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Public Comment Processing
Attention: 1018-AT50
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 North Fairfax Drive, Suite 222
Arlington, VA 22203

RE: Comments on Proposed Rule Amending Regulations Implementing Section 7 of the Endangered Species Act

Dear Sir or Madam:

The Attorney General of the State of California submits the following comments, in his independent capacity as representative of the people of the State,[1] on the proposed regulations implementing section 7 of the federal Endangered Species Act (ESA), 16 U.S.C. § 1536. (73 Fed. Reg. 47868 (Aug. 15, 2008).) While we do not oppose efforts to streamline the process per se, the proposed regulations would violate the ESA and long-standing judicial precedents, lead to further imperilment of endangered and threatened species and their habitat, and replace the current scientific consultation process with the self-interested decisions of agency bureaucrats and political appointees. The Services should withdraw this ill-considered and illegal attack on one of our nation's bedrock environmental laws.

The proposed regulations are the most significant changes to the ESA and its implementing regulations that have occurred in more than two decades, and would substantially alter both the substantive and procedural requirements for conducting inter-agency consultations under section 7 of the statute. Section 7 ensures federal agency compliance with the ESA, and the section 7 consultation process is essential to the objective, scientific evaluation of the effects of a wide variety of federal activities on endangered and threatened species and their habitat as well as the effective mitigation of these effects.

Secretary Kempthorne's announcement concerning the regulations states that "[b]y making these changes, we prevent an expansion of the ESA into an inefficient, indirect avenue for greenhouse gas regulation, a purpose for which the ESA was never intended – and for which

[1] *See* Cal. Const., art. V, § 13; Cal. Gov. Code, §§ 12511, 12600-12; *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974). This letter does not purport to reflect the views or opinions of any other State of California official, agency or entity.

it is ill suited." On the contrary, the proposed regulations use the purported need to prevent "expansion" of the ESA into an avenue for greenhouse gas regulation as a stalking horse for a wholesale, unauthorized overhaul of the statute itself. The Services, through these proposed regulations, seek to do what Congress, after lengthy hearings and deliberation, has rejected several times in the past. The proposed rules would effect sweeping changes to the safeguards essential to the protection of California's and the nation's most vulnerable species. The proposed changes would eliminate or short-circuit the section 7 consultation process for many federal agency actions, restrict the types of project effects that must be evaluated and mitigated, and replace the Services' scientific review and analysis with the inexpert judgments of project proponents. If finalized, the regulations will substantially reduce the number and extent of section 7 consultations under the ESA. The Attorney General views it as nothing short of astonishing that such changes are being proposed by the very expert agencies that are designated by statute to provide scientific oversight of the consultation process to ensure protection of imperiled species and their habitat.

What follows are the Attorney General's specific comments on the proposed rule.

I. The Proposed Rules Are Contrary to Section 7 and Therefore Unlawful

Although the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (hereafter collectively referred to as the "Services") are charged with implementing the ESA, their authority is not unlimited. Executive agencies must give effect to Congress' intent, and may only adopt regulations that are based on a permissible and reasonable construction of the governing statute. (*Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); see also *Massachusetts v. Environmental Protection Agency*, 127 S.Ct. 1438, 1463 (2007).) Regulations that are "manifestly contrary to the statute" will be stricken. (*Chevron*, 467 U.S. at 844.) Here, for the reasons explained below, the proposed regulations are not based on a permissible and reasonable construction of the ESA and are "manifestly contrary to the statute." (*Id*.) The regulations therefore are beyond the Services' authority to adopt.

A. The Statutory Mandate

The fundamental purposes of the ESA are to "provide a means whereby ecosystems upon which endangered species and threatened species depend may be conserved" and to provide a program for the conservation of such species. (16 U.S.C. § 1531(b).) The ESA further declares it to be "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." (16 U.S.C. § 1531(c).) The ESA defines "conserve" and "conservation" broadly as "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided by this chapter are no longer necessary" – i.e. to the point of full recovery. (16 U.S.C. § 1532(3).)

In the landmark case of *Tennessee Valley Authority v. Hill* (1978) 437 U.S. 153 (hereafter "*TVA v. Hill*") – which remains the law of the land today – the United States Supreme Court stated that the ESA "is the most comprehensive legislation for the preservation of endangered species ever enacted by any nation. . . . The plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, *whatever the cost*. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." (*Id.* at 180, 184, emphasis added.)

Section 7 of the ESA is one of the primary means Congress established to implement the overriding conservation purpose of the statute. (*TVA v. Hill*, 437 U.S. at 181-185.) Section 7 contains substantive as well as procedural requirements – both of which are mandatory. (*National Assn. of Homebuilders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2535 (2007); *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985).) Substantively, section 7 provides in pertinent part that "[e]ach federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or of Commerce],[2] *insure* that *any* action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification or destruction of" any designated critical habitat for such species.[3] (16 U.S.C. § 1536(a)(2), emphasis added.) "To insure" means "to make certain, to secure, to guarantee (some thing, event, etc.)." (*National Assn. of Homebuilders*, 127 S.Ct. at 2534, internal quotation marks and citation omitted.) The statute further provides that "in fulfilling the requirements of this paragraph [§ 7(a)(2)] each agency shall use the best scientific and commercial data available." (16 U.S.C. § 1536(a)(2).)

In *TVA v. Hill*, 437 U.S. 153, the Supreme Court held that:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded or carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result* in the destruction or modification of habitat of such species . . ." [Citation omitted.] This language admits of no exception.

(*Id*. at 173, emphasis in original.) The Court went on to hold that "the legislative history

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[2] The Secretary of the Interior's duties under the federal ESA have been delegated to the FWS, and the Secretary of Commerce's duties have been delegated to NMFS. (50 C.F.R. § 402.01(b).)

[3] Section 7(a)(1) contains other important substantive mandates concerning federal agencies' and the Services' duties to conserve listed species, which are not addressed in the proposed regulations – except insofar as the regulations are inconsistent with these substantive mandates as well as those in section 7(a)(2). (16 U.S.C. § 1536(a)(1).)

undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species," and to "give endangered species priority over the 'primary missions' of federal agencies." (*Id*. at 185; see also *id*. at 174, 194.) Thus, the substantive mandate of section 7 "applies to every discretionary agency action *regardless* of the expense or burden its application might impose." (*National Assn. of Homebuilders*, 127 S.Ct. at 2537, emphasis added.)

Section 7 also contains procedures designed to ensure that each federal agency actually implements the statute's affirmative command. Section 7(c) provides that:

> Each federal agency *shall*, with respect to *any* agency action . . . request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species *may* be present, such agency *shall* conduct a biological assessment . . . identifying any endangered species or threatened species *which is likely to be affected* by such action.

(16 U.S.C. § 1536(c)(1), emphasis added.)

If any such species is likely to be affected by the federal agency action, the agency must formally consult with the Secretary, who must then prepare a biological opinion "detailing how the agency action affects the species or its critical habitat" and determining whether the action is likely to jeopardize the continued existence of any listed species or adversely modify or destroy any designated critical habitat. (16 U.S.C. § 1536(b)(3)(A).) The biological opinion must include "a summary of the information on which the opinion is based." (*Id*.) If jeopardy or adverse modification is found, the biological opinion must include "reasonable and prudent alternatives" to the agency action that "can be taken by the federal agency or applicant in implementing" the action and that the Secretary believes would avoid jeopardy or adverse modification. (*Id*.)

The Services adopted joint regulations implementing section 7 in 1986. (51 Fed. Reg. 19926 (June 3, 1986).) These regulations have not been substantially amended since that time. In order to implement the basic statutory mandate in section 7(a)(2) of the ESA to avoid jeopardy to listed species and adverse modification and destruction of critical habitat, the regulations require federal action agencies to review their actions "at the earliest possible time to determine whether any action may affect listed species or critical habitat." (50 C.F.R. § 402.14(a).)[4] This includes requesting information from the relevant Service as to whether any

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[4] The regulations define "action" broadly as "all activities or programs of any kind authorized, funded or carried out, in whole or in part, by Federal agencies," including promulgation of regulations, granting of permits, licenses, contracts and other entitlements, and

listed species or critical habitat "may be present" in the action area, and in some circumstances, preparing a biological assessment of the action. (50 C.F.R. § 402.12.) A federal action agency may make a "no effect" determination only in circumstances where no listed species or critical habitat "may be present" in the action area. (50 C.F.R. § 402.12(d)(1).)

If an action "may affect" any listed species or critical habitat, the federal action agency must either initiate formal consultation with the relevant Service (see immediately below), or alternatively, engage in informal consultation. (50 C.F.R. §§ 402.13(a), 402.14(a), (b)(1).) The existing rules make clear that "may effect" is an extremely low threshold: "[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement." (51 FR 19949.)

During the informal consultation process, the federal agency may determine that the action is not "not likely to adversely affect" listed species or critical habitat, but must first obtain the Service's written concurrence in this determination in order to proceed with the project. (50 C.F.R. §§ 402.13(a), 402.14(b)(1).) If the federal agency has prepared a biological assessment that reaches a "not likely to adversely affect" conclusion, the agency likewise must obtain the Service's written concurrence in order to proceed. (50 C.F.R. § 402.12(j), (k)(1).) If the Service agrees that an action is "not likely to adversely affect" listed species or critical habitat, then no further consultation is required. (50 C.F.R. §§ 402.12(j), (k)(1), 402.13(a), 402.14(b)(1).)

If, on the other hand, the Service does not concur in a federal agency's "not likely to adversely affect" determination (or the federal agency itself initiates formal consultation), the Service must prepare a formal biological opinion analyzing, based on the best scientific and commercial data available, the direct, indirect and cumulative effects of the action on listed species and critical habitat. (50 C.F.R. § 402.14(d), (f), (g), (h).) The biological opinion also must include "reasonable and prudent measures" to avoid, minimize or mitigate any identified effects and, if necessary, "reasonable and prudent alternatives" to avoid jeopardy to listed species or adverse modification or destruction of critical habitat. (50 C.F.R. § 402.14(g)(8), (h)(3), (i)(1).) The current regulations define the scope of effects that must be considered during the consultation process relatively broadly to include direct, indirect and cumulative effects. (50 C.F.R. § 402.02.)

It is important to note that the section 7 process rarely stops projects altogether; rather, it results in reasonable project changes and other accommodations to protect listed species and critical habitat or even no changes to the project at all. (See 50 C.F.R. § 402.13(a); see also §§ 402.02 [definition of "reasonable and prudent alternatives"] and 402.14(i)(2) [limitations on "reasonable and prudent measures"].) Also, the Services' oversight of federal agency actions insures that the best available scientific and biological information is in fact incorporated into

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any other action that directly or indirectly causes changes to land, air and/or water. (50 C.F.R. § 402.02.)

project review, as required by section 7(a)(2). (See *Washington Toxics Coalition v. Secretary of the Interior*, 457 F. Supp. 2d 1158, 1179, (W.D. Wash. 2006) [invalidating "self-consultation" procedure allowing EPA to make its own "not likely to adversely affect" determinations on registration of certain pesticides].)

B. The Proposed Rules

The proposed rules directly contravene the foregoing substantive and procedural requirements of section 7 in several major respects. They therefore are illegal and beyond the Services' statutory authority to adopt.

1. Unlawful new exemptions from consultation requirement

First, the proposed regulations would exempt from section 7 altogether federal agency actions the direct and indirect effects of which "are not anticipated to result in take,"[5] and which meet one or more of several other specified criteria. Specifically, consultation is not required if the federal action agency determines that: (1) the action will have "no effect on a listed species or critical habitat"; (2) the action is "an insignificant contributor to any effects on a listed species or critical habitat"; or (3) the effects of the action on listed species or critical habitat "are not capable of being meaningfully identified or detected," are "wholly beneficial" or are "such that the potential risk of jeopardy to the listed species or adverse modification or destruction of critical habitat is remote." (Proposed 50 C.F.R. § 402.03(b).) Further, the rules propose to narrowly define the types of indirect and cumulative effects that a federal agency must consider when determining whether an action meets the above criteria. (See proposed 50 C.F.R. § 402.02, discussed in section I.B.5 below.)

These proposed provisions violate the substantive mandate of section 7(a)(2) that each federal agency "*shall* insure" that "*any* action" that is authorized, funded or otherwise carried out by that agency is not likely to jeopardize listed species *or* result in the adverse modification or destruction of designated critical habitat. (16 U.S.C. § 1536(a)(2).) Under the plain language of the statute, the Services do not have authority to exempt certain types of federal agency actions from section 7 wholesale. It is not for the Services to determine that there is "little value" in requiring consultation on certain types of federal agency actions because such consultation is "unnecessary" or not "an efficient use of limited resources." (73 FR 47871; see *Connor v. Burford*, 848 F.2d 1441, 1455 (9th Cir. 1988) [refusing "to carve out a judicial exception to [the] ESA's clear mandate that a comprehensive biological opinion . . . be completed before initiation of the agency action" if "there is insufficient information available to complete a comprehensive biological opinion"].) Section 7 "applies to *every* discretionary agency action regardless of the

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[5] The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect or to attempt to engage in any such conduct." (16 U.S.C. § 1532(19); see also 50 C.F.R.§§ 17.3, 222.102 [defining "harass" and "harm" for purposes of "take"].)

expense or burden its application might impose." (*National Assn. of Homebuilders*, 127 S.Ct. at 2537, emphasis added.) In other words, "section 7 consultation is not optional." (*National Wildlife Fedn. v. NMFS*, 524 F.3d 917, 929 (9th Cir. 2008).)

Furthermore, the regulations would exempt some projects that may result in jeopardy to listed species or adverse modification or destruction of critical habitat, also contrary to the substantive requirements of section 7. In determining whether an agency action would be exempt from consultation, the proposed regulations would require federal agencies to consider only the direct and indirect effects of their actions (as newly, narrowly defined), but not the cumulative effects, and to find only that the actions are not "anticipated" to result in take. Also, a project would be exempt if a federal agency finds that the risk of *jeopardy* – not simply the risk of adverse effects – is "remote."

These imprecise standards could exempt projects that in fact will result in "take," which in turn could jeopardize listed species and/or adversely modify or destroy critical habitat, particularly for highly imperiled species for which any additional, unmitigated impacts are intolerable. Further, a project with *any* potential risk of jeopardy, however "remote," is a per se violation of section 7(a)(2) if it does not undergo the mandatory consultation procedure of that section. (*Thomas*, 753 F.2d at 764-65.)

In addition, the proposed regulations could exempt projects that, although potentially not resulting in take or jeopardy, nevertheless may result in adverse modification or destruction of critical habitat *despite* otherwise meeting the secondary exemption criteria of proposed section 402.03(b). Because critical habitat must include areas that are not currently occupied by the species but which are essential to the species' recovery, actions that might not take listed species and whose impacts on species and critical habitat purportedly are "insignificant" or incapable of being "meaningfully identified or detected" still could result in the adverse modification or destruction of critical habitat within the meaning of section 7(a)(2). (See 16 U.S.C. §§ 1532(3), (5)(A); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1069-70 (9th Cir. 2004.)

Perhaps more importantly, under the Services' proposed approach of exempting projects with supposedly "insignificant" or difficult to determine effects, "a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide into oblivion is one of the very ills that the ESA seeks to prevent." (*National Wildlife Fedn.*, 524 F.3d at 930.) This analysis assumes, of course, that federal agencies will properly interpret and apply the exemption criteria absent the oversight of Service scientists (a significant problem that we discuss further in section II.A below). If the criteria are not appropriately applied – a very likely occurrence – even greater adverse impacts to listed species

and critical habitat will result, which likewise directly violates section 7.[6]

2. Illegal elimination of threshold Service review

Second, the proposed rules improperly would allow federal agencies to *unilaterally* determine, without the Services' review or concurrence, that certain actions are not subject to consultation under new section 402.03(b). This determination could be made without any requirement to conduct site-specific analysis or prepare documentation, and *even if* listed species and critical habitat may be present in the action area. This aspect of the proposed regulation violates both Section 7's substantive mandate as well as its procedural requirement that each federal agency, as to *any* proposed federal action, must request information from the relevant Service as to whether listed species may be present in the area of the proposed action. (16 U.S.C. §§ 1536(a)(2), (c)(1).) If the Service advises that listed species may be present, then further consultation with the Service regarding the proposed action is required. (16 U.S.C. §§ 1536(c)(1), (b)(3)(A).) As such, the regulations are illegal.

Equally importantly, as discussed in section II.A below, the consequence of these proposed rules is to eliminate scientific review from one of the most science-based of government agency decisions and allows self-consultation by federal agency project proponents. This contravenes the statutory mandate that agencies rely on the best available scientific and commercial information in carrying out their duties under section 7(a)(2). (16 U.S.C. § 1536(a)(2).)

3. Arbitrary early termination of consultation

Third, of those federal agency actions, components of agency actions and/or effects that would remain subject to the section 7 consultation requirements, the proposed regulations would allow federal action agencies to terminate the informal consultation process prematurely and arbitrarily if the Service has not provided a written concurrence with a federal agency's determination that its action is "not likely to adversely affect" listed species or critical habitat within sixty days of the date on which the federal agency requests such a determination. (Proposed 50 C.F.R. §§ 402.13(b), 402.14(b)(1).)[7] The agency may then proceed with the

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[6] In addition, as mentioned, the proposed modifications to the definitions of indirect and cumulative effects, discussed in section I.B.4, will limit federal agencies to considering only a truncated range of potential project effects when determining whether an agency action will meet the new exemption criteria, further exacerbating the problem.

[7] The Federal Register notice erroneously assumes that federal agencies will only utilize the informal consultation process for actions that are not likely to "take" listed species. (73 FR 47872.) The basis for this assumption is not clear, as the informal consultation process currently is used for many types of actions with a broad range of effects. Moreover, even if it is true that

project without further review.

This proposed procedure is patently illegal. Section 7 of the ESA *requires* adequate consultation to avoid the possibility that jeopardy to listed species or adverse modification or destruction of critical habitat *may* occur. (16 U.S.C. § 1536(a)(2); *Thomas*, 753 F.2d at 764-65.) The potential for a project to result in jeopardy or adverse modification is a scientific determination to be made by the Services, not by the federal agency seeking to authorize, fund or carry out an action. The Services' failure to concur in a federal agency's "not likely to adversely affect" determination within sixty days does not in any way address the question of possible jeopardy or adverse modification that may result from the action in question. In such circumstances, there can be no assurance that projects for which consultation is terminated will not jeopardize the continued existence of a listed species or adversely modify or destroy critical habitat, contrary to the substantive mandates of section 7.[8]

For this reason, the courts have held that failure to complete or to adequately comply with the consultation process is a significant violation of the ESA. "[T]he procedural requirements are designed to ensure compliance with the substantive provisions" of the statute. (*Thomas*, 753 F.2d at 764.) "If a project is allowed to proceed without substantial compliance with [the ESA's] procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible. . . . Only by following the procedures can proper evaluations be made." (*Id*. at 764-65; accord *Sierra Club v. Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987).)

4. Unlawful limitations on definition of indirect and cumulative effects

Fourth, the proposed regulations unlawfully would limit the type and extent of the indirect and cumulative effects that could be considered when federal action agencies or the Services are: (1) determining whether a federal agency action or effect is exempt from section 7 under new section 402.03(b); (2) preparing biological assessments; (3) determining whether an action is not likely to adversely affect listed species or critical habitat during informal consultation; (4) preparing biological opinions during formal consultation; (5) determining whether to reinitiate consultation; and (6) undertaking other consultation activities. (50 C.F.R.

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federal agencies are only likely to utilize the informal consultation procedures for actions that are not likely to "take" a listed species (and therefore which are not likely to cause jeopardy), agencies still must consider whether their actions may adversely modify or destroy critical habitat. For reasons previously explained (in section I.B.1 above), adverse modification of critical habitat can occur in some circumstances even absent any take.

[8] This provision also allows a federal action agency improperly to manipulate the process to "run out the clock," for example, by delaying providing the Services with requested information.

§§ 402.12, 402.13, 402.14, 402.16.)

Specifically, federal agencies and the Services would only need to consider indirect effects for which the action is the "essential cause" and that are "reasonably certain to occur" based on "clear and substantial information." (Proposed 50 C.F.R. § 402.02.)[9] The Federal Register notice states that "our intent is to clarify that there must be a close causal connection between the action under consultation and the effect that is being evaluated. . . . [I]f 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." (73 FR 47870.)[10] The requirement that effects be "reasonably certain to occur" based on "clear and substantial information" is intended "to make clear that the effect cannot be just speculative and that it must be more than just likely to occur." (*Id*.) In addition, "cumulative effects" would be defined to exclude "future Federal activities that are physically located within the action area" of the agency action at issue.[11] (Proposed 50 C.F.R. § 402.02.)

Again, section 7 directs federal agencies to "insure," without limitation, that each federal agency action is not likely to jeopardize any listed species or adversely modify or destroy critical habitat. (16 U.S.C. § 1536(a)(2).) This substantive statutory mandate simply cannot be met if federal action agencies and the Services need only consider the limited types of indirect and cumulative project effects as proposed in these regulations and must document the occurrence of these effects with "clear and substantial information." Additionally, the statute itself directs the Services to consider, without limitation, "how the agency action affects the species or its critical habitat." (16 U.S.C. § 1536(b)(3)(A).)

The federal Courts of Appeals in multiple circuits likewise have held for decades that section 7 requires analysis of *all* direct, indirect and cumulative effects of an agency action, including potential effects, remote effects, short-term and long-term effects, and effects for which the agency action may be a contributing, but not necessarily a "but for," cause. (See, e.g., *National Wildlife Federation v. Coleman*, 529 F.2d 359, 373 (5th Cir. 1976); *Roosevelt Campobello Intl' Park Comn. v. Environmental Protection Agency*, 684 F.2d 1041, 1052-55 (1st Cir. 1982), *Riverside Irrig. Dist. v. Andrews*, 758 F.2d 508, 512-13 (10th Cir. 1985); *Pacific*

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[9] The requirement that effects be "reasonably certain to occur" exists in the current regulations. The proposed regulations would add a restrictive evidentiary standard to this requirement.

[10] Indeed, the proposed rules purport to require, in some instances, even "more than a technical 'but for' connection," and to necessitate a showing that the action is "intended to bring about the future effects," a standard that is almost impossible to meet. (*Id*.)

[11] We recognize that the exemption of other federal agency actions from the definition of cumulative effects "is not a new concept" (73 FR 47869); however, the proposed regulations would expand on this concept which, as discussed below, is inconsistent with section 7.

Coast Fedn. of Fishermen's Assns., Inc. v. NMFS, 265 F.3d 1028, 1035-39 (9th Cir. 2001); *Pacific Coast Fedn. of Fishermen's Assns., Inc. v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1093-94 (9th Cir. 2005); *National Wildlife Fedn.*, 524 F.3d at 930-934-35 (9th Cir. 2008); *Florida Key Deer v. Paulson*, 522 F.3d 1133, 1143-44 (11th Cir. 2008).) Anything less not only constitutes a violation of the substantive mandates of section 7, but also of section 7's requirement to use the best available science. (*Roosevelt Campobello*, 684 F.2d at 1052-53.)

This case law also makes clear that the ESA is intended to address all additional causes of an effect that may bring a species closer to the point of jeopardy, regardless of whether there is a "close causal connection between the action under consultation and the effect that is being evaluated" or the effect still would occur absent the action in question (73 FR 47870), as the proposed rules would require. (See *National Wildlife Fedn.*, 524 F.3d at 930 ["even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm"].) Moreover, "Congress did not create an exception to the statutory requirement of a comprehensive biological opinion" if there is "inexact information" about all phases or aspects of the activity in question. (*Connor*, 848 F.2d at 1454.) The Services "cannot ignore available biological information or fail to develop projections which may indicate potential conflicts between development and the preservation of protected species." (*Id.*; see also *Riverside Irrig. Dist*, 758 F.2d at 512 [to require an action agency "to ignore the indirect effects that result from its action would be to require it to wear blinders that Congress has chosen not to impose"].) Thus, the proposed regulations are contrary to both the statute itself as well as long-established judicial precedents interpreting the statute.

5. Improper segmenting of analysis of federal agency actions

Finally, the proposed regulations would allow federal action agencies and the Services to improperly segment or piecemeal the analysis of federal agency actions, in three respects. First, the regulations would require consultation on only those effects that do not meet the consultation exemption criteria of proposed section 403.03(b). (Proposed 50 C.F.R. § 402.03(c).) Second, the federal action agency may terminate consultation as to "a number of similar actions, an agency program, or a segment of a comprehensive plan" if the agency determines, with the Service's concurrence, that the activity is not likely to adversely affect any listed species or critical habitat. (Proposed 50 C.F.R. § 402.13(a).) Third, the proposed rules would only require consultation as to those project effects which meet the new, limited definitions of "effects" and "cumulative effects." Federal action agencies thus could attempt to break large projects up into their component parts, each with supposedly "marginal" effects on listed species and critical habitat, in an effort to take advantage of these new provisions. (73 FR 47870.) Indeed, the example discussed in the Federal Register notice appears to suggest that segmentation of the analysis of a project's effects would be entirely appropriate under the new rules. (See *id.* [explaining why certain effects of a proposed pipeline would not need to be evaluated].)

Again, the proposed regulations violate the law. Section 7 requires consultation on the entirety of an agency action and all its attendant effects. For example, in *Connor v. Burford*, 848

F.2d 1441, the court held "that the FWS violated the ESA by failing to prepare comprehensive biological opinions considering all stages of the agency action, and thus failing to adequately assess whether the agency action was likely to jeopardize the continued existence of any threatened or endangered species, as required by section 7(a)(2). To hold otherwise would eviscerate Congress' intent to give the benefit of the doubt to the species." (*Id*. at 1454, see also *id*. at 1453 ["the ESA requires the biological opinion to analyze the effect of the entire agency action" and requires consideration "all phases of the agency action"]; and *National Wildlife Fedn.*, 524 F.3d at 928, 930-31 [agencies may not "ignore potential jeopardy risks by labeling parts of an action non-discretionary" or by defining the environmental baseline to include parts of the action that are ongoing].)

C. Conclusion

In sum, contrary to the Services' statement, the Services do *not* "have authority to determine what constitutes 'consultation' and when consultation is triggered" (73 FR 47871) where, as here, the proposed rules are directly contrary to the statute. (*Chevron U.S.A.*, 467 U.S. at 844.) Nor, in fact, do the proposed rules simply specify what constitutes consultation and when consultation is triggered. Rather, the rules create wholesale, unauthorized exemptions from the statute; eliminate mandatory threshold scientific review of certain projects by the Services; unlawfully limit the types of effects which would require consideration; and impermissbly restrict the scope of and time period for consultation.

This, of course, not only is inconsistent with section 7 itself, but with the entire purpose of the ESA. (See *TVA v. Hill*, 437 U.S. at 184 ["[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, whatever the cost"].) The proposed regulations not only would fail to assist in halting and reversing the trend towards species extinction, but in many cases actually would facilitate that trend.

II. Other Significant Concerns Regarding the Proposed Rules

In addition to violating the statute, the proposed rules raise a host of practical concerns. At best, the regulations seriously would undermine the effectiveness of the ESA in achieving its fundamental goals of recovering imperiled species and their habitat (16 U.S.C. § 1531), and at worst, they could lead to further species extinctions.

A. The Proposed Rules Reject Sound Science

As discussed in section I.B.1 above, new section 402.03(b) would allow federal agencies themselves (along with any private project proponents) to determine whether their actions meet

one or more of the criteria of this section.[12] This determination would be made without the requirement for site-specific analysis and documentation and without the Services' expert biological review and input, thereby eliminating the critical analysis and biological agency oversight that exists under current law. Under current law, each federal action agency must request from the relevant Service a list of any listed species and critical habitat that may be present in the action area. (See 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c).) If the Service advises that listed species or critical habitat may be present, then further analysis and consultation (either formal or informal) with the Service is required. (16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.12(d)(2), 402.13, 402.14.) Only if the Service advises that *no* listed species or critical habitat may be present may the federal action agency make a "no effect" determination. (50 C.F.R. § 402.12(d)(1).)

Despite the Services' stated belief that "federal action agencies will err on the side of caution" in making the exemption determinations in section 402.03(b) and "have now had decades of experience with section 7" that will lead them to make the proper decisions (73 FR 47871), the reality is that, absent the Services' expert review and input, federal action agencies are not qualified to determine whether a project is not expected to result in any "take" or would meet the other criteria of proposed section 402.03(b). Only the Services have qualified personnel with the relevant biological expertise to make these determinations.

In addition, contrary to the statements in the Federal Register notice, as the project proponents, federal action agencies are interested parties that will have every incentive to find that their activities satisfy the criteria of proposed section 402.03(b). Unlike the ESA, the statutory missions of federal agencies do not normally place first priority on protecting imperiled species and their habitat, but rather direct agencies to undertake a host of other functions that may adversely affect species and habitat. (See, e.g., National Forest Management Act, 16 U.S.C. § 1600 et seq.; Federal Land and Policy Management Act, 43 U.S.C. § 1701 et seq.; Federal Power Act, 16 U.S.C. § 792 et seq.; see also *Sierra Forest Legacy v. Rey*, 526 F.3d 1228, 1235 (2008) (Noonan, J. concurring) [U.S. Forest Service was motivated to approve timber sales on national forest lands in order to generate increased agency funds].) The ESA, by contrast, reflects "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." (*TVA v. Hill*, 437 U.S. at 185.) By allowing federal action agencies to unilaterally determine whether a project is exempt from section 7 absent a

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[12] As noted, federal agencies would evaluate whether the direct and indirect effects of the action in question "are not anticipated to result in take" and meet one or more of the following criteria: (1) the action will have "no effect on a listed species or critical habitat"; (2) the action is "an insignificant contributor to any effects on listed species or critical habitat"; or (3) the effects of the action on listed species or critical habitat "are not capable of being meaningfully identified or detected in a manner that permits evaluation," are "wholly beneficial" or are "such that the potential risk of jeopardy to the listed species or adverse modification or destruction of critical habitat is remote." (Proposed 50 C.F.R. § 403.03(b).)

requirement for site-specific analysis and the Service's review and concurrence, the proposed regulations would have precisely the opposite effect.

Moreover, the proposed rules provide no objective, scientific criteria or standards for a federal agency to determine whether its action meets the vague and open-ended criteria of proposed 50 C.F.R. § 402.03(b). The rules also do not contain any requirement for federal agencies to document their exemption determinations, so it will be impossible for the Services or the public to determine whether, when and how these determinations are being made and if such determinations are appropriate. Projects will simply proceed based on federal agencies' undisclosed, internal decisions that the projects are exempt from section 7. As a result, the Services' scientists and the public will be foreclosed from the process, and the regulations will shield from review potentially profound impacts on listed species and critical habitat.

The Services contend that "[t]his proposed language broadly tracks language from the Services' joint consultation handbook" as to actions that "may affect" listed species or critical habitat but which nevertheless are "not likely to adversely affect" such species or habitat (73 FR 47871). In fact however, there is a fundamental distinction between the proposed language and the Services' current law and practice. Under current regulations, federal agencies must obtain the relevant Service's written concurrence that an action which "may affect," nevertheless is "not likely to adversely affect," listed species or critical habitat. (See 50 C.F.R. § 402.13(a).)

The proposed regulations, by contrast, would allow federal agencies to make this determination completely on their own, absent the Services' review or concurrence. As a consequence, the proposed regulations contain no provision for the Services to verify that federal agencies' exemption determinations will be properly made and otherwise satisfy the criteria of proposed section 402.03(b). Even assuming that proper application of the criteria "could never amount to an adverse impact to listed species" (73 FR 47871) (which as we have pointed out in section I.B.1, is not the case), it necessarily follows that *improper* application of these criteria, without site-specific review and documentation and the Service's written concurrence, could well result in serious adverse effects on listed species and critical habitat, and could even lead to the extinction of some highly imperiled species.

In sum, the proposed regulations would eliminate meaningful threshold scientific review and expert biological oversight of federal agency actions and thus are likely result in inexpert and self-interested agency decisions. These decisions in turn are very likely to lead to the arbitrary and inappropriate exemption of many types of projects from the consultation requirements of the ESA that do not in fact meet the criteria of the proposed rules and which could have significant effects on listed species and critical habitat, outside of public review.

B. The Proposed Rules Inappropriately Eliminate or Truncate the Consultation Process

The Federal Register notice states that one purpose of the proposed rules is to reduce "unnecessary consultations" as well as to "simplify the consultation process and make it less burdensome and time consuming." (73 FR 47870-71.) As discussed in section I.A above, section 7 of the ESA unequivocally dictates that consultation is required for *all* discretionary federal agency actions, thereby foreclosing any regulatory authority to eliminate or streamline this process. (*National Assn. of Homebuilders*, 127 S.Ct. at 2537.) In addition to being illegal, the Services' proposed approach as a practical matter will undoubtedly allow many types of federal agency actions to go forward without adequate analysis and mitigation, and which quite possibly could lead to further imperilment of listed species and adverse modification and destruction of their habitat.

Removal of scientific review and expert agency oversight in matters involving endangered and threatened species is a very short-sighted approach. The deliberative process embodied in section 7 of the ESA effectuates Congress' firm view that the value of imperiled species to society is quite literally "incalculable" and that further extinction and endangerment of species is a price that we as a nation are not willing to pay. (See *TVA v. Hill*, 437 U.S. at 178-79, 184-185, 187, 194.) Section 7 also reflects Congress' decision to ensure the survival and recovery of imperiled species and their habitat by requiring adequate evaluation and mitigation of the effects of federal agency actions *before* such effects occur. (*Id.* at 185-186; *Thomas*, 753 F.2d at 763; *Connor*, 848 F.2d at 1453.) Thus, the ESA is the last line of defense against species extinction, and is the critical federal legal tool for species survival and recovery. As such it is entirely inappropriate to eliminate or streamline this process as the Services are proposing to do.

It is important to note that ensuring that adequate consultation occurs on all federal agency actions, as required by the ESA, does not mean that federal projects will be stopped. Instead, the consultation process typically results in project redesign and other reasonable mitigation measures to reduce or eliminate the project's potential effects on species and habitat. (See 50 C.F.R. § 402.13(b) [authorizing the Services, during informal consultation, "to suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species and critical habitat"].)[13] Indeed, this is an integral function of the process. In *TVA v. Hill*, 437 U.S. at 186, the Court stated that "it is clear Congress foresaw that § 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act." Finally, section 7 consultation is often the best or only opportunity to inject sound scientific information the into the process for project review. The proposed regulations, however, seriously would undermine these critical functions of the section 7 process.

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[13] The proposed regulations inexplicably would *eliminate* this existing regulatory provision, replacing it instead with the various section 7 exemptions.

C. The Proposed Rules Inappropriately Eliminate Consideration of the Effects of Global Warming and a Host of Other Effects on Listed Species and Critical Habitat

Although scientific knowledge of the effects of global warming and greenhouse gas emissions on listed species and their habitat is rapidly evolving, current scientific information indicates that global warming already is affecting species' survival and recovery prospects and that these effects only are likely to increase substantially in the future.[14] Given this information, it is essential that we as a society take immediate, aggressive action to ameliorate and reduce these effects.

In stark contrast to this societal imperative, the proposed rules would eliminate the consultation and concurrence requirements for projects whose effects are supposedly "an insignificant contributor" to adverse impacts on listed species and habitat, are "incapable of being meaningfully evaluated" or pose only a "remote" risk. Thus, federal agencies would be able to simply sweep the effects of increased greenhouse gas emissions from their projects – as well as a host of other types of project effects – off the table entirely by concluding that such effects are "insignificant," "incapable of being meaningfully evaluated" or pose only a "remote" risk. (See 73 FR 47870.) This could be done absent site-specific analysis, documentation and scientific review and oversight. As such, the proposed new exemptions could have devastating and irreversible effects on imperiled species and habitat. As the science of global warming and its impact on species and habitat continues to develop, it is essential that federal action agencies not be permitted to foreclose input from the federal biological agencies. The review of these expert agencies will bring the most current knowledge of these issues to bear on critical projects.

Similarly, the proposed requirements that the federal agency action being evaluated must be an "essential" cause of the effect, and that the effect must be reasonably certain to occur based on "clear and substantial information," are both specifically intended to eliminate greenhouse gas emissions (as well as other effects) from the range of effects that could be considered under section 7 of the ESA. (See 73 FR 47870.) It is true that no single source of greenhouse gas emissions can be deemed *the* cause of the global warming or its effects on any given species. This does *not* mean, however, that the effects of large projects which indirectly or cumulatively contribute to or exacerbate global warming and its adverse impacts on species and habitat should not be properly evaluated and avoided or mitigated.

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[14] See, e.g., University of Washington (May 6, 2008). "Trouble In Paradise: Global Warming A Greater Danger To Tropical Species," *ScienceDaily*, available at http://www.sciencedaily.com-/releases/2008/05/080505211835.htm; see also University Of California - Berkeley (Feb. 13, 2004), "Bighorn Sheep Threatened By Climate Change," *ScienceDaily*, available at http://www.sciencedaily.com-/releases/2004/02/040212080717.htm; and Scott R. Loarie, et al., *Climate Change and the Future of California's Endemic Flora*, PLoS One, Vol. 3, Issue 6 (June 25, 2008), available at http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0002502.

Instead of taking a reasoned and precise "carving knife" approach to evaluating the effects of greenhouse gas emissions on species and habitat, the proposed regulations use a hatchet to carve a large hole in the statute. The proposed changes in the definitions of indirect and cumulative effects would eliminate from consideration *any* effect that will have *likely* (but not necessarily "essential" or "reasonably certain") indirect and/or cumulative impacts on species and habitat. This includes the effects of global warming, the indirect and cumulative effects of air or water pollution caused by many different sources, and many other types of effects. All of these types of effects have adverse impacts on species and habitat, which no longer would be required to be analyzed or mitigated under the proposed rules. This overreaching approach to project review is unfathomable in light of the urgent need to address the effects of global warming and other impacts on imperiled species and the overriding conservation mandate of the ESA.

III. Conclusion

In conclusion, the Services' proposed rules patently violate the letter and spirit of the ESA and contravene the Services' statutory duty to protect threatened and endangered species and their habitat. Rather than improving the consultation process under the ESA, the proposed regulations attack the most important component of this process: sound and careful scientific evaluation of federal agency decision-making where endangered and threatened species may be jeopardized or their habitat modified or destroyed. This consultation process is essential to our efforts to protect the nation's most vulnerable species. The Services propose to remove science from the equation, attacking the fundamental principles of the ESA. Simply put, the proposed regulations violate the law and should be summarily rejected.

Thank you for your consideration of these comments.

Sincerely,

/S/

TARA L. MUELLER
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For EDMUND G. BROWN JR.
Attorney General