



29 September 2008

Lyle Laverty  
 Assistant Secretary for Fish and Wildlife and Parks  
 Department of the Interior  
 1849 C Street, N.W.  
 Washington, D.C. 20240

*Hand-delivered to Division of Policy and Directives Management, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Suite 222, Arlington, VA 22203 and submitted online to <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=FWS-R9-ES-2008-0093>*

Dear Assistant Secretary Laverty,

As three scientific societies concerned with the conservation of wildlife and wildlife habitat, we share the concern of the Departments of the Interior and Commerce that the Endangered Species Act be administered in an effective manner. We understand the need to assure that process, and the costs of the process, do not impede the Service from listing, designating critical habitat, and, most importantly, developing and implementing recovery plans. We realize that the consultation process, like all other aspects of ESA implementation, must be efficient.

However, the consultation process must also be effective and, above all, it must be science-based. The proposed rule sacrifices effectiveness for the sake of efficiency because it bypasses the science that is critical to the consultation process. It delegates to federal action agencies the responsibility and authority to make biological determinations despite the fact that most of those agencies have few staff with biological expertise. As the U.S. Fish and Wildlife Service has already demonstrated, even the Forest Service and the Bureau of Land Management – agencies with significant biological expertise – have been unable to make biological assessments in an acceptable manner under the authority delegated to them under the Counterpart Regulations. Delegating this authority to every other federal agency, without regard to the capacity of each agency to undertake these analyses, nearly guarantees decisions that are not biologically defensible and that will jeopardize protected species.

For this reason, and for other reasons that we elaborate in the enclosed comments, we ask that the Service withdraw this proposed rule. We suggest that the Services instead convene stakeholders to engage in thoughtful discussion about ways to improve the administration of the ESA consultation process.

Sincerely,

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The Ornithological Council is a consortium of eleven scientific societies of ornithologists throughout the Western Hemisphere; seven of those societies are based in the United States. The Council seeks to ensure that scientific information about birds is available to and used by government agencies and others whose decisions and actions affect wild bird populations.

The Wildlife Society is a professional organization of wildlife biologists that works to ensure that wildlife and their habitats are conserved through management actions that take into careful consideration relevant scientific information.

The Society for Conservation Biology is global community of conservation professionals. Its mission is to advance the science and practice of conserving the Earth's biological diversity.

Our three societies are among that class of “professional scientific associations” that the Congress in the Endangered Species Act (Section 4(b)(5)(C)) directed the Secretaries to notify of proposed listing, delisting and habitat designation regulations. Our members are among those most regularly researching, managing, enjoying and conserving listed species in their habitats around the nation and the world and have been entrusted with the additional responsibility of providing scientific peer reviews of draft recovery plans for listed species.

We submit these comments on the proposed changes to the regulations requiring federal agencies to consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (the “Services”) under Section 7 of the Endangered Species Act (16 U.S.C. 1536), as published on 15 August 2008 in the Federal Register (73 F.R.47868).

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The proposed regulatory changes do not address the problems identified by the Government Accountability Office report upon which the Services base their justification and contradict the Services' own stated view of the need for consultation and the extent of effort appropriate for consultation.

### 2. Section 402.02

a) The current regulation does not define the term biological assessment or set appropriate standards for biological assessments. The proposed regulation fails to correct this serious omission. It is not useful to state that documents prepared for another purpose may be used in lieu of a separate biological assessment without specifying standards for biological assessments. [page 6]

b) The proposed definition of “cumulative effects,” by excluding future federal actions, would encourage, or at least allow, action agencies to take multiple, small-scale actions – each with minor impacts – that would avoid a thorough review of the cumulative harm to listed species. [page 7]

c) The proposed definition of “effects of the action” inappropriately limits the effects considered by requiring a high level of causation, and setting the burden of proof for that causation at a level that most actions will not meet. In addition, the definition improperly excludes anything related to climate change from consideration under the Endangered Species Act. [page 8]

### 3. Section 402.03

a) The evaluation of potential impacts, including the “Not Likely to Adversely Affect” determination, is based on biological criteria. An in-depth understanding of the biology of the species that might be affected is needed. [page 11]

b) Action agencies may have no staff with adequate biological training; action agencies that have staff with adequate biological training may not have sufficient resources to conduct an adequate evaluation. The Services state that the action agencies have sufficient expertise to find and evaluate biological information but offer no data to support that contention. To the extent that action agencies have staff with biological training, the budgets of many action agencies are flat or declining, so funding for research and other activities that require scientific expertise is also likely to decline. It is already the case that limited funding is redirected to immediate needs such as fire suppression. [page 14]

c) A U.S. Fish and Wildlife Service and National Marine Fisheries Service review of the National Fire Plan counterpart regulations concluded that in nearly half of the cases evaluated,

even action agencies with significant scientific expertise are not preparing adequate biological evaluations that otherwise would have been conducted by the Services; the Secretaries know that the assertion that action agencies will make correct judgments, which is proffered as the basis for this proposal to delegate such work to the some of the same agencies, is simply false. [page 17]

d) The proposed regulation lacks safeguards to assure that the decisions made by action agencies are biologically sound. [page 19]

e) Unless the Services review a significant number of these action agency determinations, it will be impossible to determine if the action agencies have the requisite expertise and are making biologically credible determinations. This proposed regulation makes no provision for review of action agency determinations. [page 22]

f) Erroneous decisions, even if later amended or reversed, likely will cause irreversible harm to the continued survival of listed species. [page 22]

g) Congress has not delegated clear regulatory authority to the Services under 15 U.S.C. 1536; any general regulatory authority the Services may have under the Administrative Procedure Act must be more limited in scope than that express regulatory authority afforded to the Services under other provisions of the Endangered Species Act. [page 22]

h) The proposed regulation is contrary to clear Congressional mandate. The statute makes mandatory a consultation with “the Secretary” where “Secretary” is defined as the Secretaries of the Interior and of Commerce. The Department of the Interior does not have the authority to issue regulations that in effect re-write the legislation. [page 24]

i) The Services have no recourse should the action agency’s Not Likely to Adversely Affect determination be erroneous. There is substantial legal uncertainty about the ability of one executive branch agency to sue another. [page 25]

j) The Services know that the legal validity of the counterpart regulations is in doubt because the federal court for the Western District of Washington has invalidated the similar counterpart regulations pertaining to Federal Insecticide, Fungicide, and Rodenticide Act decisions by the Environmental Protection Agency, and a challenge to the counterpart regulations for the National Fire Plan is pending. [page 27]

k) The proposed regulatory changes contradict the Services’ own internal reasoning and the scientific data generated by the Services in a review of similar counterpart regulations, and are therefore arbitrary and capricious. [page 27]

l) The proposed regulation would allow the agency to bypass consultation if it determined – correctly or incorrectly – that its actions or the actions it would authorize or fund would likely not adversely affect a listed species. In addition to the potential harm to the affected species and its habitat, any person, corporation, state, or other entity that might rely on that determination would risk violating the Act and would face potential liability. A project associated with the

erroneous determination or omission likely would be delayed or canceled. [page 29]

m) The proposed regulation should clarify the applicability of the consultation requirement to agency decisions that affect ESA-listed species in other countries. [page 30]

#### 4. Section 402.13

By eliminating the requirement for concurrence from the Services, the proposed changes to the provisions for informal consultation contravene Congressional intent. The arbitrary deadlines would allow action agencies to bypass consultation regardless of the biological necessity for consultation. [page 30]

5. This rulemaking is subject to the requirements of the National Environmental Policy Act. It is inconceivable that a rule that affects all actions of all federal agencies and every species protected under the Endangered Species Act could have no significant impact. Therefore, a full Environmental Impact Statement, including consideration of alternative actions, is required. [page 31]

## Discussion

### 1. Stated justification

**The proposed regulatory changes do not address the problems identified by the Government Accountability Office (GAO) report upon which the Services base their justification and contradict the Services' own stated view of the need for consultation and the extent of effort appropriate for consultation.**

The Services allude to the GAO report (GAO04-93) regarding the workload associated with the consultation process, and suggest that the GAO's recommendations support the proposed actions. This is simply not the case. First, the GAO noted that the workload had increased largely as a result of the number of new listings, not because of the process itself. Second, the Services attributed the problem in handling the workload to staffing shortages. The 66 survey respondents, representing the Services and various action agencies, identified staffing shortages as their most important concern, as did other officials at the Services and action agencies (p.40). High turnover is also a problem (p.42), as are personality problems (p.53).

The solution proposed by the Services – to simply eliminate their involvement and oversight – is not justified under these circumstances. Listings are a function of the appropriate exercise of Congressionally mandated responsibility and it makes no sense to list species only to later reduce the protection afforded to those species. If staffing is a problem, the solution, in large part, is to increase staffing. If turnover is a problem, the solution, in large part, is to assess the reasons for turnover and implement changes to increase staff retention.

It is even more telling that the Services told the GAO that they felt that the existing consultation processes “provides considerable benefits to species.” In fact, “officials with the Services said that the purpose of the consultation process is to consider the potential effects of proposed activities regardless of whether they are positive or negative and to avoid jeopardizing species' continued existence and adversely modifying their critical habitat. For example, the consultation handbook states that consultation should be conducted on activities ‘with insignificant, discountable, or completely beneficial’ effects in addition to those with clearly negative effects. Some officials with the Services emphasized that they cannot ignore their responsibility to consult on every action that may affect species or their habitats.” And, the Services pointed out, “activities that are not likely to adversely affect species may undergo a less burdensome consultation process.” (p.43).

In light of the statements made by the Services' officials and staff to the GAO, it would appear that the justifications for the proposed rule are at best a misrepresentation of the GAO's report and conclusions. It also suggests that the Services' own expertise and views are contradicted by the proposed rule. Though the GAO recommended that the Services work together with the action agencies to resolve their differences of opinion about when consultation is needed and the level of effort that should be devoted to preconsultation processes, at no time did the GAO recommend that the Services simply terminate their involvement and oversight. This proposed

regulation would do just that. Like the counterpart regulations for actions and decisions made under the National Fire Plan and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), this proposed regulation would allow action agencies to avoid the consultation process entirely by making “Not Likely to Adversely Affect” (NLAA) determinations, without oversight by the Services or the need for concurrence by the Services.

## 2. Section 402.02

**a) The current regulation does not define the term biological assessment or set appropriate standards for biological assessments. The proposed regulation fails to correct this serious omission. It is not useful to state that documents prepared for another purpose may be used in lieu of a separate biological assessment without specifying standards for biological assessments.**

The actions agencies – many or most of them without staff with adequate biological expertise – are tasked with making the determination that their planned actions are or are not likely to adversely affect a listed species. This threshold decision may actually be the most critical in the entire process, as no consultation will take place if the action agency decides that its proposed action is Not Likely to Adversely Affect (NLAA) a listed species. The proposed rule would eliminate the assurance that the decisions by the action agencies are biologically sound, in that the concurrence of the Services, required under the current rule, would no longer be needed. In all probability, the oversight by the Services of the action agency NLAA determinations served to assure that the action agencies asked the relevant biological questions, provided adequate answers, and reached a biologically defensible conclusion. We do not concede that the proposed regulatory change shifting the decision-making authority to the action agencies is biologically or legally supportable. At the very least, however, it is critical, in the absence of any oversight by the Services, to provide the action agencies with not only a definition of biological assessment, but also a thorough set of standards for biological assessments.

The proposed change simply says that new documents need not be prepared if “If the information required to initiate consultation has been included in a document prepared for another purpose, we propose to allow action agencies to submit that document, rather than requiring them to create a new document to satisfy the requirements for initiating consultation as set out in 50 CFR 402.14(c).” However, the items required by that section:

(c) Initiation of formal consultation. A written request to initiate formal consultation shall be submitted to the Director and shall include:

- (1) A description of the action to be considered;
- (2) A description of the specific area that may be affected by the action;
- (3) A description of any listed species or critical habitat that may be affected by the action;
- (4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;
- (5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and
- (6) Any other relevant available information on the action, the affected listed species,



or critical habitat.  
may not comprise comprehensive and sufficiently detailed information needed for a biological assessment.

Submitting documents prepared for another purpose – a seemingly commonsense proposal that would save agency time and resources – is problematic because the current regulation does not establish adequate standards. It does not require that the reports be recent, for instance. For instance, an action agency may have conducted a biological survey of the area a decade earlier; it likely will not be accurate or complete at the time of the proposed action. There are no content standards for the biological assessments or environmental statements. This list also lacks quality standards. The Services should take this opportunity to correct this serious flaw, particularly because they now also propose to remove their own oversight process.

**b) The proposed definition of “cumulative effects,” by excluding future federal actions, would encourage, or at least allow, action agencies to take multiple, small-scale actions – each with minor impacts – that would avoid a thorough review of the cumulative harm to listed species.**

We are concerned by the proposed definition of “cumulative effects.” The concept of cumulative effects is not in the statute; the term was first defined by the Services’ 1986 regulations [51 Fed. Reg. 19926, 19932 (June 3, 1986)]. At that time, the Services defended their decision to include cumulative effects in the regulations by noting that since all federal agencies must perform a NEPA analysis for the proposed action, and NEPA requires an analysis of cumulative effects, the action agency should provide this information as part of the ESA consultation, as well. Therefore, it seems unusual that the cumulative effects analysis would be required under ESA based on the fact that NEPA requires it, but that the two standards would differ. The only authority that the Services have for their assertion that this proposed standard is the correct standard to apply under the ESA is the existing regulatory definition, which they developed; there is not a Congressionally or judicially approved standard for cumulative effects under the ESA.

Turning to the substance of the proposed definition, we are concerned by the exclusion of future federal activities from the cumulative effects analysis. The proposed regulation would clarify that cumulative effects do not include future Federal activities. 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.” However, under these proposed regulations, not all federal actions will be subject to Section 7 consultations. Indeed, if the action agency decides that the proposed action is not likely to adversely affect a protected species, then the Services will not be involved in the actions, and the possible effects of those actions will not be analyzed. Failure to analyze the effects of all future federal activities could jeopardize the survival of threatened and endangered species and their habitats.

Taken individually, an agency’s projects might have only minor effects on an endangered

species, each falling below the NLAA threshold. However, the combined impact of these projects could be substantial and perhaps qualify as jeopardy. Indeed, cumulative, piecemeal modifications to the habitat of wildlife and plants are a primary cause of species decline and extinction. The proposed definition of cumulative effects would allow action agencies to move forward with multiple, small-scale projects – each with minor impacts – and avoid a thorough review of the cumulative harm to listed species.

**c) The proposed definition of “effects of the action” inappropriately limits the effects considered by requiring a high level of causation, and setting the burden of proof for that causation at a level that most actions will not meet. In addition, the definition improperly excludes anything related to climate change from consideration under the ESA.**

### **Indirect effects**

In biology, effects cannot be neatly characterized as direct or indirect. The proposed regulation – like the current regulation – equates “indirect” with “later in time” but makes no effort to define “later in time.” Would this mean a day later? Seven months later? Eighteen years later? The take of a certain number of individuals is immediate, but the impact on the viability of the population may not be apparent for several years. Nonetheless, the effect of the take is direct, even if later in time. There is no biological basis to limit indirect effects to those that will occur in the future. Furthermore, effects can be indirect but immediate and should be considered in analyzing the effects of the action.

We agree that the analysis of effects is a biological issue and we understand the need to establish a biological linkage between the action and the result. However, the Services’ attempt to classify effects as direct or indirect, and to define the latter based on a temporal component, has no basis in science.

### **Essential cause (“but for”)**

The addition of the requirement that the proposed action be an essential cause of the indirect effect drastically limits the effects that must be considered and ignores the fact that many effects have multiple causes. According to the preamble accompanying the proposed regulations, the intent of the changes is to ensure a close causal connection between the agency’s action and the effect. We contend that such a relationship can exist without the “but for” requirement that the new interpretations create. The preamble also states, “if an effect would occur regardless of the action, then it is not appropriate to require the action agency to consider it an effect of the action. However, it may be appropriate to address it as it relates to the baseline or cumulative effects analysis.” There are several problems with such reasoning.

First, a biological evaluation necessarily entails the conditions present in the area where the proposed action will take place. Just as the size of the population in that area will be an important factor in determining potential impacts, as a larger population is more likely to persist than is a smaller population, so too are the conditions in which the population occurs. The action may be

far more detrimental in circumstances where the species faces multiple threats than would be the case where conditions are better from the perspective of that species. The nature, number, and relative magnitude of the threats in any particular place are essential elements of a biological assessment. Limiting the analysis to “but for” the agency action implies that the assessment should ignore these critical biological elements and consider only the impacts in some hypothetical ideal conditions.

Second, a species or its habitat is often threatened simultaneously by many independent and interacting stressors some of which may act synergistically and therefore cumulatively; that another stressor has similar effects on a species or its habitat should not preclude an agency from considering the effect that their action will have on the species or its habitat cumulatively. Indeed, many endangered species face a large number of multiple threats; ignoring a given threat simply because there are others ignores the very purpose of the Endangered Species Act and weakens it to the point of inapplicability.

Third, such indirect effects likely would not fall under the strict definition of cumulative effects, and so would not be considered in that context. In addition, considering indirect effects as part of the baseline obscures the contribution of the action to the status quo and gives the agency too much latitude to not consider the action.

Finally, it likely will be difficult for action agencies, or the Services, to determine whether an effect will occur “but for” the action. This new interpretation of indirect effects leaves endangered species and their habitats vulnerable to the many causes of a given harm.

In fact, as noted recently by the Congressional Research Service (RL3461; 2 September 2008), a similar interpretation of indirect effects was recently rejected by a federal court. The Ninth Circuit rejected the argument that an action would not jeopardize a species that was already in jeopardy, noting that “even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm.” This seems to be exactly what this proposed regulation would allow: if a species is already in jeopardy, an action that would cause further harm is not an essential cause of that effect. *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 930 (2008).

### **Reasonably certain to occur, based on clear and substantial information**

The proposed regulation would provide guidance on application of the existing standard of “reasonably certain to occur.” Requiring the determination that an effect is reasonably certain to occur to be based on “clear and substantial information” places an extreme burden on agencies and requires a level of certainty that agencies are unlikely to be able to meet. This appears to be a new legal standard and differs from that used elsewhere in the ESA regulations and statute, which is “the best scientific and commercial data available.” The proposed standard precludes reliance on the precautionary principle and prevents the use of predictive modeling and other predictive scientific methods.

The precautionary principle would resolve jeopardy decisions in favor of the species where there

is no scientific consensus whether harm would ensue. A requirement for clear and substantial information sets a much higher bar for agencies making the decision, which likely requires expertise and resources that they do not have. Indeed, Congress has indicated its intent that the precautionary principle be applied in consultation decisions, noting when amending the Act in 1979 that “this language continues to give the benefit of the doubt to the species, and it would continue to place the burden on the action agency to demonstrate to the consulting agency that its action will not violate Section 7(a)(2)” (H.R. Conf. Rep. No. 96-697). The burden that these changes would impose is contrary to Congressional intent. The Services “believe the proposed language to require ‘clear and substantial’ information is within the intent of the current regulations.” However, the issue is not the intent of the current regulations, which the Services also promulgated. Regulations must be consistent with the statute itself and in this case it is clear that the proposed regulation is contrary to Congressional intent.

This burden of proof would require scientific expertise and resources beyond those that the agencies currently have. In addition, it limits the type of information the agencies could use when making a determination. Resource managers often use predictive models and other predictive inferences to help make management decisions. However, these widely accepted scientific methods likely would not meet this new standard and therefore could not be used.

The overall effect of the new definition of “effects of the action” is to drastically limit, if not eliminate, consultation for federal actions that contribute to an effect on a species, perhaps even substantially, if the effect would otherwise occur to some extent without the federal action or if the agency cannot meet an extremely high burden of proof regarding the certainty of the effect. This is contrary to sound resource management practices and threatens species recovery and survival.

The stated purpose of the proposed changes is to limit the analysis of cumulative effects to only those effects that can be meaningfully considered and to “allow action agencies and the Services to determine more readily the effects of the action and thus to determine if the action will jeopardize the species or adversely modify or destroy critical habitat, thereby focusing consultation on those effects that can be meaningfully addressed.” However, failing to consider many effects of an action may lead to a determination that is biologically insufficient. We acknowledge that it can be hard to assess the likelihood of the occurrence of a potential effect. Doing so requires scientific expertise, including an ability to find and evaluate the literature, model the effects of the action based on known biological and ecological responses to that kind of stressor or similar stressors, and based on biologically justifiable assumptions. However, difficulty is not a valid basis to avoid the question, particularly because doing so may very well lead to a biologically invalid determination. There are established practices for making decisions in the light of uncertainty and these practices can and should be used, rather than simply ignoring potential effects for which it is difficult to determine probability of occurrence.

### **Climate change**

The notice states that the Services have proposed “these regulatory changes in response to new challenges we face with regard to global warming and climate change.” However, the proposal

clarifies that greenhouse gas emissions should not be considered in any way in ESA consultation decisions. A refusal to consider what is arguably the greatest threat to the survival of our nation's native species and their habitats is not scientifically valid. Indeed, the Services make clear their unwillingness to address climate change, noting that "these regulations would reinforce the agencies' current view that there is no requirement to consult on greenhouse gas (GHG) emissions' contribution to global warming and its associated impacts on listed species."

Furthermore, the Services do not have the authority to exclude certain categories of actions from the ESA; under the law, discretionary federal actions are subject to Section 7. If the effects of greenhouse gases on endangered species are to be excluded from the ESA, then Congress must enact such an exclusion.

While not every Section 7 decision should, or could, take climate change into account, there may be federal actions that contribute to the extent, duration, or magnitude of climate change and affect endangered species. These decisions must be made on a case-by-case basis. An entire category of actions cannot be excluded from the ESA by the Services through regulation.

In addition, in its attempt to exclude the impacts of greenhouse gas emissions on endangered species, the Services have proposed changes to the ESA that have ramifications for stressors beyond climate change and will fail to protect all listed species and critical habitat from a wide range of indirect effects resulting from federal actions, permits or funding decisions.

We appreciate that a consideration of the activities that produce greenhouse gases and climate change may force difficult decisions that restrict activities. That has been the case with many decisions under the Endangered Species Act and other natural resource laws, and has been the case with many laws involving other aspects of governance of this country. Difficulty is not a basis to refuse to consider the question altogether. The Services, like other governmental entities and like private individuals, make difficult decisions all the time. Ideally, Congress will act to establish a framework for this particular difficult question, but in the absence of such Congressional direction, the Services have no legal authority under the Endangered Species Act to exclude categories of activities.

### **3. Section 402.03**

**a) The evaluation of potential impacts, including the "Not Likely to Adversely Affect" determination, is based on biological criteria. An in-depth understanding of -the biology of the species that might be affected is needed.**

The proposed regulation seems to regard the consultation process as a single event, when in fact, and by practice, it entails numerous decisions, each of them with a substantial biological component. The first of these decisions is when consultation is needed. This decision rests almost exclusively on an evaluation of biological information. By delegating authority to an agency that may not have sufficient expertise, the Services are undermining the very purpose of the consultation process. If the action agency makes a Not Likely to Adversely Affect (NLAA) decision, there will be no interaction with the Services. It is entirely possible, if not probable, that

one or more erroneous NLAA decisions will be made and that endangered species will be adversely affected.

The Services' own Consultation Handbook makes this point emphatically:

#### Use of Sound Science

An overriding factor in carrying out consultations should always be the use of the best available scientific and commercial data to make findings regarding the status of a listed species, the effects of a proposed action on the species or critical habitat, and the determination of **jeopardy/no jeopardy** to listed species or destruction or **adverse modification/no destruction or adverse modification** to designated critical habitats.

The Services have jointly published a policy on Information Standards Under the Endangered Species Act [59 FR 34271 (July 1, 1994)]. This policy calls for review of all scientific and other information used by the Services to prepare biological opinions, incidental take statements, and biological assessments, to ensure that any information used by the Services to implement the Act is reliable, credible, and represents the best scientific and commercial data available.

Retrieved 3 September 2008 from  
<http://www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm>]

The Information Standard is equally clear [retrieved 3 September 2008 from  
<http://www.fws.gov/Endangered/policy/Pol004.html>]:

#### Policy

To assure the quality of the biological, ecological, and other information that is used by the Services in their implementation of the Act, it is the policy of the Services:

- a. To require biologists to evaluate all scientific and other information that will be used to (a) determine the status of candidate species; (b) support listing actions; (c) develop or implement recovery plans; (d) monitor species that have been removed from the list of threatened and endangered species; (e) to prepare biological opinions, incidental take statements, and biological assessments; and (f) issue scientific and incidental take permits. This review will be conducted to ensure that any information used by the Services to implement the Act is reliable, credible, and represents the best scientific and commercial data available.
- b. To gather and impartially evaluate biological, ecological, and other information that disputes official positions, decisions, and actions proposed or taken by the Services during their implementation of the Act.
- c. To require biologists to document their evaluation of information that supports or does

not support a position being proposed as an official agency position on a status review, listing action, recovery plan or action, interagency consultation, or permitting action. These evaluations will rely on the best available comprehensive, technical information regarding the status and habitat requirements for a species throughout its range.

d. To the extent consistent with sections 4, 7, and 10 of the ESA, and to the extent consistent with the use of the best scientific and commercial data available, use primary and original sources of information as the basis for recommendations to (1) place a species on the list of candidate species, (2) promulgate a regulation to add a species to the list of threatened and endangered species, (3) to remove a species from the list of threatened and endangered species, (4) designate critical habitat, (5) revise the status of a species listed as threatened or endangered, (6) make a determination of whether a Federal action is likely to jeopardize a proposed, threatened, or endangered species or destroy or adversely modify critical habitat; and (7) issue a scientific or incidental take permit. These sources shall be retained as part of the administrative record supporting an action and shall be referenced in all official Federal Register notices and biological opinions prepared for an action.

e. To collect, evaluate, and complete all reviews of biological, ecological, and other relevant information within the schedules established by the Act, appropriate regulations, and applicable policies.

f. To conduct management-level review of documents developed and drafted by Service biologists to verify and assure the quality of the science used to establish official positions, decisions, and actions taken by the Services during their implementation of the Act.

The proposed regulation elevates some criteria already provided for in the Services' Consultation Handbook to formal regulatory status. Specifically, Chapter 3 states that "When the biological assessment or other information indicates that the action has no likelihood of adverse effect (including evaluation of effects that may be beneficial, insignificant, or discountable), the Services provide a letter of concurrence, which completes informal consultation. The analysis, based on review of all potential effects, direct and indirect, is documented in the concurrence letter."

The key point here is that the satisfaction of these criteria is determined by the Services in the process of preparing the concurrence letter. These are questions that require biological information and the expertise to obtain and evaluate that information. By delegating the evaluation to an agency that may not have sufficient expertise, the Services are undermining the very purpose of the consultation process. If the action agency makes a Not Likely to Adversely Affect (NLAA) decision, there will be no interaction with the Services. It is entirely possible, if not probable, that one or more erroneous NLAA decisions will be made and that endangered species will be adversely affected. Unless the Services are willing, on a case-by-case basis, to assess the qualifications of the action agency staff making a particular determination, the elimination of oversight resulting from the elimination of the concurrence letter eliminates the

involvement of the Services. This is a clear failure of the Services to meet their Congressionally mandated obligation to protect listed species.

The Consultation Handbook also states (at 3.1) that “If the nature of the effects cannot be determined, benefit of the doubt is given to the species.” Thus, the proposed regulation, which proposes to eliminate the need for consultation when the effects cannot be meaningfully identified or detected, contradicts the Services’ own biologically and legally appropriate policies.

**b) Action agencies may have no staff with adequate biological training; action agencies that have staff with adequate biological training may not have sufficient resources to conduct an adequate evaluation. The Services state, but provide no supporting data, that the action agencies have sufficient expertise to find and evaluate biological information. To the extent that action agencies have staff with biological training, the budgets of many action agencies are flat or declining, so funding for research and other activities that require scientific expertise is also likely to decline. It is already the case that limited funding is redirected to immediate needs such as fire suppression.**

In proposing this regulation, the Services have failed to show that the action agencies have sufficient numbers of staff with the appropriate academic training and experience to meet these standards. The Services themselves require a certain number of credit hours of graduate level training when hiring staff for positions that call for evaluations such as those entailed in the NLAA process. The Services do not indicate that they have entered into discussion with the action agencies to determine their ability to meet these standards.

The specialized knowledge needed to make the NLAA decision requires detailed information on the species’ biological imperative such as:

- its distribution, including the historical range and throughout its seasonal or annual patterns of movement
- its status in the area, including the population trends over a biologically relevant period of time
- an understanding of its habitat needs
- an understanding of its behavior
- an understanding of the life history traits of the species
- population (and, where applicable, metapopulation) demography and genetics
- principal factor (s) responsible for its decline and how these affect viability and recovery

This information may be difficult to obtain. For instance, compiling information on geographic distribution may require field surveys at the appropriate time of year. Some species are extremely difficult to assess through surveys, because they are cryptic or their habitats are inaccessible, or they have been temporarily displaced by disturbance or competitors. Even if recent survey data are available, it is important to understand survey methods and to understand the limits of the information.

Credible biological information often appears in scientific publications, such as peer-reviewed journals. Even for experts in a given discipline, who have access to comprehensive print and



online libraries, it can be difficult and very time-consuming to identify and obtain this literature. It is typically published in dozens of journals in that particular discipline, in more general publications, and in publications in other disciplines. Other credible biological information may be published in “gray literature” which can be more difficult to obtain than that published in peer-reviewed journals.

Even after biological information has been obtained, it can be difficult to interpret. Interpretation often requires advanced academic training in relevant scientific disciplines, and specialized knowledge in one or more subdisciplines, including statistical analysis. Indeed, it is for these very reasons that the USFWS itself, whose staff comprises many biologists with advanced degrees, has established a Science Committee “to promote science excellence in fish and wildlife conservation.”

The proposed regulation ignores the fact that considerable information and careful interpretation of that information is needed to make a NLAA decision. This is the type of information and interpretation the Services use when issuing concurrences for NLAA decisions or when engaging in informal consultations with action agencies. This proposed regulation suggests that the action agencies themselves do not need the expertise of the Services to make these determinations because they have sufficient expertise. The onus is on the Services to show that this proposed change will not diminish the protections Congress afforded to listed species. The Services have not presented such evidence and do not even claim to have attempted to obtain such evidence. Therefore, this proposed policy can only be described as capricious. This proposed policy casts asides the Services’ own longstanding standards in the name of expediency and reduction of burden.

When the Services issued the FIFRA counterpart regulations, they reviewed at some length the EPA’s process for evaluating pesticides, which is inherently a scientific evaluation of biological data, conducted by biologists. Specifically, the Services said, “The approach used by EPA addresses, where applicable, the informational and analytical requirements set forth at 50 CFR 402.14(c), relies upon the best scientific and commercial data available; and analyzes the best scientific and commercial data available by using sound, scientifically accepted practices for evaluating ecological effects” 69 F.R. 47731, 47735. The Services also noted that

“EPA routinely obtains independent, external, expert scientific peer review of its risk assessment methodologies from the FIFRA Scientific Advisory Panel (SAP). Authorized under FIFRA section 25(d), the SAP is chartered under FACA and consists of seven permanent members appointed by the EPA Administrator and additional ad hoc members who are selected to serve on panels addressing specific scientific issues to which they can contribute their expertise. The SAP provides EPA with recommendations and evaluations of data, models, and methodologies used in EPA's overall risk assessment processes that occur during registration and reregistration.”

The Services have made no such evaluation in the proposed shift of Congressionally mandated responsibilities to other action agencies that are not, for the most part, implementing statutes such as FIFRA that inherently require scientific evaluations. The Services said exactly this in

response to comments on the FIFRA counterpart regulation (50 F.R. 47731, 47745):

*Comment: The proposed “no concurrence” approach to NLAAs sets a bad precedent for other agencies and should therefore be avoided.*

*Response: These counterpart regulations are tailored to EPA's existing expertise and knowledge of pesticides regulated under FIFRA. **If the Services adopt future counterpart regulations for other federal agencies, those rules would be based on each agency's capabilities and experience.** (emphasis added)*

*Comment: Separate consultation rules for FIFRA actions are warranted because such actions are fundamentally different from other federal agency actions subject to ESA section 7.*

*Response: The Services agree that counterpart regulations for FIFRA actions are warranted. Other federal agencies also consult on large and complex actions, and **whether counterpart regulations would be appropriate for other agencies would be considered by the Services on a case-by-case basis.** (emphasis added)*

Yet the Services now propose to transfer to all other federal agencies, regardless of scientific expertise, and regardless of the nature of the actions, the authority and responsibility to determine if they are required to consult with the Services. This is hardly the case-by-case basis envisioned by the Services only four years ago. That the Services appear willing to transfer the decision-making in its entirety, without any safeguards to assure the quality of the decisions or to require a review process, suggests that the Services' motives for this proposed regulation go beyond the stated interest in streamlining the process. As proposed, this regulation could functionally eliminate the consultation process.

Likewise, in the preamble to the final counterpart rule for the National Fire Plan, the Services said,

“The Action Agencies have engaged in thousands of formal and informal consultations with the Service in the 30 years since the passage of the ESA, and have developed substantial scientific, planning, mitigation, and other expertise to support informed decision-making and to meet their responsibilities under ESA section 7 to avoid jeopardy and contribute to recovery of listed species. To meet their obligations, the Action Agencies employ large staffs of qualified, experienced, and professional wildlife biologists, fisheries biologists, botanists, and ecologists to help design, evaluate, and implement proposed activities carried out under land use and resource management plans....Agency biologists are members of listed species recovery teams, contribute to management plans that provide specific objectives and guidelines to help recover and protect listed species and designated critical habitat, and cooperate on a continuing basis with Service personnel. In many parts of the country, personnel from the Action Agencies and the Service participate in regular meetings to identify new management projects and the effects to proposed and listed species through formalized streamlined consultation procedures. The Action Agencies' established biological expertise and active

participation in the consultation process provides a solid base of knowledge and understanding of how to implement section 7 of the ESA. By taking advantage of this expertise within the Action Agencies, the counterpart regulations process will help ensure more timely and efficient decisions on planned National Fire Plan actions while retaining the protection for listed species and designated critical habitat required by the ESA and other applicable regulations. The Service can rely upon the expertise of the Action Agencies to make NLAA determinations that are consistent with the ESA and its implementing regulations.”

The proposed regulation, though not characterized as a counterpart regulation, functions as a counterpart regulation, and applies to all federal agencies. If the Services have conducted a survey of the capacity of all agencies to conduct biological assessments or have other information that indicate this capacity, that information was not provided in the proposed regulation. We recognize that the Courts ordinarily defer to an agency’s expertise and judgment, but here, the Services have exercised no judgment. They have apparently conducted no investigation to determine that a delegation of authority that requires specialized knowledge is warranted.

**c) A USFWS and NMFS review of the National Fire Plan counterpart regulations concluded that in nearly half of the cases evaluated, even action agencies with significant scientific expertise are not preparing adequate biological evaluations that otherwise would have been conducted by the Services; the Secretaries know that the assertion that action agencies will make correct judgments, which is proffered as the basis for this proposal to delegate such work to the some of the same agencies, is simply false.**

Despite these seemingly well-considered and careful safeguards, a review conducted by the Services of the NLAA decisions demonstrates that the National Fire Plan counterpart regulations are not working well. The NMFS review of the first year’s biological assessments of NLAA decisions submitted in 2004 by the Forest Service and the Bureau of Land Management under the National Fire Plan <<http://www.nmfs.noaa.gov/pr/pdfs/laws/fireplanreview.pdf>> reveals that:

- None of the ten biological assessments reviewed by NMFS “Identifies spatial and temporal patterns of the action’s direct and indirect environmental effects, including direct and indirect effects of interrelated and interdependent actions”
- None of the ten biological assessments reviewed by NMFS “Identifies Action Area clearly (based on information in 2.)”
- None of the ten biological assessments reviewed by NMFS “Identifies all threatened and endangered species and any designated critical habitat that may be exposed to the proposed action (includes a description of spatial, temporal, biological characteristics and constituent habitat elements appropriate to the project assessment)”
- None of the ten biological assessments reviewed by NMFS “Compares the distribution of potential effects (identified in 2) with the threatened and endangered species and designated critical habitat (identified in 4) and establishes, using the best scientific and commercial data available, that (a) exposure is improbable or (b) if exposure is likely, responses are insignificant, discountable, or wholly beneficial.”

- In none of the 10 biological assessments reviewed by NMFS was the “Determination...based on best available scientific and commercial information.”

The USFWS review was somewhat more positive. The USFWS reviewed 43 projects completed by the Forest Service under the National Forest Plan counterpart regulations and concluded that:

- Eight did not identify the proposed action clearly.
- Twelve did not identify spatial and temporal patterns of the action’s direct and indirect environmental effects, including direct and indirect effects of interrelated and interdependent action, even though some identified the proposed project as part of a larger action. Some assessments did not address potential indirect effects, such as smoke effects from prescribed burns.
- Sixteen did not identify the action area clearly.
- Ten did not identify all listed species and critical habitat that would be exposed to the proposed action.
- Sixteen did not compare the distribution of potential effects (identified in 2) with the threatened and endangered species and designated critical habitat (identified in 4) and establish, using the best scientific and commercial data available, that (a) exposure was improbable or (b) if exposure was likely, responses were likely to be insignificant, discountable, or wholly beneficial.
- Eleven were not based on best available scientific and commercial information.

The reviewers found that most of the assessments had not cited recent studies to update their information regarding the distribution or status of species.

The Bureau of Land Management’s performance was even more deficient:

- Five of seven assessments did not describe the project area clearly.
- Six of the seven failed to identify “spatial and temporal patterns of the action’s direct and indirect environmental effects, including direct and indirect effects of interrelated and interdependent actions.”
- Most of the biological assessments did not address the indirect effects of the proposed actions. For example, one biological assessment referred to “weed abatement along trails, but did not specify how abatement would be accomplished, whether herbicides would be used, or how listed plant species might be avoided. Additionally, some biological assessments did not state how the proposed activities related to fire management.”
- Three of the seven did not identify “all threatened and endangered species and any designated critical habitat that may be exposed to the proposed action (includes a description of spatial, temporal, biological characteristics and constituent habitat elements appropriate to the project assessment).” The reviewers noted that these assessments omitted important information, such as species that might be affected by the proposed action, and potential effects to designated critical habitat.
- Four of seven BLM assessments did not compare “the distribution of potential effects (identified in 2) with the threatened and endangered species and designated critical habitat (identified in 4) and establishes, using the best scientific and commercial data available, that (a) exposure is improbable or (b) if exposure is likely, responses are insignificant, discountable, or

wholly beneficial.”

- In four of the seven assessments, the determination was not found to be based on best available scientific and commercial information. The reviewers concluded that these assessments did not demonstrate that relevant published literature and current survey data were consulted, although these were readily available.

**Table 12. Summary of FWS Counterpart Regulations (CR) Review Results**

	Forest Service	BLM
Total number of projects with FWS species completed under CR during first year of implementation	43	7
Total number of projects that met all evaluation criteria	18	1
Total number of projects that did not meet 1 or more evaluation criterion	25	6
Total number of projects that met none of the criteria	6	2

*If agencies whose staff have biological training and expertise and whose determinations are subject to reasonable safeguards under Alternative Consultation Agreements cannot conduct adequate assessments on a regular basis, then it is not plausible for the Services to suggest that all federal agencies, many without staff with advanced biological training, and without Alternative Consultation Agreements or adequate safeguards, should be permitted to make NLAA Determinations.*

*Moreover, the Services’ review was issued in 2008 and based on decisions made in 2004. The Services have not made public any further assessments or information that indicate that the situation has improved in the past four years. The review suggests that even action agencies with substantial scientific expertise are not meeting the standards the Services have established.*

*How often did these action agencies proceed with their plans on the basis of these faulty determinations? In how many of those cases did those activities adversely affect endangered species?*

The Services have not made public any further assessments or information that indicate that the situation has improved in the past four years. Given that the only documented experience with action agencies has shown that even those with substantial scientific expertise are not meeting the standards they have established, it is hard to understand why the Services have such faith that other action agencies, who may have little or no staff with biological expertise, will be able to find and evaluate relevant biological information and make appropriate decisions.

For instance, we are particularly concerned about how the absence of Section 7 consultations may affect forest plan revisions, particularly several planned or in process in the Pacific Northwest. As an example, the BLM is revising its forest plans on 2.4 million acres in western Oregon. The proposed plan would eliminate safeguards for listed species like the spotted owl and marbled murrelet. According to analyses by the U.S. Fish & Wildlife Service and others the proposed actions could result in an incidental take of 830 owl nest sites and 600 murrelet nest sites yet this action may not go through Section 7 consultation under the proposed rule change even though it reflects a major impact to listed species. Because the BLM proposes this project, it is inappropriate for them to make a determination on whether the project is likely to adversely affect listed species. This represents a clear conflict of interest on the part of the action agency evaluating the impacts of its own actions.

**d) The proposed regulation lacks safeguards to assure that the decisions made by action agencies are biologically sound.**

Even if the Services have determined that some agencies have sufficient expertise to make biological decisions, the proposed regulation lacks important safeguards. First, the regulation should set standards for the biological investigation and decision-making process. It should require that the documentation of the investigation and decision leading to the NLAA be made available to the public.

The Services should require the action agencies to notify the Services that an action is being contemplated that would require an assessment of the impacts on endangered and threatened species. The action agencies should be required to notify the Services of each NLAA decision. The Services should establish a practice of routinely reviewing a certain number of no-consultation-needed decisions by each agency.

The proposed regulation also lacks the safeguards established under Alternative Consultation Agreements entered into under the counterpart regulations. The EPA Alternative Consultation Agreement, for instance, includes a training and certification process that requires the Services to provide Section 7 training to senior risk managers who are responsible for ecological risk assessments for pesticides, and to certify those individuals as adequately trained. They are also required to receive periodic, updated training. The agreement also requires EPA to notify the Services of all its NLAA decisions via a website. We have perused the EPA Effects Determination website <<http://www.epa.gov/oppfead1/endanger/litstatus/effects/>>. There are a number of NLAA determinations, but the EPA has requested informal consultation or concurrence on each of them.

The Alternative Consultation Agreement with the Bureau of Land Management pertaining to the National Fire Plan specifies that the analyses are to be conducted by qualified scientists:

**“Personnel to Make NLAA Determinations and Document ESA Compliance**

1. The counterpart regulations may be used by any BLM biologist, botanist or ecologist who conducts Section 7 effects analyses for proposed actions that are Fire Plan Projects and

makes determinations of effect under the ESA and has completed the required training per section E. However, journey level biologists, botanists or ecologists are responsible for ensuring and documenting adequacy of the BE/BA with existing policy, and will be listed on Appendix 1.

The National Fire Plan Alternative Consultation Agreement also requires Section 7 training. It also establishes standards:

**F. Standards of Project Review**

1. In assessing the effects of proposed National Fire Plan actions, the BLM will consider the following standards in making NLAA determinations regarding individuals of the species or constituent elements of critical habitat: (1) direct and indirect effects of the proposed action, (2) effects of inter-related or inter-dependent actions, (3) the environmental baseline, and (4) whether effects are insignificant, discountable, wholly beneficial, or adverse.
2. In so doing, the BLM must consider the best scientific and commercial data available, and must provide a reasoned explanation for its conclusions.

Further, there is a thorough monitoring system that allows the USFWS to determine if the BLM's NLAA decisions are appropriate:

**Monitoring and Periodic Program Evaluation**

1. The purpose of the monitoring program is to evaluate whether the BLM is making NLAA determinations consistent with the best available scientific and commercial information, and is in compliance with the ESA and the section 7 regulations.
2. The monitoring program will be national in scope, with samples based at the subunit level (Field Office) and completed one year following implementation of the regulation. The monitoring program will be conducted every three years following the first year.
3. A national monitoring team (Team) will be comprised of individuals from the FWS, NMFS and BLM. The FWS and NMFS team members will be responsible for conducting the evaluation, with the BLM members available to provide any needed context and clarifications, and to answer questions on projects.
4. As part of their annual project reporting requirement, each subunit (Field Office) that uses the counterpart regulations must complete the procedural checklist certifying that the procedural requirements have been met (Appendix 2), and submit it annually by March 1st to its respective BLM State Office. If the procedural requirements have not been met, the subunit will discuss the appropriate remedies in the certification memo. The BLM will provide the Team with this information.
5. The Team will take a random sample of projects from the BLM national list of fire plan projects that received NLAA determinations during the period under review. The sample will be sufficient to allow the FWS and NMFS to determine, with a mutually agreed upon level of confidence, that the BLM is making the determinations appropriately.
6. The BLM will provide the Team with the biological assessment or biological evaluation for each project that has been selected.
7. The Team will evaluate whether the BLM considered relevant information and used

the best scientific and commercial data available in evaluating effects of the proposed action on listed species and critical habitat and in making the NLAA determination. It also will evaluate whether the BLM demonstrated a rational connection between that information, the proposed action, and the NLAA determination. This includes identification of any direct effects, indirect effects, effects of any interrelated actions or interdependent actions and a description of how the effects are insignificant, discountable and/or beneficial.

8. The Team will use the Evaluation Form (Appendix 3) to document results of each project review. If all of the determinations were made appropriately, then no further remedy is needed. If a determination is found to be inappropriate, more intensive sampling of that office's National Fire Plan project records may be warranted. Corrective actions will be identified by the Team. For example, if the Team determines several determinations made for a fuel treatment project were not made consistent with the best available scientific and commercial information, the ESA, and the Section 7 regulations, then the Team may recommend further focused review of those types of determinations for similar types of projects.

9. Within 45 days of completing the evaluation, a monitoring report will be prepared by the Team. Based on the results, the FWS and NMFS Service Directors may recommend changes to the BLM implementation of the ACA. If necessary, NMFS and/or FWS may suspend or exclude any subunit from participating under the ACA, or otherwise terminate or suspend this ACA. 10. A Federal Register notice of monitoring report availability will be prepared by the NMFS or FWS, and the monitoring report will be posted on an agency website.

**e) Unless the Services review a significant number of these action agency determinations, it will be impossible to determine if the action agencies have the requisite expertise and are making biologically credible determinations. This proposed regulation makes no provision for review of action agency determinations.**

In *Defenders of Wildlife v. Kempthorne* (Civ.No.04-1230GK), the USFWS failed to rebut repeated statements by the plaintiffs that the monitoring instituted under the Counterpart Regulations of the Not Likely to Adversely Affect decisions made by the action agencies is not intended to determine whether the action agencies are making the same "Not Likely to Adversely Affect" decisions that the Services would have made. Rather, the record suggests that the Services will "monitor" only a small fraction of the action agencies' decisions, and the rule will be deemed a success even if the action agencies make biologically indefensible decisions (i.e., they fail to initiate formal consultation on an activity that will harm listed species or critical habitat) with respect to at least one out of every 20 projects. See Pfs. Mem. at 23 n.16. Thus, record evidence not addressed in the Court's ruling compels the conclusion that the Services have not designed, and do not expect, the new system to be "equally protective" of listed species as the project-by-project consultation process it is replacing.

**f) Erroneous decisions, even if later amended or reversed, likely will cause irreversible harm to the continued survival of listed species.**



The Services assume that action agencies have strong incentives to make accurate determinations because these action agencies are aware that take is not allowed without an incidental take statement, and that they are ultimately responsible for assuring that their activities will not adversely affect listed species. This assumption is of little value because the result of an erroneous decision – even if made in good faith – is likely to cause irreversible harm to the continued survival of the listed species.

**g) Congress has not delegated clear regulatory authority to the Services under 15 U.S.C. 1536; any general regulatory authority the Services may have under the Administrative Procedure Act must be more limited in scope than that express regulatory authority afforded to the Services under other provisions of the Endangered Species Act.**

In contrast to other sections of the Endangered Species Act, Section 7 does not provide express regulatory authority to the Secretary. Other sections, by contrast, allow or require that the Secretary promulgate regulations to implement the provisions of that particular section.

Specifically:

16 U.S.C.1533 (listings)

(a) Generally

(1) The Secretary **shall by regulation** promulgated in accordance with subsection (b) of this section

16 U.S.C.1535 (cooperation with states)

The Secretary may, in his discretion, and **under such rules and regulations as he may prescribe**, advance funds to the State for financing the United States pro rata share agreed upon in the cooperative agreement.

(h) Regulations

The Secretary is **authorized to promulgate such regulations** as may be appropriate to carry out the provisions of this section relating to financial assistance to States.

16 U.S.C.1538 (prohibited acts)

(a)(1)(G) violate any **regulation** pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title **and promulgated by the Secretary pursuant to authority provided by this chapter.**

(a)(2)(E) violate any **regulation** pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title **and promulgated by the Secretary pursuant to authority provided by this chapter.**

(b)(2)(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary **may by regulation** require

(d)(3) Regulations

The Secretary **shall prescribe such regulations** as are necessary and appropriate to carry

out the purposes of this subsection.

(f)(1) Designation of ports

For the purpose of facilitating enforcement of this chapter and reducing the costs thereof, the Secretary of the Interior, with approval of the Secretary of the Treasury and after notice and opportunity for public hearing, **may, by regulation**, designate ports and change such designations.

In the consultation section (15 U.S.C.1536), however, Congress gave the Secretary regulatory authority only with regard to the exemption provisions:

16 U.S.C.1536 (interagency cooperation)

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the **Secretary shall promulgate regulations** which set forth the form and manner in which applications for exemption

It is even more striking that the consultation section refers only to guidelines, and then only in the context of subsection (3), providing for consultation on behalf of a prospective permittee or license applicant:

16 U.S.C.1536 (a)(3) Subject to such **guidelines** as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

It could be fairly inferred, then, that Congress did not intend to give the Secretary regulatory authority with regard to the consultation provisions. In that case, any regulatory authority the Secretary might have could emanate only from the very general provisions of the Administrative Procedure Act (5 U.S.C.553), which do not actually bestow regulatory authority, but only prescribe the manner in which that authority is to be exercised.

Given that there is no statutory authority for the issuance of regulations pursuant to 15 U.S.C. 1536, the validity of the proposed regulations is in doubt. To the extent that agencies have some implied authority to issue regulations, the absence of express statutory authority suggests that whatever regulatory changes might be made must be carefully drawn so as not to deviate from Congressional intent. And there can be no doubt about Congressional intent in this case. The use of the word “shall” leaves no doubt that the consultation requirement is mandatory. “It cannot be denied that Congress has chosen expansive language which admits to no exceptions. Reduced to its simplest form, the statute clearly states that each federal agency must consult with the Secretary regarding any action to insure that such action is not likely to jeopardize the existence of any endangered species.” *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (1990).

The proposed regulation is a sweeping change. It raises the potential for action agencies to avoid

consultation in many, if not most, cases, simply by making an NLAA determination. The action agencies, knowing that they will not need the concurrence of the Services and that the Services will not be reviewing their decisions, will have nearly unfettered authority. Or, in the rare instance that the Services review an action agency's NLAA decision, it is not likely that the action agency will suffer any consequences. Contrary to the Services' assertion in proposing this regulation, the action agencies will have virtually no incentive to make careful, science-based assessments that assure that their activities will not harm protected species. Surely the Secretary is outside whatever limited regulatory authority he may have to establish a provision that could effectively end the consultation process in many, if not most, cases.

**h) The proposed regulation is contrary to clear Congressional mandate. The statute makes mandatory a consultation with “the Secretary” where “Secretary” is defined as the Secretaries of the Interior and of Commerce. The Department of the Interior does not have the authority to issue regulations that in effect re-write the legislation.**

It is true that Congress did not define the term “consultation” or proscribe procedures, but it is clear that the Congress intended for the consultation process to involve the Services. Section 1536 (a)(2) reads:

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

As a matter of statutory construction, the word “shall” is mandatory, and the Congress directed the Federal agency (the “action” agency) to consult with the Secretary (defined by the statute as the Secretaries of Interior and Commerce). There is nothing in this statutory mandate to suggest that Congress contemplated allowing action agencies to consult with themselves.

It is illogical to suggest that when a consultation is necessary, it must involve the Services, but that the action agency itself may decide whether consultation is necessary. The entire consultation process requires the same scientific information and analysis. If action agencies can bypass the consultation process by determining – even in good faith – that no consultation is needed, Congressional intent is thwarted.

The same paragraph requires that “In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.” The proposed rule would reduce the number of those consultations with expert agencies that ensure use of the best available science, as required by law.

**i) The Services have no recourse should the action agency's no-harm determination be erroneous. There is substantial legal uncertainty about the ability of one executive branch agency to sue another.**

The Services' Section 7 consultation handbook says as much:

**Agencies that refuse to consult or confer**

When an action agency disagrees or does not respond to the Services' informal suggestions for consultation or conference, the Services should send a letter requesting the agency to initiate such action. The letter notifies the agency of its responsibilities under the Act, and presents a clear case for the Services' determination of "may affect" for listed species or "likely to **jeopardize**" for proposed species. Possible **adverse modification** of designated or proposed critical habitat is treated similarly. If the agency still refuses to consult, the issue should be elevated to the Regional Office of either the FWS or the NMFS, depending upon the species involved. For the FWS, the elevation would be to the appropriate Regional Director. For the NMFS, the elevation would be to either the appropriate Regional Director, or the Director -Office of Protected Resources at the headquarters office.

The Regional Director can pursue the need to consult with the action agency. *The Services cannot force an action agency to consult.* However, if the proposed action results in take of a listed fish or wildlife species, the matter should be referred to either the FWS Law Enforcement Division and the Office of the Solicitor, or the NMFS Office of Law Enforcement and the Office of General Counsel – depending upon which species are involved. Additionally, if the action agency requests consultation after-the-fact, that consultation cannot eliminate any section 9 liability for take that has occurred already (Appendix D, Solicitor's opinion #SO 5).

(Italics added; despite the reference to the Law Enforcement Division and the Office of the Solicitor, it is, as discussed below, not clear that one federal agency can sue another).

If the action agency makes a NLAA decision, and the Service agency disagrees, the Service agency may have no enforcement authority because it is not clear that one executive agency can sue another. The text in the Handbook suggests that the Services believe that they sue action agencies that violate the prohibition on taking of endangered species. This may or may not be so. It is even less clear that one executive branch agency may sue another in the absence of an alleged violation of law. Where the issue is a mere disagreement about a decision, or about process, a suit likely would not be authorized. Under the "unitary executive" theory of government, the Departments of Interior and Commerce would not attempt litigation. The Department of Justice – which would be in the position of representing both parties – would not allow the Services to proceed with such litigation. It may also be barred by the U.S. Constitution

or by jurisdictional requirements of the federal courts.

The “case-or-controversy” provision of Article III of the U.S. Constitution forbids one person from being both plaintiff and defendant. Herz (1991) explores the implications of this provision, and, citing a 1978 memorandum from John Harmon (Assistant Attorney General, Office of Legal Counsel) to Michael J. Egan (Associate Attorney General) stating that allowing EPA to sue another agency would violate the established principle that “no man can create a justiciable controversy against himself,” concludes that such litigation is not permissible. Herz also suggests that the theory of a unitary executive dictates that only the President may resolve disputes between executive agencies. Whether constitutionally permissible or not, however, Herz is not alone in acknowledging that as a matter of practice, the Department of Justice adheres to the theory of the unitary executive and will not institute litigation on behalf of one executive agency against another.

The staff of the Advisory Committee on External Regulation of DOE Nuclear Safety of the Department of Energy staff wrote in a 1995 analysis,

“In general, EPA’s enforcement of Federal agencies differs from its enforcement of private individuals in that EPA does not take civil judicial action against other Federal agencies. This is mostly in response to the Department of Justice’s “Unitary Executive” theory. This theory posits that a dispute between two agencies of the Executive branch does not amount to a “case or controversy” within the Constitution’s Article III jurisdiction for federal courts and that judicial resolution of such a dispute would violate the separation of powers doctrine. Simply put, the theory states that, as Chief Executive, the President, not the courts, should resolve disputes between sister agencies. Therefore, EPA takes administrative enforcement actions against federal agencies usually in the form of negotiated Compliance Agreements and Consent Orders...The Department of Justice’s “Unitary Executive” theory applies to the NRC also. Thus, although the NRC may proceed against a Federal licensee, ultimately the Department of Justice can resolve the dispute, which will never reach court.”

Herz, M. 1991. United States v. United States: When can the federal government sue itself? 32 William and Mary Law Review 893.

**j) The Services know that the legal validity of the counterpart regulations is in doubt because the federal court for the Western District of Washington has invalidated the counterpart regulations pertaining to FIFRA decisions by the Environmental Protection Agency and a challenge to the counterpart regulations for the National Fire Plan is pending.**

The U.S. District Court for the Western District of Washington ruled that the FIFRA counterpart regulation was invalid [Washington Toxics Coalition v. U.S. Department of the Interior, 457 F. Supp. 2d 1158 (W.D.Wash.2006)]. The Court held that, “Put together and applied to this case, Defenders of Wildlife and the Thomas line of cases make it clear that ESA section 7(a)(2) requires that EPA, in contemplating even actions deemed NLAA, “consult” with the Services to

ensure that its action be not likely to jeopardize listed species.” The Court also held that **“For these reasons, the Court cannot conclude that the plain meaning of “consultation” contemplates the joint creation of a process by which action agencies may unilaterally make the critical section 7(a)(2) determination regarding NLAA actions.** Accordingly, the Court finds that the portion of the counterpart regulations permitting no Service consultation on NLAA actions fails the Chevron step-one test and is therefore not in accordance with the law within the meaning of 5 U.S.C. § 706(2)(A). This portion of the rules must therefore be set aside. 5 U.S.C. § 706(2).” It is of great significance that the Department of the Interior appealed this decision but then voluntarily withdrew its appeal and apparently has agreed to refrain from implementing the FIFRA counterpart regulation (pers.comm. P. Goldman to E. Paul).

The validity of the National Fireplan counterpart regulation was upheld by a U.S. District Court (*Defenders of Wildlife v. Kempthorne*, No.04-1230GK, 2006 WL2844232). A motion for reconsideration is pending. The Court also said (in a footnote) that, “The Court shares many of Plaintiffs’ concerns about the wisdom and efficacy of the Counterpart Regulations.” Judicial interpretation constrains the courts from substituting their own judgment for that of the agencies, but as this comment from the Court suggests, agency may not have acted wisely.

We appreciate the need for expediency and for redirection of the Services’ resources to decisions and actions that afford meaningful protection to endangered species. However, these practical needs do not allow the Services to disregard Congressional mandates. If the Departments of the Interior and Commerce are dissatisfied with the operation of the existing law, the appropriate course of action is to seek an amendment of the statute from the U.S. Congress. However valid the rationale, agencies cannot ignore their statutory constraints and requirements.

**k) The proposed regulatory changes contradict the Services’ own internal reasoning and the scientific data generated by the Services in a review of similar counterpart regulations, and are therefore arbitrary and capricious.**

The Ninth Circuit opinion that invalidated the transfer of NPDES authority by the EPA because of the resulting abdication of ESA responsibilities by the EPA (*Defenders of Wildlife v. EPA*, *supra*) stated,

Also, internally contradictory agency reasoning renders resulting action “arbitrary and capricious;” such actions are not “founded on a reasoned evaluation of the relevant factors.” *Ariz. Cattle Growers’ Ass’n v. U.S. FWS*, 273 F.3d 1229, 1236 (9th Cir. 2001) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989)); see also *Gen. Chem. Corp. v. United States*, 260 U.S. App. D.C. 121, 817 F.2d 844, 857 (D.C. Cir. 1987) (finding agency action “arbitrary and capricious” because it was “internally inconsistent and inadequately explained”).

As noted above, the Services’ reasoning is internally contradictory. Their own documents – the Consultation Handbook, the Information Standard, the justifications given for the counterpart regulations – make clear that science is essential to endangered species’ protection and that the analyses needed to make the required decisions require an expert assessment of a large body of

scientific information. Further, the Services' own assessment of the ability of two agencies that have substantial scientific expertise suggests that the Services are aware that NLAA determinations are not being made in a manner that meets the standards the Services have set. All this, in the absence of any suggestion that other action agencies could meet these standards, epitomizes internally contradictory reasoning, and can only be characterized as an arbitrary and capricious.

In addition, the record in *Defenders of Wildlife v. Kempthorne* (Civ.No.04-1230GK) suggests that the USFWS regional directors criticized the counterpart regulations for reasons that are equally applicable in this case. The plaintiffs demonstrated in their motion for partial reconsideration that the counterpart regulations themselves were based on reasoning contradictory to that of the agency's own highly experienced regional directors. Language from the administrative record cited by the plaintiffs leaves no doubt that the final rule contradicted the agency's own rationale for its long-standing practice of requiring involvement in the NLAA decision:

...the Services' own Regional Directors, along with the agencies' biologists and other commenters, urged defendants to consider at least three interrelated ways in which the Lynx and other imperiled species will surely be harmed by the exclusion of FWS personnel from individual NLAA determinations, i.e, through (1) the loss of unique expertise; (2) the loss of critical independence from the action agency's preferred project; and (3) the loss of biological information that is crucial to meaningfully assessing cumulative impacts and "baseline" conditions... First, the Regional Directors explained that, as the Congressionally designated experts on listed species, the Services have, through the informal consultation process, in fact played a vital role in convincing the USFS, the BLM, and other action agencies to routinely make modifications in projects that "have tremendous conservation benefit[s]." FWS CR A.R., Vol.10, at K427... Second, in addition to guaranteeing the benefits of the Services' expertise in listed species, the Regional Directors (and other commenters) explained that the informal consultation process has in fact protected listed species by bringing an impartial perspective to bear on projects that the action agencies wish to pursue.... Third, the Services' Regional Directors and other consultation experts gave very specific reasons as to why – even aside from the Services' superior objectivity and expertise with regard to listed species – allowing action agencies to unilaterally make NLAA determinations would inevitably impair species conservation over the long run. In particular, they explained that any scientifically valid analysis of project impacts requires an ability to evaluate cumulative impacts – i.e., how a particular project, that might appear insignificant in isolation, may harm a species when viewed in conjunction with other projects that may also affect the species' "baseline" condition.

**1) The proposed regulation would allow the agency to bypass consultation if it determined – correctly or incorrectly – that its actions or the actions it would authorize or fund would likely not adversely affect a listed species. In addition to the potential harm to the affected**

**species and its habitat, any person, corporation, state, or other entity that might rely on that determination would risk violating the Act and would face potential liability. A project associated with the erroneous determination or omission likely would be delayed or canceled.**

The Act in Section 7 (c) establishes the standard for initiating consultation: with respect to each federal agency action the action agency must ask the Secretary if any listed species may be present in the area of the proposed action, and, if so, the agency must conduct a biological assessment to identify any species that is likely to be affected. That assessment forms part of the information considered in the consultation, which in turn is designed not only to avoid jeopardy but also to minimize take and to minimize habitat degradation. The assessment also allows the agencies to identify ways in which the action agency can fulfill its Section 7(d) duty to expedite the recovery of the species while fulfilling its other legal duties and responding to other legitimate requests.

The proposed regulation also would undermine the intent of Congress when it enacted Section 7(d), which ensured that pending interagency consultation, no irreversible commitment of resources would precede the expert agency's opinion that the Act would not be violated. This provision was enacted to protect the federal purse and all those expecting to engage in projects that might affect listed species.

Reliance on the assessment by an agency that has little or no biological expertise is a risky proposition for businesses and individuals who need authority or funding from that agency to carry out an activity. For instance, the Federal Communications Commission (FCC) has repeatedly stated publicly that it has no capacity to determine the impact of telecommunications towers – for which FCC registration is mandatory – upon birds. Should the FCC then register a tower that causes the death of one or more individuals of a protected species, the tower owner would have difficulty asserting good faith reliance on the FCC's Not Likely to Adversely Affect determination. In the face of these many public pronouncements by the FCC that it does not possess the requisite expertise, the tower owner knew or should have known that he could not rely on the FCC's Not Likely to Adversely Affect determination. That these Not Likely to Adversely Affect decisions will no longer be reviewed by the agencies designated by Congress as those with the appropriate expertise to make such determinations should put all on notice that they are taking a risk by proceeding on the basis of determinations made by the action agencies.

**m) The proposed regulation should clarify the applicability of the consultation requirement to agency decisions that affect ESA-listed species in other countries.**

As the Secretaries would open, for perhaps the first time since 1986, the regulations governing consultation, they should take this opportunity to correct the 1986 regulation that illegally reversed the original (1979) regulation's express coverage of U.S. agency decisions and actions affecting ESA-listed species in other countries. In *Defenders v. Lujan* (911 F.2d 117), the Eighth Circuit ruled on the merits that the regulatory change (that provided that federal agencies funding projects in foreign countries have no duty to consult with the Secretary about their projects' impact on endangered species) was illegal. The Supreme Court's 1992 reversal was on



procedural (standing) grounds only (505 U.S.555). Therefore, the Secretaries should take this occasion to reverse the 1986 regulation (50 C.F.R.402.01) limiting consultation requirements to “any action [an agency] authorizes, funds, or carries out, in the United States or upon the high seas....” Apart from the clear dictate of the Eight Circuit decision, we also note that while the action may take place outside U.S. territory, the decision to authorize, fund, or carry out is ordinarily made within the United States. Since the consultation requirement hinges on not only on the actions of federal agencies, but also on their authorizing and funding activities, the agencies should be required to consult regardless of the actual location of the activity. As it is the Services’ stated purpose in proposing this regulation to clarify when consultation is required, this would be an appropriate opportunity to make this long overdue correction.

We appreciate that there might be a concern about potential delay in situations that involve national defense. Since the Act provides expedited exemptions for the Defense Department and the regulations already provide for emergency exemptions as needed (50 C.F.R.402.05), there is no need to avoid providing the same protection for species in other countries as we believe to be appropriate in our own country. especially in developing countries whose laws and enforcement powers sometimes are not as thorough or dependable as our own. The application is not even extraterritorial in most cases, because major agency decisions are usually made in Washington, D.C. or elsewhere within the United States.

#### **4. Section 402.13**

**By eliminating the requirement for concurrence from the Services, the proposed changes to the provisions for informal consultation contravene Congressional intent. The arbitrary deadlines would allow action agencies to bypass consultation regardless of the biological necessity for consultation.**

The concept of informal consultation is reasonable but the proposed regulation, suggesting that it is needed only when the criteria for consultation (402.03) are not met, demonstrates the problem. Informal consultation may be an appropriate way to determine *if* formal consultation is required. The current version of 402.03 simply states that Section 7 applies to all actions in which there is discretionary Federal involvement or control. The current version of 402.13 is reasonable because there is always some form of consultation, followed by a required concurrence by the Service that the proposed action is not likely to adversely affect listed species, and that therefore, formal consultation is not needed. The point is that there will always be involvement on the part of the Services.

The new regulatory scheme would allow the action agencies to bypass this reasonable process. An action agency could simply decide on the basis of the criteria proposed for 402.03 that no consultation – formal or informal – is needed. Even if the action agency opts for informal consultation, the elimination of the requirement for concurrence is an abdication of the Services’ mandated role.

We also object to the notion that an action agency could determine that a number of similar actions would not likely adversely affect listed species. Even if those actions are take place in the

same area, the impact could change. For instance, the presence of a listed species might not have been detected at the time the first action took place. More likely, similar actions will take place in different areas, and the presence or absence of listed species is a separate determination that cannot be made until the area is identified. The concept of a “segment of a comprehensive plan” is also troubling. An action agency could simply characterize small, incremental actions as “segments” and while any one action might have little or no effect, the overall plan could very well affect a listed species adversely. As previously noted, cumulative, piecemeal modifications to the habitat of wildlife and plants are a primary cause of species decline and extinction. The proposed definition for cumulative effects would encourage, or at least allow, action agencies to move forward with multiple, small-scale projects – each with minor impacts – that would avoid a thorough review of the cumulative harm to listed species.

Finally, we object to the arbitrary deadlines. The time needed to evaluate the potential impacts of a project depends upon the nature, scope, and complexity of the project and the species in the area and their particular biological characteristics. These deadlines, especially given the staffing problems reported by the Services to the GAO, as outlined above, would likely result in the failure of the informal consultation process. Even without the need for a concurrence letter, the informal consultation process provides some assurance that the Services will review the action agency’s determinations. If the action agencies can proceed simply because the Services could not respond by an arbitrary deadline, the opportunity for any review of the adequacy of the action agency’s determination is lost.

**5. This rulemaking is subject to the requirements of the National Environmental Policy Act (NEPA). It is inconceivable that a rule that affects all actions of all federal agencies and every species protected under the Endangered Species Act could have no significant impact. Therefore, a full Environmental Impact Statement, including consideration of alternative actions, is required.**

In promulgating the counterpart regulations for the FS and BLM for the National Fire Plan and for the EPA for implementation of FIFRA, the Services issued a Finding of No Significant Impact (FONSI). The Services characterized the counterpart regulations as a procedural change. While it is true that the counterpart regulations changed procedure, the change also had a significant substantive impact. The FONSI claimed that:

Accordingly, the regulatory procedural changes would only enhance the efficiency of the program without eliminating the ultimate Federal agency responsibility for complying with section 7. As discussed in the preamble for the section 7 regulations (51 FR 19937), the proposed counterpart regulation program must retain the overall degree of protection afforded listed species required by the ESA. The standards for analyzing the effect of the proposed fire plan projects would remain the same. The Action Agency will still be required to comply with all existing laws with regards to implementing any proposed fire plan project, including further environmental review, if necessary. Therefore, no significant effect to these environmental resources is expected to result from this procedural change to the Section 7 consultation process contained in the proposed

counterpart regulations.

As detailed in these comments, however, that proved not to be the case. Even with the oversight and monitoring required by the Alternative Consultation Agreements, there has in fact been a reduction in the degree of protection afforded listed species. The standards may have remained the same, but they were not met. If the Services have analyzed the impacts of those inadequate decisions made by the FS and BLM on endangered species, they have not published that information. The Services should not proceed with this rulemaking until they have identified the impacts of the inadequate decisions and determined if protected species were harmed as a result. In other words, the Services should proceed with this rulemaking only if there is clear and substantial evidence that agencies will meet biologically appropriate standards, will make correct determinations, and that any incorrect determinations that have been made or will be made will not harm protected species.

The counterpart regulations affected only three agencies and were limited to the National Fire Plan and FIFRA implementation. The proposed regulations, in contrast, apply to all federal agencies and all actions. The rule provides for no oversight or monitoring and does not call for Alternative Consultation Agreements. It is inconceivable that this rule would have no significant environmental impact.