grange
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National Mining Association
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National Potato Council
Washington, D.C.

National Rural Electric Cooperative Association
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Nebraska Farm Bureau Federation
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Northern Electric Cooperative, Inc.
Bath, South Dakota

Northwest Horticultural Council
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Public Lands Council
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Rancho California Water District
Temecula, California

Renville-Sibley Cooperative Power Association
Danube, Minnesota

**Rushmore Electric Power
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Rapid City, South Dakota

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Sulphur Springs Valley Electric Cooperative
Willcox, Arizona

Teel Irrigation District
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Tri-State Generation & Transmission Association, Inc.
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Washington State Potato Commission
Moses Lake, Washington

Washington State Water Resources Association
Yakima, Washington

Weber River Water Users Association
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Wells Rural Electric Company
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West Side Irrigation District
Tracy, California

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