COMMENTS FROM ENVIRONMENTAL LAW PROFESSORS

Re: Proposed Rule — Interagency Cooperation under the Endangered Species Act (Amendments)

U.S. Department of Interior, Fish and Wildlife Service
U.S. Department of Commerce, National Marine Fisheries Service

published 15 August 2008, 73 Fed. Reg. 47,868-75

TABLE OF CONTENTS

Introduction 2

I. General Concerns 5

A. The Proposed Changes to Causation Requirements Could Drastically Narrow the Scope of Regulatory Protections and Threaten to Frustrate ESA Goals 5

B. The Proposed Changes Discount the Role of the ESA in Addressing Climate Change 8

C. It Is Not Appropriate to Rely on Action Agencies to Make Threshold Determinations About the Applicability of Consultation Requirements Because of Potential Differences in Expertise and Incentives 10

D. The Proposed Changes Are a Threat to Enforcement by Citizen Plaintiffs and Judicial Review 14

II. Potential Legal Problems with the Proposed Changes 15

A. The Services Have Not Adequately Supported Their Decision to Enact the Proposed Changes 15

1. The Services Have Not Provided a Showing of Need for Regulatory Change 17

2. There Is Insufficient Factual Basis that the Proposed Changes Will Address Cited Needs 19

3. The Proposed Amendments Depart from Longstanding and Consistent Regulatory Positions 20

4. Conclusion: The Section 7 Proposed Amendments Should Be Remanded to the Agency in the Event of Subsequent Judicial Review 20

B. The Services Have a Consultation Duty and Neither the President Nor the Services May Reassign This Duty 21

1. The Proposed Amendments Conflict with Congressional Intent 22

2. The Proposed Amendments Fail Under a *Chevron* Step One Analysis 22

3. The Proposed Changes Erode the ESA's Protective Purpose 24

4. The Proposed Changes Frustrate the Congressional Design of the ESA ... 26

5. The Proposed Changes Are Overbroad to Accomplish the Stated Goals .. 28

6. The Proposed Amendments Do Not Warrant Deference 28

7. The Transfer of Responsibilities by the Services to Other Action Agencies Is Contrary to Congress's Goal to Delegate Implementation to Expert Agencies 30

III. The Proposed Changes Contain Problematic Specific Provisions 31

A. Definitions: "Cumulative Actions" & Exclusion of Future Federal Projects...31

B. Definitions: "Essential Cause" & Effects Would Occur Regardless of the Action 32

C. Definitions: "Effects of the Action" & the Exclusion of "Insignificant" Contributors 33

D. Definitions: "Effects of the Action" & the Requirement that Effects Must Be "Reasonably Certain" to Occur 36

E. Definitions: "Effects of the Action" & "Clear and Substantial Information"...38

F. There Is Statutory Evidence that the Services Do Not Have Authority to Make the Proposed Broad Exclusions from the Consultation Requirements...39

1. Section 402.03(b) (in general) 39

2. Section 402.03(b) ("No Take") 41

3. Section 402.03(b)(1) ("No Effect") 44

4. Section 402.03(b)(2) ("Insignificant Contributor") 45

5. Section 402.03(b)(3)(i) (Effects "Not Capable of Being Meaningfully Identified or Detected") 45

6. Section 402.03(b)(3)(ii) (Effects That Are "Wholly Beneficial") 47

7. Section 402.03(b)(3)(iii) (Effects That Are "Remote") 49

8. Section 402.03(c) (Limitations on the Scope of Analysis of Actions that Fall Partly Within the Exceptions of 402.03(b)) 53

IV. Procedural Recommendations for the Proposed Revisions 55

Conclusion 59

INTRODUCTION

The enactment of the Endangered Species Act ("ESA") in 1973 marked a watershed in development of law for the preservation of biological diversity. In sweeping terms, the 1973 Act extended the federal sphere of influence over wildlife to include every parcel of land or stretch of ocean in the United States or on the high seas required for the survival of any protected species.

Section 7 of the Act provides that "[a]ll...Federal departments and agencies *shall*:

> in consultation with and with the assistance of the Secretary, 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 destruction or adverse modification of habitat of such species.

The proposed regulatory changes greatly shift the determination of when and whether to enter consultation, and under what circumstances an action may affect a listed species, away from the expert agencies (U.S. Fish and Wildlife Services, "FWS," and National Marine Fisheries Service, "NMFS" or together, the "Services") to the federal action agencies themselves. This re-assignment of decisional authority puts the action agencies in a position of self-review, contradicting both the language and intent of Section 7(a)-(d). It fundamentally dilutes and erodes Section 7's centrally important consultation process. It places some of the most important decisions federal agencies can make about the management of protected species and their ecosystems in the hands of agencies that have a basic conflict of interests and often have no knowledge or expertise regarding either species or habitat.

The legislative history of the Endangered Species Act of 1973 demonstrates Congress's abiding concern about the extinction crisis and Congress's commitment to "the conservation of species and of the ecosystems on which they depend." 119 Cong. Rec. 42,913 (1973) (remarks of Rep. Dingell). Almost every statement concerning the various versions of the law contains some reference to the extinction crisis. *See* 119 Cong. Rec. 30,162 (statement of Rep. Sullivan); 119 Cong. Rec. 30,164 (statement of Rep. Goodling); 119 Cong. Rec. 30,165 (statement of Rep. Grover) (House consideration of H.R. 37, Sept. 18, 1973); 119 Cong. Rec. 25,675 (statement of Sen. Williams); 119 Cong. Rec. 25,668 (statement of Sen. John Tunney). Legislative documents demonstrate a relatively profound grasp of the problem and the limited scientific knowledge of it, recommending a "certain humility and sense of urgency" in our efforts to protect the "incalculable" value of biological diversity. As the House Committee Report observes:

> Man's presence on the Earth is relatively recent, and his effective domination over the world's life support systems has taken place within a few short generations. Our ability to destroy, or almost destroy, all intelligent life on the planet became apparent only in

> this generation. A certain humility, and a sense of urgency, seem indicated.
>
> From all evidence available to us, it appears that the pace of disappearance of species is accelerating. As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their–and our own–genetic heritage.
>
> The value of this genetic heritage is, quite literally, incalculable. The blue whale evolved over a long period of time and the combination of factors in its background has produced a certain code, found in its genes, which enables it to reproduce itself, rather than producing sperm whales, dolphins or goldfish. If the blue whale, the largest animal in the history of the world, were to disappear, it would not be possible to replace it--it would simply be gone. Irretrievably. Forever.

H.R. Rep. No. 412, 93d Cong., 1st Sess. 4-5 (1973). Congress further understood that the preservation of species required the preservation of their habitat. *See, e.g.,* S. Rep. No. 307, 93d Cong., 1st Sess. 2, *reprinted in* 1973 U.S. Code Cong. & Admin. News 2989, 2990.

In 1978, Congress revamped the text of Section 7 of the Endangered Species Act. The reappraisal was largely a response to the United States Supreme Court opinion in *Tenn. Valley Authority v. Hill*, 437 U.S. 153 (1978). The 1978 legislative process resulted in significant amendments to Sections 4 and 7 formalizing the Section 7 consultation process, and creating a cabinet level committee to grant exemptions to the Section 7 prohibition against jeopardizing protected species. The substantive provision requiring that federal actions not jeopardize the continued existence of protected species and critical habitat became Section 7(a)(2). The House of Representatives Committee Report asserted that "the popular press has grossly exaggerated the potential for conflict under the Act." H.R. Rep. 1625, 13, reprinted in 1978 U.S. Code Cong. & Admin. News 9463. The 1978 debates demonstrate that Congress, with some reservations, truly meant to preserve species from extinction. While the establishment of the Endangered Species Act Committee to grant exemptions to Section 7 suggests that other interests may sometimes outweigh preserving species, the exception is very narrow and does not alter the effect of Section 7 in the vast majority of cases.

The current language of Section 7(a)-(d) governing the consultation process expresses the strongest commitment to species preservation and the consistent attempt to constrain federal agency action. Congress uses the word "shall" fifteen times in these relatively brief Sections. As discussed below, the Congressional language sets out a structure for "consultation" at odds with the regulatory changes proposed by the Services.

The proposed shift of authority to action agencies is of especial concern because it is combined with other proposed changes that would make it much harder for the Services to fully evaluate the potential impacts of proposed federal actions on listed species. In particular, there are a series of proposed changes that would significantly increase the standards that must be met to establish a causal link between a proposed federal action and the potential adverse effects of that action on a listed species. Those heightened standards may have the impact of greatly weakening the protections for listed species under Section 7 of the ESA.

We understand that the issues that the Services seek to address with their proposed changes – the efficiency and effectiveness of the consultation process, and the role of the ESA in addressing climate change – are serious ones. We agree that they are well worth study and there may be ways in which the functioning of the Act in these areas could be improved. We are deeply concerned, however, about the rushed and hurried manner in which the Services are attempting to address these concerns through the proposed regulations.

The Services originally provided only a truncated 30-day review-and-comment period for the proposed regulations subsequently extended to 60 days, still very short for such a significant set of proposed changes. The proposal has not followed any open debate within or outside of the federal government. The GAO Report cited to substantiate the Services' argument for curtailed consultation procedures advised no such changes. This despite the fact, that, as indicated below, there are substantial concerns that the proposed regulations may be both unwise as a matter of policy and improper as a matter of law. Additional time for comments and data collection would allow for the opportunity for both the Services and outside parties to fully determine the nature and scope of the problems that the Services are seeking to address through the proposed regulations. It would also allow both the Services and outside parties – including Congress – to develop and analyze a wide range of options to address those problems. As noted below in our discussion of the role of the ESA in addressing climate change, there are a number of options aside from the proposed regulations that might be promising ways to address the issues raised by the Services in their proposal. However, the rapidity with which the Services seek to advance this proposal indicates that they are not interested in exploring those options.

The timing of the proposed regulations and the hurried nature of the process by which the Services are pursuing those changes indicate instead that one possible goal is to lock in regulatory changes before the departure of the current Administration, one that has been sparing in its expansion and enforcement of endangered species protections.[1]

[1] Listings of endangered species under ESA Section 4 provide one discrete indicator of administrative implementation of the Act. According to available data, the numbers of species listed in recent Administrations are — Carter: 126 (one term); Reagan: 255 (two terms); George H.W. Bush: 231 (one term); Clinton: 522 (two terms); George W. Bush: 60 (two terms).

Our comments fall into four main categories. First, we lay out our general concerns with the proposed regulations as a matter of policy – how the proposed changes to the causation standards and the consultation requirements may greatly undermine species conservation and the fulfillment of the goals of the ESA. We also discuss the role that the ESA can play in addressing climate change. Second, we discuss the general legal concerns we have about the proposed revisions, focusing on two points: (1) whether the proposed revisions are consistent with the text of the ESA; and (2) whether the Services have adequately justified their choice to revise the regulations. Third, we discuss the individual provisions in the proposal, raising specific legal and policy concerns about each of the major provisions. Fourth, we lay out our concerns about the process by which the Services have proceeded in this case, with a particular focus on the need for compliance with the environmental review provisions of the National Environmental Policy Act (NEPA). 42 U.S.C. § 4321 *et seq*.

But our overall message to the Services is quite simple: Given the wide range of policy and legal concerns with the proposed revisions, and the sharp changes that they would institute to a long-standing regulatory structure, the Services should (as a matter of both law and policy) take the time to fully study the issues and problems, develop the data more, and include a fuller range of parties, including Congress, to develop solutions to the issues that they seek to address.

I. GENERAL CONCERNS

A. The Proposed Changes to Causation Requirements Could Drastically Narrow the Scope of Regulatory Protections and Threatens to Frustrate ESA Goals

In evaluating the proposed changes by the Services to the Section 7 regulations, it is important to keep in mind the importance of causation for the implementation of the ESA. Causation – the causal relationship between an action and adverse effects to a listed species – is essential to the two main regulatory requirements under the Act: consultation for proposed federal actions pursuant to Section 7, and the prohibition of "take" of individuals of listed species pursuant to Section 9. Changes to the definition of causation under the Act will result in significant changes to the regulatory protections provided by the Act to listed species.

The proposed changes by the Services would potentially narrow dramatically the scope of regulatory protections provided by the Act because they would make it much more difficult to establish causation between particular federal actions and adverse effects to listed species. In particular there are two main ways in which the proposed regulatory changes would make causation harder to establish and reduce regulatory protections: (1) the requirement that a federal action must be

---

Of course, there is nothing necessarily improper about politics playing a role in the implementation of regulatory statutes, but it must be done in a constitutional manner. *See* infra II.A at 14 (discussing political agendas in *Motor Vehicle Mfgs. Ass'n v. State Farm Mutual*).

the sole "but for" cause of the adverse effects to the listed species; and (2) the requirement that there must be "clear and substantial information" to demonstrate that it is "reasonably certain" that a federal action will be the indirect cause of the adverse effects to the listed species.

The first change is significant because it will mean that species that are in danger because of multiple threats will receive reduced or no protection from Section 7 consultations. Many listed species face extinction because of multiple threats, such as habitat destruction and the introduction of non-native species. *See, e.g.*, David S. Wilcove *et al.*, *Quantifying Threats to Imperiled Species in the United States*, 48 BioScience 607, 608 tbl. 2 (1998) (showing that many species face multiple threats). The proposed definition of "effects of the action" states that: "If an effect will occur whether or not the action takes place, the action is not a cause of the direct or indirect effect." As a result, Section 7 consultation would not consider any effects to the species if the adverse effects to the species would occur in any case because of another action or set of effects. Accordingly, a species that is threatened with extinction from two causes (for instance from overhunting and habitat destruction), each of which would be sufficient to drive the species to extinction independently, might not receive any protection under Section 7 consultation from either cause. After all, even if there is no overhunting (for example) the extinction of the species might take place in any case because of habitat destruction, and vice versa. Ironically, the proposed regulatory changes could mean that species that face multiple threats that might result in their extinction or endangerment will receive *less* protection than species that face extinction or endangerment as a result of one threat. At least in the context of species that only face one threat, there will be potentially some analysis. For species that face multiple threats, they may be caught in a "Catch-22" where each individual threat cannot be examined because other threats will independently result in the extinction of the species.

The second change has the impact of reversing the "burden of proof" for consultation analyses, at least in the context of "indirect effects." It places the burden on those seeking to protect the species – whether it be the Services or citizen groups – to establish by a "clear and substantial information" standard that an action will be "reasonably certain" to cause adverse effects to a listed species. This change in the burden of proof is inconsistent with the overall spirit and purpose of the ESA, which is to provide protection for listed species on the edge of extinction. 16 U.S.C. § 1531(b) (ESA is intended to "provide a program for conservation of such endangered species and threatened species"); *see also TVA v. Hill*, 437 U.S. 153, 184 (1978). Moreover, it is especially problematic because there is often very limited evidence or information about the status of listed species, the threats that they face, or how particular activities will result in particular adverse effects to a listed species. *See, e.g.,* Fraser Shilling, *Do Habitat Conservation Plans Protect Endangered Species?*, 276 Science 1662, 1663 (1997) (stating most conservation plans "lack adequate baseline information about population size of target species and actual habitat use, primarily because of the generalized lack of such information"); Joshua J. Lawler, et al., *The Scope and Treatment of Threats in Endangered Species Recovery Plans*, 12 Ecological

Applications 663, 663 (2002) (noting lack of basic information about the magnitude, timing, frequency, and severity of threats facing endangered species); *see also* Christopher S. Mills, Note, *Incentives and the ESA: Can Conservation Banking Live up to Potential?* 14 Duke Envtl. L. & Pol'y F. 523, 556 (2004) ("Perhaps the largest obstacle to protecting the biodiversity of species is lack of information."). This is especially true in the context of "indirect effects"; these effects are extremely important in their potential impacts on listed species, but they are also the effects where the least amount of information is likely to be present or available. Accordingly, the proposed regulatory changes could drastically reduce, if not eliminate, the consideration of indirect effects of actions on listed species in the vast majority of cases.

Moreover, by requiring "clear and substantial information" that effects are "reasonably certain" to occur, the proposed regulation deprives listed species of protection during the early stages of development of scientific evidence of threats to their existence, which is precisely when protective intervention by the Services could be of most use. For example, possibly the earliest study of forest fragmentation to document nest predation at edges as an adverse effect on birds was published in 1984. David S. Wilcove, *Nest Predation in Forest Tracts and the Decline of Migratory Songbirds,* 66 Ecology 1211, 1211 (1984) (listing edge effect nest predation as one of several hypothesized causes of migratory songbird decline, stating that prior to publication "different rates of predation have not been documented," and describing results of experiment using artificial nests). By now this threat has been much more studied (a search on ISI Web of Science conducted Sept. 7, 2008 for topic "forest fragmentation edge nest predation" returned 253 results published 1993 to 2008), including studies of particular listed species. *E.g.* Joshua Malt and David Lank, *Temporal Dynamics of Edge Effects on Nest Predation Risk for the Marbled Murrelet*, 140 Biol. Conserv. 160 (2007) (describing results of artificial nest experiments and making management recommendations based on results). The proposed regulation and its preamble would suggest, at a minimum, that the 1984 study of songbirds would not suffice to justify even *considering* this possible effect in connection with a proposed federal action affecting marbled murrelet habitat. Indeed, the proposed regulation could be read to mean that no consideration of this possible effect on marbled murrelets was justified until the 2007 publication of species-specific experimental results – or perhaps even after, considering that the authors acknowledge that more research is needed and the scientific information likely to evolve. *Id*. at 171 (recommendations "could change as we learn more"). The proposed regulation would place the burden of scientific uncertainty on species protection, turning upside down the statute's direction that federal agencies "insure" that their actions do not jeopardize listed species.

The hypothetical that the Services use to support their proposed changes does not support the proposed changes to the causation standards. The preamble states that if a long proposed pipeline requires only one federal permit for crossing a waterway, the permit should not be considered a "cause" of the effects of building and operating "the entire pipeline" because "the route and design of the pipeline for most of its length ... is not determined by the crossing." Yet the example contradicts itself because if, as postulated, the pipeline must cross the

waterway and can do so only with a permit, then the permit really *is* essential to the entire pipeline. The hypothetical permits only one conclusion – "no crossing, no pipeline" – rather than "no crossing, a pipeline rerouted at its distal ends." If there were some other feasible route that could avoid the crossing, the permit, and the attendant consideration of effects on endangered species, the pipeline company presumably would have chosen it (unless, of course, the Services have by regulation already assured the pipeline company that the Corps won't worry about endangered species). *See also* infra Part III.B at 30 (discussing pipeline hypothetical at length).

Finally, the proposed regulatory changes to causation analysis in the Section 7 consultation process may well impact the analysis by courts of similar causation questions in the Section 9 context. Accordingly, the reduction in protections for listed species discussed above might apply across the full range of regulatory protections under the ESA.

B. The Proposed Changes Discount the Role of the ESA in Addressing Climate Change

Today, the "incalculably" valuable resources Congress intended the ESA to protect are facing a crisis on an almost unimaginably vast scale. The United States Supreme Court has recognized global climate change as "the most pressing environmental challenge of our time." *Massachusetts v. EPA*, 127 S.Ct. 1438, 1446 (2007). Much of the devastating impact of climate change will fall on the species and ecosystems Congress intended the ESA to protect. *See* Thomas Lovejoy and Lee Hannah, *Climate Change and Biodiversity* (2005). By shifting habitats, exposing species to more extreme weather events, and facilitating new species invasions, among other effects, climate change will expose many species to substantial new strains. Indeed, "climate change might very well be more destructive to non-human life than all other sources of habitat loss combined." Wayne Hsiung and Cass R. Sunstein, *Climate Change and Animals*, 155 U. Pa. L. Rev. 1695, 1703 (2007).

The overall scale of the threat is staggering. According to the Intergovernmental Panel on Climate Change, because of climate change "[a]pproximately 20-30% of plant and animal species assessed so far are likely to be at increased risk of extinction if increases in global average temperature exceed 1.5-2.5 degrees C." IPCC, *Climate Change 2007: Impacts, Adaptation, Vulnerability: Summary for Policymakers* 11. Other scientists predict similar consequences. A 2004 study published in *Nature* concluded that climate change "is likely to be the greatest threat in many if not most regions" to species survival, and estimated, "on the basis of mid-range climate-warming scenarios for 2050, that 15–37% of species in our sample of regions and taxa will be 'committed to extinction.'" Chris D. Thomas *et al.*, *Extinction Risk from Climate Change*, 427 Nature 145 (2004). Those percentages translate into huge overall numbers of species; globally, millions could go extinct. *See* Hsiung and Sunstein, 155 U. Pa. L. Rev. at 1703.

Impacts to the potentially millions of other species threatened by climate change – including species already listed under the ESA because of the threats posed by climate change, such as the polar bear – are causally connected to the emissions from individual sources, including sources derivative of federal agency actions in the United States. Climate change, and the secondary effects upon species that follow from it, result from the aggregate effect of global emissions, and no one emissions source, or even one country, is the exclusive cause of climate change as a whole or of any particular secondary effect. But every emissions-causing action plays a contributing role. Most greenhouse gases, including carbon dioxide, are long-lived and well-mixed, meaning that they become evenly blended throughout the atmosphere. Consequently, there is no benign place for greenhouse gas emissions to be released; no matter where and when they are released, they add to the global total, and that global total directly drives climate change. That means that while it is impossible to attribute ultimate consequences exclusively to particular emissions sources—scientists cannot reasonably say, for example, that a heat wave in one location was caused exclusively by emissions from a particular power plant, even if they are reasonably sure that climate change as a whole was responsible for the heat wave—scientists do know, with a very high level of confidence, that an individual power plant's emissions incrementally intensify climate change, and that those emissions make secondary consequences like heat waves, droughts, and sea level rise incrementally more likely or intense. If climate change will increase risks to a species or will adversely modify its habitat, scientists therefore can be fairly sure that each emissions-causing project has a contributing role in those adverse impacts.

One might expect that the biodiversity threats posed by climate change would trigger the protective provisions of the ESA. As noted above, the ESA is our primary national biodiversity-protection statute, designed to shield endangered species from a wide variety of threats, and climate change now appears to be the greatest threat to those species. Moreover, the ESA's drafters were particularly concerned with the threats posed by habitat loss, and climate change threatens dramatic and widespread degradation of species habitat. Indeed, in drafting Section 7 of the ESA, Congress specifically set forth habitat protections, requiring government agencies to avoid taking part in any action that adversely modifies the critical habitat of listed species. It therefore should not be surprising, let alone alarming, that our primary species protection law would address the primary threat to millions of species and their habitat, or that it would do so through the consultation process.

Yet the proposed regulations treat the ESA's applicability to climate change as a problem to be resolved, and seem designed to ensure that no one will interpret Section 7 as doing anything to protect species threatened by climate change. The Services take this approach not because they claim that climate change is not a threat to listed species, for such an assertion would be overwhelmingly inconsistent with the scientific literature, but instead because of a perception—never clearly stated, but implied throughout—that the ESA provides poor regulatory mechanisms for doing something about climate change.

At the outset, we caution that such policy-based reasoning is no basis for amending a regulatory program in ways inconsistent with statutory text. "All the policy reasons in the world," as the D.C. Circuit recently cautioned, "cannot justify reading a substantive provision out of a statute." *North Carolina v. E.P.A.*, 531 F.3d 896, 909 (D.C. Cir. 2008). The Services may believe that the ESA will provide an unwieldy or inefficient mechanism for dealing with climate change, but even if that belief is correct, their recourse is to recommend changes to Congress, or to make regulatory changes within the bounds allowed by the statute, not to promulgate revisions foreclosed by statutory language, structure, and purpose. Yet, as these comments will explain in detail below, some of the changes now proposed are inconsistent with the statutory language and design.

Clearly, applying Section 7 to all discretionary federal agency actions that contribute to climate change, and therefore adversely affect species and adversely modify critical habitat, would have significant implications, for it would require consultation on any federal agency action that creates an aggregate increase in emissions. That could cause a substantial increase in the number of consultation processes, and could also lead to constraints on the ability of federal agencies to increase emissions. But a broad application of Section 7 could bring enormous benefits along with its costs. At the very least, interagency consultation will improve understanding of the climate-related challenges faced by endangered species. *See* J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U. L. Rev. 1, 49 (2008). That knowledge, in turn, can aid the Services as they fulfill the remainder of their duties under the ESA. *Id.* at 59-62.

There may be further benefits if the application of Section 7 ultimately constrains federal agencies from increasing GHG emissions. Reduced emissions should lead not just to fewer extinctions, but also to lower sea level rise, fewer extreme weather events, less disruption of water supplies, less spread of disease, less ocean acidification, and lower levels of non-greenhouse-gas air pollutants, among other benefits. Those environmental benefits can lead to legal benefits, for greenhouse gas emissions appear to be complicating compliance with the Clean Air Act and other statutes as well as the ESA. As the Supreme Court has recognized, regulatory curbs on greenhouse gas emissions, while not capable of avoiding climate change, can reduce its extent, and reduce the severity of secondary consequences. *Massachusetts v. EPA*, 127 S.Ct. 1438, 1458 (2007). Those curbs also can reduce the challenges the United States will face when, as seems increasingly likely, it takes legal steps to reduce its emissions; if federal agencies increase emissions now, the country may have more work to do as it strives to fulfill emissions reduction goals.

The administrative complications also need not be nearly so great as the Services appear to assume. Faced with the possibility that every increase in emissions could require consultation, federal agencies will likely do what any reasonable entity facing a potentially onerous constraint would do: they will adjust their practices. They may refrain from pursuing some projects that simply don't provide sufficient benefit to justify their environmental cost. And where they do

choose to pursue their projects, multiple mechanisms, including emissions offsetting or mitigation funding, could allow them to pursue their goals without harming listed species. The Services also could explore potential ways to facilitate more efficient compliance; for example, they might develop programmatic habitat conservation plans or consultation processes, or might coordinate consultation processes with review processes required by other environmental laws, such as conformity determinations or NEPA studies. They might even team with other agencies to develop proposals for climate change legislation. Our point is not to prescribe a specific approach, but merely to suggest possibilities, and to show that, if the Services try, they might find methods that realize the benefits of legal compliance while reducing the costs. Unfortunately, there is simply no evidence in this proposed rulemaking that the Services have even begun to make that effort.

C. It Is Not Appropriate to Rely on Action Agencies to Make Threshold Determinations About the Applicability of Consultation Requirements Because of Potential Differences in Expertise and Incentives

The proposed changes to the consultation requirements, significantly reducing action agency obligations to consult with the Services in a wide range of situations, depends in large part on a contention by the Services that action agencies have the appropriate expertise and incentives to conduct a proper analysis of endangered and threatened species today. The preamble to the proposed regulation states:

> Many Federal action agencies have now had decades of experience with Section 7. The Services believe that Federal action agencies are fully qualified to make these determinations in the limited circumstances provided for in the proposed rule. In light of the tremendous workload and consumption of resources that consultations require, the Services believe it is not an efficient use of limited resources to review literally thousands of proposed Federal agency actions in which take is not anticipated and the potential effects are either insignificant, incapable of being meaningfully evaluated, wholly beneficial, or pose only a remote risk of causing jeopardy or adverse modification or destruction of critical habitat. The Services have determined that actions satisfying these criteria will not cause adverse effects on listed species and that Federal action agencies are qualified to determine that their actions satisfy these criteria. Finally, Federal action agencies have strong incentives to make these determinations accurately. Federal action agencies are well aware that take is not authorized without an incidental take statement (which can only be obtained through formal consultation) and that ultimately it is they who must insure that it is not likely that their action will jeopardize the continued existence of listed species or adversely modify or destroy designated critical habitat.

We are not so sanguine about the abilities of action agencies to take the place of the Services in conducting consultation analysis. In particular, we have serious

concerns that action agencies do not have the appropriate incentives to produce accurate information that will result in decisions that are protective of listed species.

We would first note that the proposal by the Services is likely to have a large impact on consultation under the ESA. For instance, the proposal would eliminate consultation in areas where there is little or no information about the potential impacts of proposed actions on listed species. The proposed regulations would eliminate informal consultation where the effects of a proposed action "[a]re not capable of being meaningfully identified or detected in a manner that permits evaluation."

However, situations in which there is sparse high-quality information about the potential impacts of proposed human activities on listed species are common in the management of endangered and threatened species. As the GAO has found, "complete scientific information is rarely available for listed species." *See* United States General Accounting Office, *Endangered Species: Despite Consultation Improvement Efforts in the Pacific Northwest, Concerns Persist About the Process* at 8 (2003). In such cases, however, consultation with the Services, who have specialized expertise to evaluate what data does exist, is only more appropriate to ensure that the limited data that is available is not dismissed based upon policy and economic reasons. Unfortunately, we can expect that at least this prong of the exceptions from consultation in the proposed regulations might be triggered quite frequently.

More generally, the proposed exceptions to consultation would encompass the great majority, if not all, of the situations in which informal consultation currently occurs today. The only recent quantitative study of the ESA consultation process found that, in the Pacific Northwest, between 65 and 80 percent of all consultations were informal ones. *See* U.S. Gen. Accounting Office, *Endangered Species: More Federal Management Attention Is Needed to Improve the Consultation Process* at 13 (2004). Thus, the proposed changes are likely to have a major impact on the consultation process as a whole for the Services and the action agencies in general.

While it may well be that many action agencies have significant in-house expertise in wildlife biology and related fields today – certainly more than in the past – we do question the Services' assertion that those agencies will apply that expertise in a manner similar to the Services. As noted above, ample data with respect to most listed species is not always available at the time of consultation. It is no surprise that the perspectives, training, and goals of the individuals interpreting limited data will affect those interpretations, leading to systematic skews and biases. *See* Holly Doremus, *Science Plays Defense: Natural Resource Management in the Bush Administration*, 32 Ecology L.Q. 249, 278-79 (2005); *see also* Michael A. McCarthy *et al.*, *Comparing Predictions of Extinction Risk Using Models and Subjective Judgments*, 26 Acta Oecologica 67 (2004) (finding that subjective judgments by scientists as to the risk of extinction of species based on limited data were consistently biased). The staff members of action agencies such as the

Forest Service ("FS"), Bureau of Land Management ("BLM"), and the Corps of Engineers are employees of large organizations with very different missions and goals from the Services and are subject to very different institutional pressures. Accordingly, it is quite possible, even likely, that the different missions of these action agencies will result in their employees – even in-house biologists – reaching very different conclusions as to the impacts of proposed actions on listed species given the sparse data they often have to work with. *See* Holly Doremus, *Science Plays Defense: Natural Resource Management in the Bush Administration*, 32 Ecology L.Q. 249, 282-87 (2005) (noting that analyses about impacts on listed species that are conducted by action agencies will likely result in very different outcomes than the same analyses conducted by employees of conservation agencies such as FWS or NMFS). In general, one likely outcome of the proposed changes to the consultation process is that the employees of action agencies will either not interpret the limited available data as showing a possibility of adverse effects to listed species, or alternatively might not even develop information in the first place about negative impacts to listed species from proposed actions. The reason is that this type of information about the adverse effects of proposed actions to listed species would interfere with the performance by the action agencies of activities that are in keeping with their missions. Information about potential adverse effects to listed species will be inconvenient and therefore downplayed, ignored, or never collected in the first place. *See* Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple Goal Agencies*, 33 Harv. Envtl. L. Rev. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090313 (noting that mission orientations of agencies will often lead them to ignore or not develop information about the impacts of their activities where that information would interfere with accomplishment of their mission).[2]

There is ample evidence of this dynamic in practice, where action agencies have either interpreted limited information in a way to avoid the discovery of potential adverse effects to listed species or not developed the information in the first place. The Services have already tried a limited experiment of allowing several action agencies, including BLM and FS, to conduct their own analyses of impacts of proposed actions on listed species, the "Counterpart Regulations" implemented in 2004 and 2005. The Counterpart Regulations allowed action agencies to make NLAA determinations, albeit with many restrictions and precautions. First, the Services required action agency staff to undergo additional training and examinations, requiring certification, and second, the NLAA determinations made by the certified personnel with the action agencies would be reviewed periodically by the Services.

[2] The Services rely on the fear of citizen litigation to explain why they think action agencies will conduct adequate analyses. Such a position erodes the responsibility of the Services to ensure that Congress's mandate is not diluted in the action agencies. Reliance upon the volunteered litigation efforts of citizens to hold agencies to the demands of congressional mandates is doubly inappropriate — because the citizen role in correcting government excesses should be the exception not the rule, and courts are understandably hesitant in correcting, and tend to defer to, actions of the sister branch.

The stated rationale for the Counterpart Regulations also relied heavily on the assumption that the action agency personnel already had significant expertise, much as the current proposal claims. The 2004/2005 regulations stated that 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." Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 68 Fed. Reg. 68,254 (Dec. 8, 2003) (codified at 50 C.F.R. pt. 402.30). The Service also noted that, "[t]he Action Agencies employ large staffs of professional wildlife biologists, botanists, and ecologists to meet their obligations under the Act and other natural resource management laws they implement." *Id.* Finally, the Service further justified the action to promote a more efficient NLAA determination process.

Recently, the Services released their analysis of the action agencies' biological assessments pursuant to these Counterpart Regulations. In spite of the stringent requirements imposed by the Services, and even though the action agencies knew their work would be reviewed, the results were startling: *None* of the ten biological assessments that had been prepared by the action agencies (FS or BLM) adequately described the area of the proposed action, the effects of the proposed action, the listed species that might be affected by the proposed action, or used the best available science. FWS found that of the fifty biological assessments prepared by the FS or BLM that addressed FWS-listed species, only 19 met all of the evaluation criteria (similar to the criteria listed above), and 8 met *none* of the criteria. The failure rate of the action agencies across the board was 67.2%; the action agencies met Service expectations less than a third of the time. Finally, the Counterpart Regulation process was only used 60 times, an order of magnitude less than projections. This "success" simply doesn't support the Services' belief "that Federal action agencies are fully qualified to make these determinations in the limited circumstances provided for in the proposed rule." Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47868 (proposed Aug. 15, 2008) (to be codified at 50 C.F.R. pt. 402).

The proposed regulations are even more sweeping than the Counterpart Regulations. They impose no special training or Service review requirements, and allow agencies without internal natural resource expertise to make NLAA determinations with no external review. If the BLM and FS, which actually do have their own natural resource expertise and also received additional training, had such great struggles with performing consultation functions pursuant to the Counterpart Regulations, we have very grave concerns about the ability of other agencies to make these determinations correctly.

We also note that many officials within the Services appear to be skeptical of the changes that the agencies are proposing. In a recent Government Accountability Office ("GAO") report on the consultation process, multiple officials of the Services told GAO that they believed that the consultation process was important

precisely because officials in action agencies did not bring the same conservation-oriented perspective to their analyses that the Services officials did. *See* United States General Accounting Office, *Endangered Species: More Federal Management Attention Is Needed to Improve the Consultation Process* at 43-53 (2004); *see also id.* at Appendix II (DOI comments noting that the "bulk of the time in consultations is usually spent working with the action agencies to determine *how* their proposed actions will affect the conservation needs of the species" and adding that while DOI "very much respects the expertise" of many AAs, "*this expertise, the information available, and the perspective of AAs typically differ from the Services.*" (emphasis added)). In the same GAO report that studied ESA consultation in the Pacific Northwest, the Services noted that there had been concerns about the ability of action agencies to conduct their own conservation analyses. *See id.* at 51 & Appendix II (reporting by GAO investigators that, "despite increased guidance, [the Services] still receive many biological assessments with insufficient detail to judge a project's effects," and in those cases they sometimes "make repeated requests for more detailed information until they are satisfied that the assessment adequately addresses the effects of the proposed activity on the species").

The key problem here is that if action agencies do not develop the information about the potential impacts of proposed projects on listed species – or interpret limited data in a way to minimize those impacts – there will never be the kind of information that is necessary to determine whether federal actions are helping or harming listed species. And without that information, there will not be liability for federal actions, because no one will know whether individuals of listed species have been taken as a result of the federal action, and whether the federal actions have jeopardized the existence of the listed species or adversely modified critical habitat. Thus, while the Services rely upon the possibility of liability for incidental takes or improper biological assessments in order to provide an incentive for action agencies to conduct adequate biological assessments, that reasoning may in fact be precisely backwards. If action agencies do not develop information about impacts on listed species in their analyses, then there may be much less potential liability under the ESA for those agencies (because there is no evidence of adverse effects), and there will be even less of an incentive for the agencies to conduct adequate analyses.

D. The Proposed Changes Are a Threat to Enforcement by Citizen Plaintiffs and Judicial Review

Another concern with the proposal is its potential impact on citizen enforcement of the ESA and judicial review in ESA cases. As the United States Supreme Court noted in *Bennett v. Spear*, 520 U.S. 154 (1997), supplemental enforcement under the citizen suit provision of the ESA is central to its statutory scheme. The ESA citizen suit provision is very broadly worded. In contrast to the citizen suit requirements of such other environmental statutes as the Clean Water Act and the Surface Mining Control and Reclamation Act, the ESA states that "*any person* may commence a citizen suit," language that was given an expansive interpretation by the Supreme Court in *Bennett*. In that case the Court noted that

the "obvious purpose of the particular provision in question is to encourage enforcement by so-called 'private attorneys general'." *Id.* at 165.

Moreover, in the same decision the Court also discussed the ESA requirement that each federal agency must "use the best scientific and commercial data available" in meeting its ESA obligations. The *Bennett* court opined that the "obvious purpose" of that mandate is to "ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." *Id.* at 176.

Our concern here is that if this proposal is finalized it will make it more difficult for citizen plaintiffs to rely upon a scientifically sound record that was prepared by the very federal agencies Congress recognized as having the best expertise in the Executive Branch with respect to ESA questions. The proposed regulations would thus deny citizens a full and ample opportunity to employ citizen enforcement actions as a way to compel the scientifically sound implementation of the statute's important requirements.

Moreover, we are concerned that the proposed regulation will undermine the effectiveness of judicial review in ESA cases more generally. As Michael C. Blumm and Steven R. Brown have convincingly documented, in the context of lawsuits under the NEPA, courts are very likely to reach conclusions about federal agency compliance or non-compliance with environmental statutory mandates that are consistent with the comments advanced by a commenting agency that has appropriate technical expertise in environmental matters. *See* Michael C. Blumm and Steven R. Brown, *"Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation,"* 14 Harv. Envtl. L. Rev. 277 (1990). To the extent that the proposed regulations result in the loss of objective, technically sound commentary from an eminently well qualified federal agency (the FWS or NMFS, for example), we believe that judicial review of compliance with ESA requirements are very likely to become considerably less careful, thoughtful, and well supported.

II. POTENTIAL LEGAL PROBLEMS WITH THE PROPOSED CHANGES

A. The Services Have Not Adequately Supported Their Decision to Enact the Proposed Changes

As noted above, there are serious concerns about whether the Services – in their haste to revise the regulations – have adequately provided support for the need for and merits of the proposed changes.

For a quarter of a century the regulations pertaining to interagency consultations under the ESA have remained stable and consistent. Now, in the last months of the present Administration, the proposed regulatory amendments would substantially undercut many fundamental elements in the long-established rules for making interagency determinations on species protections.

As noted above, the proposed amendments in many cases would devolve the Services' protective role overseeing the action agencies — the agencies that Section 7 is designed to constrain — to those very agencies themselves for a process of self-review, self-consultation, self-exemption, and self-approval. This presents an inherent conflict of interest that might prove difficult for action agencies to resist. The Rule would also make it far more difficult to establish causation in real-life settings — limiting consideration to "but-for" causations proved to be "reasonably certain" by "clear and substantial evidence," avoiding consideration of the *cumulative* effect of actions upon species, and in other ways substantially departing from the congressional statutory mandate in the ESA that the Supreme Court has described as "institutionalized caution." *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 194 (1978) (quoting Congress).

In *Motor Vehicle Mfg. Ass'n v. State Farm Mutual,* the Reagan Administration, acting upon its aversion to federal regulations of the nation's industries, had substantially diluted the Department of Transportation ("DOT")'s existing auto safety regulations, rescinding the air bag requirements. 463 U.S. 29 (1983). Mr. Justice Rehnquist candidly acknowledged the political agendas that can legitimately drive Administrations' changes of regulatory law. 463 U.S. 29, 49 (1983) ("As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the [current] administration") (Rehnquist, J., concurring in part and dissenting in part). But Justice Rehnquist's political realism did not insulate the proposed regulatory changes from critical "hard look" judicial review scrutiny under the arbitrary and capricious standard of the Administrative Procedure Act (APA), 5 U.S.C. 706. Even Justice Rehnquist joined the Court's unanimous holding in *State Farm Mutual* striking down the Reagan Administration's changes in the auto safety rules for the agency's failure to explain why it had rescinded one particular portion of the prior auto safety provisions. Additionally, the Court found DOT's changed rule arbitrary because it had failed to consider clearly available alternative regulatory provisions that would address the regulatory needs. 463 U.S. at 53.

State Farm's holding has been quoted hundreds of times in federal court decisions since 1983. *See, e.g.,* Sunstein & Miles, *The Real World of Arbitrariness Review*, 75 U. Chi. L. Rev. 761 (2008). The rule-change was rejected because "the agency failed to present an adequate basis and explanation for rescinding the requirement . . . . In these cases, the agency's explanation for rescission of the [prior] requirement is *not* sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking. An agency's view of what is in the public interest may change, either with or without a change in circumstances . . . . But an agency changing its course must supply a reasoned analysis. We . . . conclude that the agency has failed to supply the requisite 'reasoned analysis' in this case."[3] 463 U.S. at 34, 52, 56.

[3] *State Farm Mutual* dealt with a rescission of one part of the auto safety regulations, the air bag requirement, but its holding applies generally to any amendments: "[T]he rescission or modification of [the prior rule] is subject to the same test." 463 U.S. at 41. Similarly *State Farm Mutual* does not distinguish a difference between whether an amended rule is procedural or

The Court's judicial review in *State Farm,* in sum, found the agency's rule-change arbitrary and capricious on double grounds — that the agency had failed to *explain* the factual basis of its decision, and that where it did offer an explanation the agency had not developed sufficient facts to support the explanation.

The Services' present proposed amendments, at least based on the face of the preamble for the proposal, do not even get to the second step, because they offer no explanations of need or remedial logic in the first place.

If the *State Farm* doctrine is applied to the promulgation of the proposed amendments as they presently stand, the regulations may well be found to be arbitrary and capricious. The Services should begin a renewed consideration of their proposal after reviewing actual data on the efficacy of the existing rules and allowing sufficient time for the interested public to comment on the Services' considered, final suggestions.

1. ***The Services Have Not Provided a Showing of Need for Regulatory Change***

Below we discuss in particular the various ways in which the Services have not provided sufficient justification for the proposed regulatory changes. The reasons given by the Services for the proposed amendments' various substantial changes (followed by our concerns about those reasons) are —

1. "[T]here have been no comprehensive revisions to the implementing Section 7 regulations since 1986."[4]

> This does not define any need for change in the existing regulations. By itself, a lack of change is not itself a reason for change. If the implication is that the regulations are dysfunctional, obsolescent, unnecessary, etc., that would presumably need to be asserted, and is not.

2. "[T]he Services have gained considerable experience in implementing the Act, as have other Federal agencies, States, and property owners," and therefore

---

substantive; a reviewing court must hold both to compliance with Congress's statutory mandates.

[4] There is one exception to this statement: the 2003 Section 7 Counterpart Regulations for specific types of consultations. *Joint Counterpart Endangered Species Act Section 7 Consultation Regulations*, 68 Fed. Reg. 68254 (Dec. 8, 2003, codified at 50 C.F.R. §§ 402.30 to 402.34 (2006)). As discussed in Part I.C, these Counterpart Regulations were an experimental departure from the existing Section 7 regulations, allowing agencies which complied with a stringent series of prior-approval requirements to exercise their own screening of potential species conflicts, replacing final action by the Services. These rules, however, were shown to have produced a poor record of quality control and compliance in the Services' own subsequent review, raising doubts that the Proposed Rules far less rigorous provisions would serve the ESA's statutory mandates. See Drew, *Beyond Delegated Authority: The Counterpart Endangered Species Act Consultation Regulations,* 37 ELR 10483 (2007); *see also* Part II.B (noting that the Services have a consultation duty which neither the President nor the Services may reassign, and that it is inappropriate to have action agencies conduct consultation for ESA Section 7 purposes).

"federal action agencies are qualified to determine that their actions satisfy these [statutory] criteria."

> This does not define any need for change in the existing regulations. The assertion that experience has grown may imply that the Services' expertise is now functionally superfluous. The Services' text, however, provides no indications why the significant interagency checks and balances currently applied within the existing Section 7 consultation process — between the supervisory Services and the regulated action agencies — therefore need to be, or reliably can be, shortcut.

3. Global warming and climate change require "common sense modifications to the Section 7 regulations to provide greater clarity and certainty."

> This does not define any need for change in the existing regulations. The statement does not identify the lacks of clarity and certainty that, in "common sense," require such modifications beyond conclusory statements.

4. "[T]he consultation process, [has been] contentious between the Services and action agencies."

> This does not define any need for change in the existing regulations. Section 7 puts the Services in the role of policing the action agencies to ensure their compliance with statutory mandates that the action agencies tend to resist. Contention thus is part of the statutory design. This assertion — that the existence of contention justifies lifting regulatory constraints — would equally well argue, in the NEPA context, that federal agencies should be relieved of their responsibility to follow Council on Environmental Quality ("CEQ") regulations.

5. "[A]ction agencies continue...to consider the consultation process burdensome."

> This does not define any need for change in the existing regulations. As with NEPA, the fact that a protective statutory mandate is considered burdensome by agencies whose primary mission and actions may present the problems that necessitate those protections in the first place is no reason to suspend the protection. All agencies have multiple statutory mandates, some of which mandates burden other mandates.

6. "[T]he Services and other federal agencies should 'resolve disagreements about when consultation is needed ….'"

> This does not define any need for change in the existing regulations. Here, too, a desire to resolve disagreements does not require regulatory dilutions of statutory mandates, and the 2004 GAO study from which the Services quote does not make any such recommendation.

7. "Efficiency" is a further rationale for the proposed amendments' changes in the existing body of interagency regulation. "The Services believe it is not an efficient use of limited resources to review literally thousands of proposed Federal agency actions in which take is not anticipated and the potential effects are either insignificant, incapable of being meaningfully evaluated, wholly beneficial, or pose only a remote risk of causing jeopardy or adverse modification or destruction of critical habitat."

This, too, does not define a basis for change in the existing regulations. Efficiency is not a higher purpose than the statutory mandate. There is no assertion that transfer of the essential screening process to the action agencies that have conflicting objectives will necessarily produce accurate scientific assessments and adequately protect endangered species.

In fact, actual experience with the Services' prior attempts of relatively strictly controlled delegations of the consultation process to approved agencies has produced a factual record of inaccuracies and mismanagement that further undercuts the factual assumptions of the proposed regulatory amendments.[5]

"Efficiency" presumably connotes efficiency in functionally accomplishing a particular defined objective — the congressional mandate — in the most waste-avoiding, resource-conserving manner. Presumably the new rule's exemptions are designed to eliminate current requirements that purportedly do not serve a useful function in accomplishing Congress's goals. To assert that a new process is more efficient, it is necessary to identify the wastefulness, ineffectiveness, and other shortcomings of the prior process. Thus there should be some showing that useless formal or informal consultations have taken place, and that existing causation definitions are mistaken. The proposed amendments' justifications on this record do none of that.

It should be noted that a showing that many formal and informal consultations end with a determination that there is no jeopardy does not mean that the process has been ineffective or does not achieve statutory goals. One function of consultations is reassurance that a serious reconnaissance for potentially destructive actions has been done, and any such possible consequences have been identified and avoided. It is a process that requires integrity and credibility, open to public scrutiny, assuring that official attention has been paid to potential effects, direct and indirect, that might be individually lethal, or cumulatively lethal. Consultations that, out of "institutionalized caution," establish such reassurances by negative evidence are not an inefficient waste of time but serve important public and statutory objectives.

[5] *See* the report regarding the Counterpart Regulations, issued by U.S. Department of Interior (FWS, BLM), U.S. Department of Agriculture (USFS), and U.S. Department of Commerce (NMFS), January 16, 2008, *available at* http://www.nmfs.noaa.gov/pr/pdfs/laws/fireplanreview.pdf.

2. ***There Is Insufficient Factual Basis that the Proposed Changes Will Address Cited Needs***

The Services also have a burden to develop factual evidence for whether the proposals would actually address the concerns raised by the Services. As described above, in *State Farm* the Court rejected the altered DOT rule as arbitrary and capricious because "[i]n these cases, the agency's explanation for rescission of the [regulatory] requirement is not sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking." 463 U.S. at 52.

The same flaw exists here. The Services not only do not identify the shortcomings in the existing Section 7 regulations requiring change, but they do not indicate (except by reverse implied extrapolation from the proposed changes themselves) how and why the proposed changes would address those concerns.

State Farm indicates that in order not to be found arbitrary in the present case, the Services would have to provide a record supporting their decision that the proposed amendments would *address and remedy* the perceived flaws and needs of the displaced rules. In the proposed amendments no factual basis for such logic is offered. (In *State Farm* the agency at least cited field studies indicating the new rules' factual basis for remedying the alleged shortcomings, though the Court held that factual basis insufficient.)

Nor do the present proposed amendments indicate consideration of alternative methods of remedying the implied problems of "inefficiency," "burdensomeness," and "contentiousness" that prompted the proposed rule's regulatory amendments. In *State Farm*, a further element of the agency's arbitrariness was that "[t]he agency also failed to articulate a basis for not requiring [the available alternative regulatory approach of] nondetachable belts." 463 U.S. at 53.

In the case of the present proposed amendments as well, presumably other methods of addressing problems prompting the Administration's new rule exist, but they are not noted, much less rejected after reasoned consideration.

3. ***The Proposed Amendments Depart from Longstanding and Consistent Regulatory Positions***

As noted above, the Supreme Court in *State Farm* stated that —

> An agency's view of what is in the public interest may change, either with or without a change in circumstances . . . . But an agency changing its course must supply a reasoned analysis. 463 U.S. at 57.

As the Services acknowledge, the Section 7 rules they are proposing to change at this political moment have existed virtually unchanged for a quarter of a century.

In administrative law, the fact that a body of agency regulations has existed stably for an extended number of years is a factor weighing *against* changes in its provisions rather than in favor of amendment. In the *Skidmore*[6] and *Gilbert*[7] cases, the Supreme Court dealt with precipitous agency alterations in longstanding interpretive rules and guidelines. But, even as to such cases of non-binding agency decisions, the Court noted the relevance of the agency interpretations' long-standing consistency. Among the factors to be considered, the Court noted that "judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier and later pronouncements*, and all those factors which give it power to persuade...."[8] "The [EEOC] guideline, *conflicting as it does with earlier pronouncements of that agency*, and containing no suggestion that some new source of legislative history had been discovered in the intervening eight years, stands virtually alone."[9] Thus, to the extent that judicial review of the proposed revisions will depend on an interpretation of the ESA's text itself, the long-standing nature of the current regulations will cut against a judicial finding that the proposed changes are consistent with the Act.

4. *The Section 7 Proposed Amendments Should Be Remanded to the Agency in the Event of Subsequent Judicial Review*

As in *State Farm*, the appropriate judicial disposition of a rule change that is insufficiently based in fact and logic, and insufficiently explained, is remand to the agency for further consideration.[10] Accordingly, we strongly encourage the Services to reconsider the proposed changes to the regulations and (at the very least) to provide additional thought and data into its revision process. If the proposed amendments are to go forward, the Services need to identify the statutory objectives they are serving, the data evidencing the problems that are alleged to exist, and the basis for believing that the amendments will functionally correct the identified problems.

B. The Services Have a Consultation Duty and Neither the President Nor the Services May Reassign This Duty

Under Reorganization Plan Numbered 4 of 1970, the Secretary of the Interior and the Secretary of Commerce are specifically assigned the duty of consultation that is prescribed in 16 U.S.C. §1536(a)(2).[11] That is, when the ESA mandates that "[e]ach Federal agency shall, in consultation with and with the assistance of the

---

[6] Skidmore v. Swift, 323 U.S. 134 (1944).
[7] GE v. Gilbert [EEOC], 429 U.S. 125 (1976).
[8] Skidmore v. Swift, 323 U.S. at 140 (*emphasis added*).
[9] 429 U.S. at 145 (*emphasis added*).
[10] 429 U.S. 129. The Services, in light of the factual record of action agencies' noncompliance with the strictures of the counterpart regulation initiative — noted in the *January 16, 2008 Report* referenced in footnote 6, supra — would likewise do well to acknowledge the disappointing factual record of that experience, and reconsider the counterpart regulations' alteration of the established consultation rules.
[11] Reorganization Plan No. 4 of 1970, 84 Stat. 2090, 2090 (1970).

Secretary, insure that any [agency] action … is not likely to jeopardize the continued existence of any endangered species…"[12] the ESA specifically defines "Secretary" to mean "the Secretary of the Interior or the Secretary of Commerce."[13] This specific designation of the duty of consultation excludes other officers from exercising this duty.[14]

The Services cannot promulgate regulations that absolve the wildlife agencies of their statutorily mandated duty of consultation. While wildlife agencies do have administrative and interpretive power to define terms under the ESA,[15] the Secretary of the Interior does not have the authority to redefine "Secretary" as used in the ESA. Congress did not authorize the Services in Section 7 to relinquish or share their statutorily bestowed duty of consultation on action agencies.[16]

The definition of "Secretary" in 15 U.S.C. §1532(15) was promulgated in accordance with Reorganization Plan Numbered 4 of 1970 issued by President Nixon.[17] In 1983, with *INS v. Chadha*, the Supreme Court invalidated the Congressional "legislative veto,[18]" thereby also invalidating the Reorganization Acts that relied on the legislative veto.[19] The President's reorganization authority under Reorganization Plan No. 4 expired at the end of 1984 and has not been subsequently renewed.[20] The Services may not exercise authority that they do not have, and the President has no reorganization authority to redistribute the duty of consultation under Section 7.

1. *The Proposed Amendments Conflict with Congressional Intent*

The U.S. Supreme Court has described the ESA as the most comprehensive legislation for the preservation of endangered species ever enacted by any

---

[12] The Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2000).
[13] 16 U.S.C. §1532(15).
[14] *See* 1 U.S. Op. Atty. Gen. 624, 625 (October 20, 1823) ("If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without violation of the law."); *see also Chevron v. NRDC*, 467 U.S. 837, 842—43 (1984) ("If the intent of Congress is clear . . . the agency[] must give effect to the . . . intent of Congress."); *United States v. Giordano*, 416 U.S. 505, 512—13 (1974) (holding that where Congress had given power to Attorney General, that power could not be delegated to Executive Assistant); *Population Institute v. McPherson*, 797 F.2d 1062, 1072 (C.A.D.C. 1986) ("Where Congress or the Executive vouchsafes part of its authority to an administrative agency, it is for the agency and the agency alone to exercise that authority.").
[15] *See* Sweet Home v. Babbitt, 515 U.S. 687, 708 (1995).
[16] Cynthia A. Drew, Beyond Delegated Authority: The Counterpart Endangered Species Act Consultation Regulations, Environmental Law Reporter News & Analysis, 37 Envtl. L. Rep. 10483, 10509-10 (2007), available at http://ssrn.com/abstract=991655.
[17] Reorganization Plan No. 4 of 1970, 84 Stat. at 2090.
[18] 462 U.S. 919, 959 (1983).
[19] 462 U.S. at 967-68 (White, J., dissenting) (noting that the Court's decision "sounds the death knell" for statutory provisions such as the Reorganizations Acts that relied on the legislative veto).
[20] Harold C. Relyea, CRS Report for Congress, Presidential Directives: Background and Overview, Order Code 98-611 GOV (2007). See also Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192, 3192 (1984).

nation. *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The consultation provision (16 U.S.C. § 1536) is the primary procedure to ensure that federal agencies comply with the ESA's substantive requirements and is an integral component of the ESA's comprehensive scheme. *See*, *e.g. Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) ("[T]he strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.").

The proposed amendments would revise the regulations governing consultation in a way that conflicts with specific statutory provisions, the purpose of the ESA, and the essential statutory function of the Services in ensuring that all other agencies comply with the ESA.[21] Accordingly, the rule is in conflict with the clear intent of Congress and, therefore, invalid.

2. *The Proposed Amendments Fail Under a Chevron Step One Analysis*

In *Chevron v. NRDC*, the Supreme Court established the familiar test for determining the validity of an agency's construction of the statute it administers. The first prong is:

> [W]hether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

467 U.S. 837, 842-43 (1984). The Services' proposed amendments fail under this analysis because they would alter several procedures explicitly mandated by the ESA, placing them in conflict with clear congressional intent.[22] This intent is easily discoverable upon examination of the plain meaning of statutory language, purpose, and design. It also fits within the consistent understanding of the U.S. Supreme Court and other federal courts in more than 30 years of jurisprudence.

The plain meaning of Section 7 reveals a statutory mandate of consultation. The key consultation provision of the ESA, Section 7(a)(2), establishes consultation as

---

[21] In the Proposed Rule, the Services occasionally argue that a proposed change "is within the intent of the current regulations." Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47868, 47869 (proposed Aug. 15, 2008). The appropriate test, however, is whether a change comes within the intent of *Congress* – that the prior regulations are well-established does not necessarily mean each would withstand scrutiny under a jurisdictionally proper challenge.

[22] Even if a stricter analysis under *United States v. Salerno*, 481 U.S. 739, 745 (1987), were applied, the rule would fail due to its direct conflict with the statute as outlined herein. *C.f. Wash. Toxics Coalition v. U.S. Dep't of the Interior,* 457 F. Supp. 2d 1158, 1176 (W.D. Wash. 2006) ("Plaintiffs' claims are (1) that the very terms of the counterpart regulations themselves violate ESA Section 7's command to federal agencies to consult with the Services . . . . If Plaintiffs are correct, then every application of the counterpart regulations necessarily violates the statute. . . . In other words, if Plaintiffs' claims have merit, the arguably stricter Salerno standard is met and there would be no set of circumstances under which the counterpart regulations could be valid because their very terms violate the relevant statute.").

a mandatory procedure in which the Services actively advise and assist the action agencies to ensure that Federal actions do not jeopardize listed species or destroy critical habitat. This section states:

> 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...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat....

16 U.S.C. § 1536(a)(2) (emphasis added). The mandatory nature of the action agency duty to consult is made plain by the use of the word "shall." *Bennett v. Spear*, 520 U.S. 154, 175 (1997). But, the statute also makes clear that the Services have a mandatory duty to collaborate with the action agencies. In *Washington Toxics Coalition v. U.S. Department of the Interior*, the court interpreted "consultation" as "[t]he act of asking the advice or opinion of someone (such as a lawyer)" or "a meeting in which parties consult or confer." *Id.* (citing Black's Law Dictionary (8th ed. 2004)). Thus, any "consultation" requires at least two parties. Use of the preposition "with" in the statute indicates clearly that one of the parties to consultation must be "the Secretary" (*i.e.*, the Services). *C.f.* Cynthia A. Drew, *Beyond Delegated Authority: The Counterpart Endangered Species Act Consultation Regulations*, 37 Envtl. L. Rep. 10483, 10504 (2007) (noting that "[b]oth the 'consulting' with and the 'assistance' to be had must be granted *from* the Secretary *to* each federal agency. The opposite relation could not within the strictures of the English language be signified by this grammatical structure"). Thus, by its terms, Section 7(a)(2) imposes a mandatory duty on the Services to actively consult and assist the action agencies in determining the impact of proposed actions on listed species.[23] *Cf. Thomas*, 753 F.2d at 765 ("Congress has assigned to the agencies *and to the Fish & Wildlife Service* the responsibility for evaluation of the impact of agency actions on endangered species, and has prescribed procedures for such evaluation." (emphasis added)).

The plain meaning of "consultation," coupled with the sentence structure employed in Section 7(a)(2), demonstrates that the Services have a duty to engage in the determination of whether an action is likely to jeopardize listed species or adversely modify critical habitat. Because Congress did not leave a gap for the Services to fill on this point, the Services' attempted transfer of

[23] The Supreme Court recently reinforced the compulsory nature of Section 7's consultation requirement. In *National Association of Homebuilders v. Defenders of Wildlife*, the Court concluded that each federal agency's Section 7 "mandate is to be carried out *through* consultation." 127 S. Ct. 2518, 2532 (2007) (emphasis added). In one of the cases underlying *National Homebuilders*, the Ninth Circuit had explained, "Section 7(a)(2) makes no legal distinction between the trigger for its requirement that agencies consult with FWS and the trigger for its requirement that agencies shape their actions so as not to jeopardize endangered species," further noting "[b]oth the consultation obligation and the obligation to 'insure' against jeopardizing listed species are triggered by 'any action authorized, funded, or carried out by such agency,' and both apply if such an 'action' is under consideration." 420 F.3d at 961. *Defenders of Wildlife v. EPA*, 420 F.3d 946, 961 (2005), *rev'd on other grounds* 127 S. Ct. 2518 (2007). Despite a reversal on the relationship of Section 7 to nondiscretionary duty, the Supreme Court's reasoning supports the Ninth Circuit's view of the consultation within the ESA context.

authority to make jeopardy decisions to the action agencies is unlawful.[24] *See Washington Toxics*, 457 F. Supp. 2d at 1179 ("'shall...in consultation with' cannot be read as 'no consultation on [not likely to adversely affect] NLAA actions.'"). Indeed, the proposed 50 C.F.R. § 402.03 would authorize, for the first time, situations in which "Federal agencies are not required to consult." Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47868, 47874 (proposed Aug. 15, 2008) (to be codified at 50 C.F.R. pt. 402); *see also* proposed 50 C.F.R. §§ 402.13 and 402.14.

The Services' proposed amendment to 50 C.F.R. § 402.02 is similarly unlawful. By defining documents prepared for other purposes as sufficient for initiating Section 7's consultation requirement, this measure conflicts with the section's requirement that, upon determination that a listed species is present in the action area, the relevant "agency shall conduct a biological assessment." 16 U.S.C. § 1536(c)(1). The statute speaks plainly and does not permit action agencies to substitute prior documents for a project-specific biological assessment. It is unlawful for the agencies to amend the statute by creating such exceptions.[25]

3. *The Proposed Changes Erode the ESA's Protective Purpose*

The consultation requirement is a key element of an overall protective framework established in the ESA. The protective framework of the ESA is apparent in its provisions, in court interpretation of the Act and in the legislative history. Even if an examination of the consultation provisions did not yield a definitive understanding of consultation, this overall protective framework of the Act requires strict interpretation of the ESA's provisions to favor species protection. *See Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001).

The ESA's explicit purpose is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for conservation of such endangered species and threatened species." 16 USC § 1531(b). The statute recognizes that species are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 USC § 1531 (a)(3). The statute reflects "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies," *Tenn. Valley Authority*, 437 U.S. at 185, and

[24] Such a transfer of authority is precisely the result of the Services' attempt to allow "action agencies to determine the effects of their own actions, without concurrence from the Service, in some very specific narrow situations." Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47868, 4769 (proposed Aug. 15, 2008) (to be codified at 50 C.F.R. pt. 402). The Services justify this effort by arguing that they seek to reduce the number of "unnecessary" consultations. Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. at 47871. However, the ESA does not grant the Services authority to reduce the scope of situations requiring consultation on the basis of the expected outcome of the process. Section 7 explicitly requires consultation to reach a "no jeopardy" conclusion, see 16 U.S.C. § 1536(a)(2) ("[I]nsure that any action . . . is not likely to jeopardize the continued existence of any endangered species"); it does not authorize a regulatory shortcut.

[25] Although the statute allows the biological assessment to "be undertaken as part of" an agency's compliance *with* NEPA, the statute does not allow recycling previously prepared NEPA or other documents, which the proposed regulation would. *Compare* 16 U.S.C. § 1536(c)(1) with 73 Fed. Reg. 47868, 47874.

unequivocally makes it unlawful for "any person" to "take" such species without authorization. 16 U.S.C. § 1538.

As the U.S. Supreme Court has held, "[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward 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." *Tenn. Valley Authority*, 437 U.S. at 184 (emphasis added). If the Services had adequately weighed this congressional intent, they could not seriously justify regulatory changes on the basis of expected interagency "efficiency" or a reduction in "the number of unnecessary consultations." 73 Fed. Reg. 47868 at 47869, 47871; *see also*, Drew, supra at 10506.

The Act's legislative history reflects the protective thrust of its statutory text. As the Supreme Court documented in *Tenn. Valley Authority v. Hill*,[26] the history of Section 7, in particular, illustrates Congress' unambiguous desire that agencies relegate their own policies to the survival of endangered species. The Endangered Species Act of 1966[27] stated that federal agencies should seek to preserve endangered species only "insofar as is practicable and consistent with [their] primary purposes," *Tenn. Valley Authority v. Hill,* 437 U.S. at 181, but this equivocal language was cut prior to the passage of the ESA. This expansion of Section 7 makes it one of the firmest mandates in any environmental statute.

In *Tenn. Valley Authority v. Hill*, the Court concluded that – despite multi-million dollar loss projections – the history and text of the ESA required it to enjoin completion of a nearly-finished federal project because of its impact on the endangered snail darter. After reviewing the ESA's history and purpose, the Supreme Court concluded that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording

---

[26] The Supreme Court in *Tenn. Valley Authority* analyzed the protective structure of the ESA through the language of the ESA itself:

> Congress expressly stated in § 2 (c) that "all Federal departments and agencies shall seek to conserve endangered species and threatened species . . .." Lest there be any ambiguity as to the meaning of this statutory directive, the Act specifically defined "conserve" as meaning "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 pursuant to this chapter are no longer necessary." Aside from § 7, other provisions indicated the seriousness with which Congress viewed this issue: Virtually all dealings with endangered species, including taking, possession, transportation, and sale, were prohibited, except in extremely narrow circumstances. The Secretary was also given extensive power to develop regulations and programs for the preservation of endangered and threatened species. Citizen involvement was encouraged by the Act, with provisions allowing interested persons to petition the Secretary to list a species as endangered or threatened, § 1533 (c)(2), and bring civil suits in United States district courts to force compliance with any provision of the Act.

437 U.S. at 179. (citations omitted).

[27] Later replaced by the Endangered Species Act of 1973.

endangered species the highest of priorities, thereby adopting a policy which it described as institutionalized caution." *Id.* at 194.[28]

The Court later reaffirmed *Tenn. Valley Authority's* central holdings in *Babbitt v. Sweet Home*, 515 U.S. 687 (1995). In that case, the Court noted the significance of *Tenn. Valley Authority* and upheld FWS's broad regulatory interpretation of "take" on the basis of, *inter alia*, "the broad purpose of the ESA" and "Congress' intent to provide comprehensive protection for endangered and threatened species." *Id.* at 698-99.

Federal Courts have also given effect to the Act's protective goals by requiring action agencies to "give the benefit of the doubt to the species," *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (internal quotation omitted), and observing that "Congress has determined that under the ESA the balance of hardships always tips sharply in favor of endangered or threatened species." *National Wildlife Federation v. National Marine Fisheries Service,* 422 F.3d 782, 794 (9th Cir. 2005) (quotes and citations omitted); *see also Center for Biological Diversity v. Lohn*, 296 F. Supp. 2d 1223, 1239 (W.D. Wash. 2003), *rev'd on other grounds*, 483 F.3d 984, 2007 WL 1217738 (9th Cir. 2007).[29] By sacrificing Congress' stated goals for administrative efficiency and convenience, the proposed amendments would impermissibly *reverse* this judicially recognized balance.

4. *The Proposed Changes Frustrate the Congressional Design of the ESA*

Other sections of the statute, as well as the ESA's overall design, are evidence of the unlawfulness of the proposed amendments. This is apparent both upon a closer examination of Section 7's structure and the relationship of the statute's other major provisions.

Section 7(a)(1) provides for the Services to utilize other programs they administer to promote the ESA's purposes. *See* 16 U.S.C. §1536(a)(1). It further states that "[a]ll other federal agencies shall, in consultation with and with the assistance of the [Services], utilize their authorities in furtherance of the purposes of" the ESA. *Id.* This provision creates a sweeping affirmation of authority to act on behalf of listed species.[30] *See Sierra Club v. Glickman*, 156 F.3d 606, 615-16 (5th Cir. 1998) ("Congress was clearly concerned with the conservation of each endangered and threatened species. To read the command of § 7(a)(1) to mean that the agencies have only a generalized duty would ignore the plain language of the statute.") Section 7(a)(2) then provides the needed precision by connecting the duties to the concrete contexts of federal agency action. Whereas Section 7(a)(1) is affirmative

[28] As detailed elsewhere in these comments, the Services' proposed consultation regulations impermissibly chip away at the carefully crafted "institutionalized caution" in the Act. *See e.g.* discussion of the proposed 50 C.F.R. § 402.03, *supra*.

[29] Indeed, this language has its origins in the legislative history of the ESA itself. H.R. Conf. Rep. No. 96-697, 96th Cong., 1st Sess. 12. ("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).")

[30] Similarly, Section 2(c)(1) provides that it is "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 [the ESA]." 16 U.S.C. § 1531(c)(1).

and broad-reaching, Section 7(a)(2) establishes the narrow, mandatory requirement that agencies must meet– actions shall not jeopardize listed species or adversely modify critical habitat.

We can also look to Section 7(b)(3)(A), which requires a post-consultation "written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." Of course, the Services must be involved in evaluating the proposed action for this written statement to serve any purpose. Through changes to 50 C.F.R. §§ 402.03, 402.13 and 402.14, the Services propose to grant agencies the authority to determine the effects of their own actions without concurrence from the Services. 73 Fed. Reg. 47868, 47874. Such changes would render Section 7(b)(3)(A) inapplicable to any situations within their scope, further illustrating the incongruence of the proposed amendments and congressional intent.

The ESA seeks to achieve its purpose through two primary mandates: the take prohibition in Section 9 and the consultation requirement of Section 7. *See* 16 U.S.C § 1538(a)(1)(B) ("[I]t is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States"). These two provisions function in tandem to provide the core requirements of the Act. *See Babbit v. Sweet Home*, 515 U.S. at 702-703. The ESA's reputation as a firm and powerful statute is derived, at least in part, from the nature of these two provisions which yield only in very limited circumstances as stated expressly in the Act. The mandatory nature of Section 9 is relieved only through explicitly allowed permitting under Section 10. *See* 16 U.S.C. § 1539(a)(1)(B) ("The Secretary may permit . . . any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."). Likewise, the mandatory nature of Section 7 can be eased only through the enacted exceptions processes in Section 7(e). *See* 16 U.S.C. § 1536(e)(2) ("The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application."). Accordingly, the Services' effort to eliminate supposedly "unnecessary" consultations, 73 Fed. Reg. at 47871, in fact contravenes the extensive coverage that Congress intentionally mandated for Section 7.

Given the long-recognized importance that Congress attached to the purposes of the ESA, the core function of Section 7 in assuring federal compliance with the statute further indicates its mandatory nature. *See* Drew, *supra* at 10506. Therefore, in addition to directly contravening the plain language of the statute, the proposed changes in 50 C.F.R. §§ 402.03, 402.13 and 402.14 are unlawful because they dismantle a core element of the protective framework of the ESA established by Congress. The statute demonstrates the critical role of the Services as the expert agencies for endangered species determinations. Accordingly, the protective purposes of the statute and the integral role of consultation in that framework would be impermissibly undermined by transferring threshold

consultation decisions to the action agencies – some of which have historically demonstrated insufficient consideration of the statute's protective framework. In some cases, at least, the proposed amendments implicitly transfer authority to make "no jeopardy" determinations to action agencies, in conflict with congressional intent.

Finally, the proposed amendments unlawfully impair the protective structure of the Act by injecting requirements that an action be (1) an "essential cause" rather than an "insignificant contributor," and (2) "reasonably certain" to occur based on "clear and substantial information" in order to trigger consultation. These requirements impermissibly create a qualitative threshold for consultation, whereas Section 7 clearly mandates consultation for *any* agency action. Contrary to the blanket statutory command, the proposed amendments would thus exempt an entire class of agency action from consultation. Like the proposed amendments' treatment of Section 7's biological assessments and consultation requirements, these alterations are unlawful because the Services, "in guise of interpretation" have in fact proposed to "[effect] change in statutory intent." *Quarles v. St. Clair*, 711 F.2d 691, 708 (5th Cir. 1983). In other words, because the changes create a situation in which actions that would be subject to consultation under a plain reading of the statute will not be subject to consultation under the regulations, the proposal conflicts with the protective nature of the Act.

5. ***The Proposed Changes Are Overbroad to Accomplish the Stated Goals***

Although the Services' proposed amendments are ostensibly aimed at streamlining bureaucracy and distinguishing climate change from other types of ESA issues, the striking breadth of the rule far exceeds these announced goals. The proposed changes would not simply alter administrative workflow; they would impermissibly re-distribute authority between the Services and the action agencies. For this reason, the regulations cannot survive the first step of a *Chevron v. NRDC* analysis.

By relinquishing its own expertise and authority to make decisions concerning the effect of proposed federal agency action, the Services' proposal undermines the broadly protective framework of the ESA established by Congress. As reflected in *Tenn. Valley Authority v. Hill*, ESA's legislative history, and, above all, the ESA itself, Congress did not intend to locate authority for such decisions with individual action agencies. Instead, Congress intended Service consultation early in the decision process as an essential element of an overall protective framework. The proposed amendments threaten to dismantle a crucial piece of the framework, stripping the designated expert agencies of the decisive authority to conclude whether an action agency's proposed project may jeopardize a protected species or adversely affect its critical habitat. Because they conflict with Congress' intended role for consultation in ensuring survival of species, the proposed amendments fail the first step of the *Chevron* analysis and the Services should withdraw them.

6. ***The Proposed Amendments Do Not Warrant Deference***

Even if portions of the proposed regulatory amendments are not contrary to the plain language of the Act, they will not warrant deference from the courts because they rely on rationales and conclusions outside the scope of the Services' expertise.

The ESA proposed amendments conflict with the foundations of American administrative law because they improperly excuse the Services from the responsibilities they are uniquely delegated and capable of performing. From the outset of the modern regulatory age, the legitimacy of legislative delegation of binding rulemaking authority has been premised upon the notion that the recipients of such authority possess the necessary expertise and specialized knowledge to accomplish substantive goals set by Congress. *See* Richard Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1678 (1975); Robert Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189, 1320 (1986) ("Since the New Deal, deference to the agencies had been rationalized in terms of expertise."); *see also Gonzales v. Oregon*, 546 U.S. 243, 266 (2006); *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-652 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."); *F.C.C. v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978).

The fact that Congressional delegation of tasks to agencies is rooted in reliance on expertise comports with historical interpretations of administrative law. For instance, the explosion of public interest legislation during the 1960s and 70s – of which the ESA is representative – has been summarized as Congress cabining agency expertise with more detailed delegations of authority. Rabin, at 1291 ("A new Congressional mood was evident – a willingness to go beyond the blank-check delegation of the past."). But this increased Congressional control relied on agencies' expertise in their respective fields. Congressional restrictions upon agencies were announced in the broad technocratic vocabulary of "lowest achievable emissions" and "best available technology." *Id.* At the foundation of the regulatory state is an implicit assumption that agencies may make law, and interpret broad terms such as "best available technology," because they are uniquely capable to answer the particular questions posed to them. *See Gonzales v. Oregon*, 546 U.S. 243, 266 (2006) (stating that "policymaking expertise" accounts for the presumption that Congress delegates authority to agencies); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 365 (1973) (noting Congressional strategy of enacting a broad statute and entrusting its "construction to an agency with the necessary experience" to render it effective).

The importance of expertise is interwoven into the development of judicial doctrine governing the review of agency action, and deference is limited to special authorized areas of expertise. *See Baltimore Gas & Electric Co. v. Natural Resource Defense Council, Inc.*, 462 U.S. 87, 103 (1983) (when agencies act "within [their] area[s] of special expertise, at the frontiers of science...a reviewing court must generally be at its most deferential."); *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 n.30 (noting less deference is owed where action is outside agency expertise); *Ardestani v. I.N.S.*, 502 U.S. 129, 148 (1991) *(*"This Court has indicated, however, that reviewing courts do not owe deference to an agency's

interpretation of statutes outside its particular expertise and special charge to administer.").

Therefore, Congressional reliance on agency expertise in delegation does not imply that judicial deference should extend to all agency decisions, but in fact requires the judiciary to ensure that agency actions are within their statutory authorization. For instance, in *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965), the Supreme Court reversed an order by the National Labor Relations Board and held that an employer did not violate the National Labor Relations Act when, after a bargaining impasse had been reached, he temporarily shut down his plant and laid off employees. *Id.* at 318. The Court noted that in making its determination, the Board stretched the NLRA "far beyond [its] functions" of protecting employee organization rights, and relied on a policy decision, not authorized by the Act, that the shutdown would give the employer "too much power." *Id.* at 317. The Court warned that a serious danger exists when an agency interpretation is "fundamentally inconsistent with the structure of the Act." *Id.* at 318. In these instances, "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions property made by Congress." *Id.*; *see also Bureau of Alcohol, Tobacco, and Firearms v. FLRA*, 464 U.S. 89, 97 (1983).

The proposed amendments constitute such an assumption of a major policy decision, and contravene the purpose of the ESA to provide protection for listed species on the edge of extinction. 16 U.S.C. § 1531(b) (ESA is intended to "provide a program for conservation of such endangered species and threatened species"); *see also Tenn. Valley Authority v. Hill*, 437 U.S. 153, 184 (1978). As demonstrated in Part II.B.7, supra, Congress carefully assigned responsibilities within the ESA to individual agencies in an effort to accomplish this purpose. Rather than pursuing the Congressional intent of reversing the trend toward species extinction, the Services have proposed an unauthorized policy decision by favoring expedience over species protection. As made clear in *Am. Ship Bldg.*, deference is not owed in such circumstances.

7. *The Transfer of Responsibilities by the Services to Other Action Agencies Is Contrary to Congress's Goals to Delegate Implementation to Expert Agencies*

In order to ensure that delegation within the ESA would be founded on expertise, Congress carefully assigned responsibilities to individual agencies. Contemporary scholars identified no fewer than five agencies specifically assigned to help, each in its own way, the Department of Interior to accomplish the goals of the act. *See* George Cameron Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D. L.Rev. 315, 328--29 (1974) (listing and detailing statutorily-assigned role of Departments of Commerce, Agriculture, and State, as well as Smithsonian Institution and Coast Guard). Two examples are particularly apt. First, in enacting the ESA, Congress lodged most species-listing and supervisory authority in the Secretary of the Interior. However, Congress assigned regulatory responsibility for certain

marine animal species to the Secretary of Commerce, and further required approval by the Secretary of the Interior for any listing decision. *See* 16 U.S.C. § 1533(a)(2)(A). Likewise, the Secretary of the Interior may not list, remove, or change the status of any species without a "prior favorable determination" by the Secretary of Commerce. 16 U.S.C. § 1533(a)(2)(C). In both cases, the text of the statute explicitly requires that listing decisions must be made "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b). This specific delegation of responsibilities, coupled with the "best science" requirement, indicates a conscious Congressional determination to assign responsibilities based on agency expertise.

The second example of this deliberate allocation of regulatory responsibilities involves the categorization of threatened and endangered plant species. The original ESA tasked the Smithsonian Institution with crafting lists of threatened and endangered plant species. 16 U.S.C. § 1541. The reasoning behind this allocation of authority was clear to the contemporary Interior and Commerce Departments: Those departments, admittedly, "kn[e]w little if anything about what plants [we]re threatened or endangered." Rudy R. Lachenmeier, *The Endangered Species Act of 1973: Preservation or Pandemonium*, 5 Envt'l L. 29, 78 (1979) (quoting Seminar for Federal Employees hosted by heads of relevant scientific and wildlife offices within Departments of Interior and Commerce). Congress reached outside of its typical stable of federal agencies to find a public institution with the relevant expertise to accurately categorize threatened species.

The Supreme Court in *Gonzales v. Oregon*, 546 U.S. 243 (2006) made clear that statutes, like the ESA, dividing agency authority based on expertise indicate a conscious Congressional structural determination; agencies have no power to evade or further delegate these responsibilities. In *Gonzales*, the Court noted that the Attorney General does not have sole delegated authority under the Controlled Substance Act ("CSA"), but rather he is required to "share it with and in some respects defer to, the Secretary [of Health and Human Services], whose functions are likewise delineated and confined by the statute." *Id*. at 265. For instance, the CSA allocates decision-making power among actors so that expert medical judgments are placed in the hands of the Secretary of Health and Human Services. *Id.* at 265. The Court stated that this "structure of the CSA, then, conveys unwillingness to cede medical judgments to an Executive official who lacks medical expertise." *Id*. at 266. In interpreting such "statutes that divide authority" the Court recognized that "[b]ecause historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency" the Attorney General does not have authority to make medical judgments, as he is not an expert. *Id*. at 266.

The *Gonzales* Court further elaborated that the notion that Congress would give the Attorney General such broad authority "through an implicit delegation" is not sustainable: "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions–it does not, one might say, hide elephants in mouseholes." *Id*. at 267 (citing *Whitman v. Am.*

Trucking Ass'ns., Inc., 531 U.S. 457, 468 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.")). Likewise, Congress specifically delegated lawmaking power in the ESA to the Services based on their expertise; an interpretation that they are implicitly authorized to evade those responsibilities is therefore unsustainable and contravenes the statutory purpose of protecting endangered species.

In crafting and enacting the ESA, Congress grappled with an acute institutional problem: how to allocate discrete responsibilities to each agency with relevant expertise while regulating interdisciplinary environmental threats. Administrative re-delegation of authorities under this Act would upset the careful institutional choreography established by Congress, and constitutes a major policy determination. Such broad authority cannot be permitted "through an implicit delegation."

III. THE PROPOSED CHANGES CONTAIN PROBLEMATIC SPECIFIC PROVISIONS

A. Definitions: "Cumulative Actions" and Exclusion of Future Federal Projects

The regulations propose to expressly[31] exclude from a cumulative impacts analysis any effects of future federal projects, even if those projects are relatively certain to occur, unless those projects already have been the subject of their own consultations. The Services theorize that those future federal actions will be the subject of their own consultations, and that their impacts will be addressed then. We have two concerns about this approach.

The first problem is that the assumption underlying this approach—that future federal actions that potentially affect species will receive their own consultation processes—is undercut by the rest of the proposed regulatory changes. By excluding from consideration effects that are not certain to occur, actions that make only "insignificant" contributions to species impacts, and actions that are not "essential causes" of species impacts, the Services would ensure that many future federal projects will not be the subject of consultation, even if those projects would have impacts upon species. Even if those projects individually would create only small effects, collectively they could create significant consequences, and if a cumulative effects analysis ignores those consequences, it will utilize an optimistically skewed baseline.

The second problem is that this categorical approach would sometimes create counterproductive blinders. If an agency knows it intends to pursue other future actions with potential species impacts, it would be wise to address those impacts in its cumulative effects analysis. Otherwise, the agency may miss opportunities to adjust the first project in ways that might allow the second to proceed without

[31] The current regulations imply the existence of this exclusion, and the changed language would clearly state that it exists.

a jeopardy determination, or might squander an opportunity to prepare a more comprehensive species-protection strategy. That does not mean that agencies should be required to address every potential future project; we think it is reasonable to empower action agencies to set some boundaries on the scope of their analyses. But flatly prohibiting agencies from addressing any future federal project, and thus requiring agencies to place what sometimes will be artificial blinders on the consultation processes, could undercut the efficiency and wisdom of agency decision-making.

B. Definitions: "Essential Cause" and Effects Would Occur Regardless of the Action

The proposed regulations would define "effects of the action" to include only those effects for which the action is an "essential cause." But neither the regulations nor the preamble clearly or consistently define "essential cause," and the term does not carry a self-evident meaning. Additionally, the preamble's application of the "essential cause" concept to climate change suggests a flawed understanding of climate change causality (or, alternatively, suggests an unreasonably narrow definition of "essential cause").

The proposed regulation appears to supply two different definitions of the term "essential cause." The first definition suggests that essential causation is synonymous with but-for causation: "the effect would not occur 'but for' the action under consultation and the action is indispensable to that effect." 73 Fed. Reg. at 47870. That definition appears consistent with traditional legal usage of the term "essential cause." The term rarely appears in judicial decisions and is not an accepted term of art like "proximate cause," but when it does it appear it typically denotes a but-for cause, which need not be the sole or exclusive cause of an effect. *See, e.g., State of Md., for Use of Pumphrey v. Manor Real Estate & Trust Co.*, 83 F.Supp. 91, 102 (D.C.Md. 1949).

In the following paragraph, however, the preamble implies that "essential cause" means something else. The preamble states that "[w]e propose to add the word 'essential' to capture the requirement that in some instances there needs to be more than a technical 'but for' connection," suggesting that but-for causation is necessary but not sufficient for essential causation. 73 Fed. Reg. at 47870. The preamble does not say what else is necessary, however, and the hypothetical example that follows is not illuminating. The preamble describes a permitting decision for the installation of a pipeline, which will cross a waterway subject to federal jurisdiction. If the pipeline cannot be constructed without crossing that waterway somewhere (the hypothetical does not state whether an alternative route might avoid crossing jurisdictional waterways) the issuance of that permit will be a but-for cause of the other impacts of pipeline construction, for the pipeline could not be built without the permit. Using the phrase "essential cause" traditionally, the permit therefore would qualify as an essential cause of the environmental impacts of constructing the whole pipeline; no matter what route it takes elsewhere, it cannot be constructed, and therefore it and its impacts will not exist, but for that permit. Yet the example suggests that this level of

causation might not be enough, without clarifying what would be. That leaves the meaning of "essential cause" murky, and that meaning should be clarified.[32] *See also* supra Part I.A (discussing pipeline hypothetical).

While the preamble is unclear here as well, there appear to be problems with the Services' intended application of the "essential cause" concept to climate change. The preamble suggests that the Services believe that no single project ever could be the "essential cause" of climate change, for climate change is occurring, and will continue to occur, with or without any individual project's emissions. Adding another project's emissions, in the Services' apparent view, therefore is analogous to adding another gunman to an already overstaffed firing squad; the outcome will not change.

But climate change, and the secondary effects that follow from it, are fundamentally different than the firing squad outcome, for they can occur to greater or lesser degrees, Moreover, climate scientists concur that while the relationship may not be exactly linear, the degree of climate change will be proportional to the amount of emissions. Consequently, adding another emissions-causing action is not analogous to adding another gun to the firing squad; the outcome will change, for climate change, and the secondary effects it creates, may be slightly accelerated. The increment of change may be small, but it is real. One might say that an individual action's emissions are a contributing cause to the overall extent of climate change, or that the individual action's emissions are the essential and exclusive cause of an incremental worsening of climate change—either description amounts to the same thing—but either way, each individual project may affect overall outcomes, and cause an adverse effect on any species threatened by climate change.

---

[32] We do not think the Services intend "essential cause" to mean "exclusive cause." If, however, that is the services' intent, there are huge problems with that approach, for, as discussed above and explained in more detail below, neither the courts nor the Services have ever interpreted the ESA to leave species unprotected where they face threats from multiple causes. Indeed, because most species face threats from multiple causes, such a meaning would amount to a regulatory repeal of the entire statute.

Another possible meaning of "essential cause" is "non-redundant cause"—that is, a cause, like the addition of the extra person to the firing squad, that clearly has no effect on the ultimate outcome. We caution, however, that in endangered and threatened species protection, such non-redundant causes are extremely rare, and will be difficult to identify even if they do exist. Because of scientific and human uncertainties, scientists rarely can be entirely certain that a trend will continue; indeed, empirical evidence suggests that with time and effort, many species can be helped. *See* Jeffrey Rachlinski, *Noah by the Numbers: An Empirical Analysis of the Endangered Species Act*, 82 Cornell L. Rev.. 356 (1998) ("Each aspect of the Act's protection—listing, designating critical habitat, and adopting a species recovery plan—benefits listed species. In short, the Act works.") An additional cause therefore is rarely redundant, for it usually will increase the odds against the species. Moreover, even if a new action affects only a species that clearly is already doomed, it may still change outcomes by accelerating the species' demise. The Services' apparent focus on the certainty and exclusivity of the link between agency actions and species effects is thus exactly backwards: when asking if a cause is non-redundant, the focus should be on whether the link between the *other* causes and the effects are conclusively established.

We therefore suggest that the Services avoid using the term "essential cause," or, if they do use it, define it more clearly. A clearer term would be "non-redundant cause," or an "essential cause" could be defined as a non-redundant cause.

C. Definitions: "Effects of the Action" and the Exclusion of "Insignificant" Contributors

In paragraphs b(2) and b(3), the Services propose to exclude from consultation any effects that are "insignificant contributors" to jeopardy or to adverse consequences upon species or their habitat. The regulations do not clarify what exactly would qualify as an "insignificant contributor"; interpreting that term instead would be left to the action agencies. But even in its present ambiguous form, this change creates inconsistencies with statutory language and design.

The ESA itself states that an action is subject to Section 7's procedural and substantive constraints if that action is likely to "result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. 1536(a)(2). No degree modifiers accompany that language; the statute does not say "significantly adversely modify," "substantially adversely modify," or anything else to that effect. The literal meaning therefore is that any adverse modification of critical habitat, regardless of scale, is subject to Section 7's constraints, and that meaning at the very least creates a consultation requirement.

Likewise, the ESA requires consultation if an action is likely to jeopardize the continued existence of the endangered species. 16 U.S.C. 1536(a)(2). Again, the statute says nothing suggesting that the action at issue must make an exclusive contribution to causing jeopardy, and both the Services and the courts have consistently found that contributing causes are capable of causing jeopardy. *See, e.g., Defenders of Wildlife v. Babbitt*, 130 F.Supp.2d 121 (D.D.C. 2001) ("The BO must also include an analysis of the effects of the action on the species when 'added to' the environmental baseline-in other words, an analysis of the *total* impact on the species."). Under that traditional approach, a project with a small adverse effect still would necessitate a jeopardy finding, if its impact, when added to the total impact of other projects affecting the species, would likely cause jeopardy, and the action agency would not be able to avoid that finding by characterizing the action's consequence as insignificant.

There are good reasons for this approach. Environmental laws often confront large problems that result partly or even primarily from small harms—harms that would likely seem insignificant to their perpetrators. We require best management practices for individual stormwater discharges and smog tests for individual cars, to provide just two examples, not because each pollution source would cause noticeable problems on its own, but because the collective effect of many environmental incursions is significant degradation—degradation we can reverse only by addressing its individual causes. Nor is that insight unique to environmental law; we enforce tax laws—and, conversely, zealously protect individuals' rights to vote—precisely because we aware that actions that seem individually insignificant collectively create important consequences. Though we

cannot trace those individual contributions to ultimate actions—it would be absurd to ask which vote won an election, for example, for all votes count equally, and we would never ask a person defending his right to vote to demonstrate that he would have cast the winning ballot—we do know that every individual action incrementally affects the likelihood of the ultimate outcome.

That same phenomenon is centrally important to endangered species protection. The primary threats to endangered species—things like habitat degradation, poaching, or pollution—often arise from the collective effect of many individually minor actions. Whether the species is at risk because many people individually take a few animals, or because lots of individual developers cause incrementally small but collectively significant incursions into habitat, or because of many small contributions to environmental pollution—or some combination of many such factors—species often become vulnerable not because of one major action, but because of lots of little ones. Because those actions seem individually small, the individual actors may not appreciate the significance of their small contribution to the larger problem. To exempt from regulatory coverage any action that seems to be insignificant, therefore, is to expose many species to heightened threats of extinction through a slow whittling away at their numbers, or through incremental loss of the habitats they need for survival. Indeed, in some contexts, that exemption might lead to the absurd conclusion that there is no significant cause of a species' extinction, even if that extinction clearly is caused by human factors.

Recognizing that threat, courts already have rejected approaches quite similar to those that the Services now propose. In *National Wildlife Federation v. National Marine Fisheries Service*, for example, the Ninth Circuit considered the legality of a jeopardy analysis that began by asking whether the action at issue would cause the species' condition to become "appreciably worse." 524 F.3d 917, 929-30 (9th Cir. 2008). "Under this approach," the court warned, "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 the ESA seeks to prevent." *Id.* at 930; *see also Pacific Coast Federation of Fishermen's Associations, Inc. v. National Marine Fisheries Service*, 265 F.3d 1028, 1036 (9th Cir. 2001) (rejecting a claim that projects in individual watersheds were too small in scale to affect overall species recovery, for a broader recovery plan "does nothing to restore habitat over broad landscapes if it ignores the cumulative effect of individual projects on small tributaries within watersheds"). The *National Wildlife Federation* court cautioned that "an agency may not take action that will tip a species from a state of precarious survival into a state of likely extinction. Likewise, even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm." *Id.* Yet that is exactly what these proposed regulations would purport to allow: modest, but collectively destructive, steps toward extinction or habitat degradation could occur without even triggering the consultation process. Neither specific statutory language nor the overall statutory structure and purpose allow that result.

The proposed new regulations would compound that problem by changing institutional roles. By stating that action agencies, rather than the Services, will judge what counts as significant, the regulations would delegate a key choice to agencies peculiarly ill-suited to make that choice, and would remove the Services from any role in reviewing that choice. Individual action agencies are far less likely than the Services to be able to take a broad view of cumulative impacts; they are likely to be focused narrowly on the individual consequences of their projects, and have no reason to be cognizant of other threats to the species. Indeed, they have a strong incentive toward bias; acknowledging that their action's small effect plays an incremental role in a larger problem will compel them to shoulder the procedural tasks required by the ESA, and they may therefore prefer to simply label their actions' consequences as insignificant. The Services, by contrast, are charged with taking a broader view of species health, not just through consultation processes but also through listing decisions and recovery planning. They therefore are much more likely to realize how small impacts fit into the larger picture of species health, and are more likely to realize when jeopardy is the likely consequence of a series of small harms.

To say that this proposed approach is illegal does not mean that the ESA must prohibit *any* action that would have a negative impact on listed species or their critical habitat. Even if the species has reached a point where any additional strain will cause or exacerbate jeopardy, the ESA provides several tools that could allow the agency to act. Through habitat conservation plans, recovery plans, or conservation measures developed pursuant to ESA Section 7(a)(1), action agencies and the Services can create affirmative protection and recovery measures sufficient to compensate for some minor incursions into species habitat or for some limited take of the species. The Services might build sufficient protection into those measures to more than compensate for the consequences of small-scale adverse effects, and then might reasonably allow such effects to proceed without jeopardy determinations. But the Act itself, with its clear overall mandate for protection and recovery of listed species, and judicial authority, with its prohibition on incremental slides toward extinction, requires that the cumulative effect on species' habitat be at least neutral, and precludes adding additional strain to a species already facing jeopardy from the cumulative consequences of other activities. To allow that slow slide by giving agencies license to ignore any effects they deem insignificant *without* any compensating measures, as these proposed regulations would do, is not consistent with the statutory language, purpose, or structure.

D. Definitions: "Effects of the Action" and the Requirement that Effects Must Be "Reasonably Certain" to Occur

The proposed regulation would add language stating that "effects of the action" are only those effects that are "reasonably certain" to occur.[33] For both legal and policy reasons, there are problems with that language.

[33] The preamble states that the current regulations also contain this requirement, and that an effect "must be 'reasonably certain to occur' before it can be included in the effects analysis." In fact, the current regulations state only that "indirect effects" must be reasonably certain to occur,

Most importantly, this regulatory language will create outcomes inconsistent with the plain text of the statute. Section 7(a)(2) requires each federal agency to, "in consultation with and with the assistance of the secretary, 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 result in the destruction or adverse modification of (critical) habitat" (emphasis added). 16 U.S.C. 1536(a)(2). Consequently, if a federal agency action would "likely" cause an effect that will jeopardize a listed species or adversely modify its critical habitat, the agency must consult on that action (or not proceed with it at all).

However, under the proposed new regulatory language, if a federal agency action will likely cause an effect, but that effect is not "reasonably certain" to occur, that effect will not be considered an "effect of the action" at all—even if it would lead to jeopardy if it did occur.[34] Because the regulations state that actions without effects on listed species may proceed without consultation, and "effects" do not include consequences that are not reasonably certain to occur, this action could simply proceed without consultation, even though, in the real world, the likely consequence would be jeopardy. The regulation would insert a certainty standard where Congress selected a likelihood standard, and therefore is facially inconsistent with the statute itself.

A straightforward hypothetical illustrates the significance of this divergence. Suppose a federal agency proposes to build a road through an endangered bird species' critical habitat. Agency scientists determine that road construction and use are likely to diminish the value of that habitat for the species. However, because of scant data on the species' reactions to human incursion, the scientists are not reasonably certain that the adverse effect will occur; they concur that, while a more favorable outcome is unlikely, the species might turn out to be indifferent to and unaffected by the presence of pavement and passing vehicles. Under the statutory standard, construction of that road is clearly subject to Section 7, for an adverse effect is likely. But under the regulatory "reasonably certain to occur" standard, that effect is not cognizable at all; while likely, it is not reasonably certain to occur. The regulation therefore would conflict with the statute, for it would exempt from Section 7 coverage a project to which the statute clearly applies.

---

and establish no such requirement for direct effects. 50 C.F.R. 402.02. The categorical requirement that direct effects be "reasonably certain to occur" therefore would be a regulatory change.

Moreover, the fact that the old regulations state that indirect effects must be reasonably certain to occur does not make that requirement legal, for time cannot cure a conflict between a regulation and the statute it purports to implement. See, e.g., *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) (holding that another part of the 1986 regulations creates an illegal conflict with the statute); *Sierra Club v. United States Fish and Wildlife Serv.*, 245 F.3d 434, 441-42 (5th Cir.2001) (same).

[34] The preamble leaves no doubt on this point, stating that "[o]ur intention is to make it clear that the effect cannot just be speculative and that it *must be more than just likely to occur*" (emphasis added).

That divergence could create dramatic consequences for ESA implementation. Because of informational limitations and the inherent variability of environmental conditions, agency scientists often face great difficulty achieving reasonable certainty that agency actions will cause particular environmental effects. Reasonable certainty about environmental consequences is probably the exception, not the norm—as one NMFS administrator recently put it, "[i]f a biological opinion was a science document, on a par with those that appear in peer-reviewed journals, it would conclude that we don't have enough information to make a decision"[35]—and under a "reasonably certain" standard, Section 7 consultations, and the protective steps they generate, therefore would be rather rare. More often, however, agency scientists can predict that effects are at least likely to occur, for that is a substantially different bar. The statutory language therefore provides species with much more protection.

There also are problems with the preamble's proposed application of the "reasonably certain to occur" concept to climate change. The preamble suggests that climate change impacts to endangered species will not qualify as "reasonably certain to occur." But while environmental science is filled with uncertain chains between causes and environmental effects, with climate change the causal chain is relatively certain. There is no real doubt that climate change will cause adverse impacts upon endangered species and their habitat; those effects already have been the basis for multiple listing decisions, and the IPCC predicts that huge numbers of other species will be adversely affected. *See* IPCC, Climate Change 2007, Impacts, Adaptation, and Vulnerability: Summary for Policymakers (2007). There is no real doubt that human greenhouse gas emissions are a major cause of climate change, and that increasing the amount of greenhouse gas emissions will increase the extent of climate change and the severity of secondary effects. *See* Intergovernmental Panel on Climate Change, Climate Change 2007: The Physical Science Basis, Summary for Policymakers (2007). And if an agency action creates an aggregate contribution to greenhouse gases, there is no uncertainty that it increases the overall total, and therefore contributes to adverse impacts upon listed species and their habitat.[36] While the science of endangered species protection is filled with highly uncertain causal chains, the link between agency actions causing greenhouse gas emissions and adverse consequences for climate-affected species is not one of them.

E. Definitions: "Effects of the Action" and Clear and Substantial Information

The proposed rules also supplement the "reasonably certain to occur" language with language requiring such certainty to be demonstrated by "clear and substantial information." That regulatory language also suffers from inconsistency with the statute itself.

---

[35] Sharon Levy, *Turbulence in the Klamath River Basin*, 53 Bioscience 315, 320 (2003).

[36] Carbon dioxide and other primary greenhouse gases are long-lasting and well-mixed, which means that emissions from all sources blend together in the atmosphere. *See* Myles Allen et al., *Scientific Challenges in the Attribution of Harm to Human Influence on Climate*, 155 U. PA. L. REV. 1353, 1358 (2007). Consequently, unlike emissions of other pollutants like ozone precursors, whose impact depends in part upon the location of emissions, there is no time or location at which GHG emissions are inconsequential.

While this language purports to create an informational standard, the ESA already has an information standard, and it is not the same. According to Section 7(a)(2), "each agency shall use the best scientific and commercial data available" when evaluating agency actions' effects upon species. The word "available" carries important meaning, for in endangered species protection, as in other areas of environmental policy, the best available scientific information does not always point to clear conclusions, and agencies must act on the basis of information incapable of supplying clarity or removing doubt. *See Ethyl Corp. v. EPA*, 541 F.2d 1, (D.C. Cir. 1976) (observing, in a statement as applicable to endangered species protection as it is to risk assessment, that "regulators entrusted with the enforcement of [environmental] laws have not thereby been endowed with a prescience that removes all doubt from their decision making. Rather, speculation, conflicts, and theoretical extrapolation typify their every action."). By requiring agencies to work with the "best available" science, Congress directed agencies to proceed despite such ambiguities or information gaps—to "utilize the 'best scientific data *available,*' not the best scientific data *possible*." *Building Industry Association of Superior California v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001) (emphasis in original); *see Greenpeace Action v. Franklin*, 14 F.3d 1324, 1337 (9th Cir. 1993) (upholding a biological opinion based on admittedly uncertain studies). Requiring "clear and substantial information" sets a very different standard, for it would require agencies to ignore the best available scientific and commercial data if those data contain ambiguities.

A plausible elaboration of the bird-and-highway hypothetical illustrates the potential problem. Imagine that the agencies base their conclusions on three scientific studies. All of the studies were peer reviewed, and all were authored by respected researchers. But two of the studies address a closely-related species, and the third, while addressing the species at issue, deals with kinds of habitat change other than road building. There simply are no outside studies of the effects of traffic on this particular species. Agency biologists agree that those studies are the best and most relevant that they have to work with, and are somewhat confident in their ability to extrapolate from those studies to conclusions about the species at issue, but are not certain about their conclusions. This scenario is not at all implausible; quite often, Services biologists must predict species impacts without access to studies directly on point, and they do not have sufficient time or funding to fill those gaps by commissioning new studies. *See generally* Holly Doremus, *Data Gaps in Natural Resource Management: Sniffing for Leaks along the Information Pipeline*, 83 Indiana L.J. 437 (2008) (explaining the informational deficits commonly facing agency scientists, and the reasons why those deficits exist).

According to the statute itself, the agency scientists clearly would act lawfully in relying upon those studies to determine the effects of the action. In fact, they would have no choice, for they would be relying upon the "best available" science, and that is exactly what the statute requires. *See Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 679

(D.D.C., 1997).[37] But under the proposed regulatory standard, that information would be irrelevant, for the agency scientists would not describe it as "clear." The proposed regulatory language therefore sets up an informational standard directly at odds with the one created by Congress.

That heightened standard also compounds problems with the "reasonably certain to occur" language. To require scientists to produce "clear and substantial" information demonstrating a likelihood of harm already is a high burden, for agency scientists frequently must make do with information that is not clear. But to require "clear and substantial" information demonstrating a "reasonable certainty" of harm creates a nearly impossible burden. For any species whose behavior or needs are uncertain—and that means many, if not most, species—Section 7 would offer hardly any protection at all. That outcome is hardly consistent with a statute commonly described as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Authority v. Hill,* 437 U.S. 153, 180 (1978).

F. There Is Statutory Evidence that the Services Do Not Have Authority to Make the Proposed Broad Exclusions from the Consultation Requirement:

1. *Section 402.03(b) (in general)*

Proposed Section 402.03(b) offers a list of types of actions on which federal agencies are "not required to consult." No language in ESA Section 7 suggests that the Services have the authority to identify such blanket exceptions. Many provisions indicate they do not.

The plain language of the ESA does not allow any exemptions for Section 7 consultation. But, the proposed regulations remove entire categories of actions from all ESA Section 7 consultations. *See* Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47868, 47874 (Aug. 15, 2008) to be codified at 50 C.F.R. pt. 402. Congress used the word "shall" to describe the duty to consult with the Services in order to "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 destruction or adverse modification of habitat . . . ." 35 U.S.C. 1356(a)(2). "Shall," when used by Congress, implies a mandatory duty. *Lopez v. Davis*, 531 U.S. 230,

[37] In *Defenders*, the FWS, attempting to use an approach much like that now proposed, had stated that it would only list a species as endangered if "conclusive" information supported the listing (listing decisions also are subject to a "best available science" standard). The court rejected that approach:

> The statute contains no requirement that the evidence be conclusive in order for a species to be listed. Application of such a stringent standard violates the plain terms of the statute, and therefore justifies reversal of the agency's decision… The statutory standard, requiring that agency decisions be made on the 'best scientific and commercial data available', rather than absolute scientific certainty, is in keeping with congressional intent in crafting the ESA. Congress repeatedly explained that it intended to require the FWS to take preventive measures *before* a species is "conclusively" headed for extinction.

Id. at 679-80 (emphasis in original).

241 (2001) (noting that Congress' use of "shall" imposes "discretionless obligations"). Consultation requires the involvement, at some level, of the Services in each determination regarding each agency action's effects on all endangered or threatened species and their habitat.

For instance, Section 7(c) lays out the biological assessment process:

> To facilitate compliance with the requirements of subsection (a) (2) of this section, each Federal agency shall . . . 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 for the purpose of 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).

While the current regulations limit the requirements of Section 7(c) to "major construction activities," 50 C.F.R. 402.12(b), the proposed regulatory changes would go far beyond the current regulation by applying a series of new exemptions (e.g., "insignificant impacts" or "remote" impacts) to *all* activities. But the statutory provision does not provide on its face for *any* exceptions (except for a timing provision that is irrelevant for contemporary purposes). Thus, the proposed blanket provisions would be contrary to the ESA by creating new exemptions to portions of the consultation process for which Congress imposed a mandatory consultation duty.[38]

The only argument the Services can assert to reconcile their proposed blanket exemptions and the clear mandate of Section 7(c) is to assert that preparation of a biological assessment is somehow not part of the consultation process. The statutory language at the beginning of Section 7(c) ("To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall") contradicts this assertion. The ESA Section 7 Consultation Handbook, March 1998, which has governed U.S. Fish and Wildlife Service Consultations for ten years, clearly indicates that preparation of a Biological Assessment under Section 7(c) is part of the consultation process, *see* Chapter 3, Figure 3.1.

The Services assert:

> The Services are proposing these changes to the applicability of Section 7 as part of our administrative authority and interpretive authority under the Act. The Services have the authority to determine what constitutes "consultation" and when consultation is triggered . . . . [T]he Act does not

[38] In the proposed rule, the Services occasionally argue that a proposed change "is within the intent of the current regulations." Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47868, 4769 (proposed Aug. 15, 2008). The appropriate test, however, is whether a change comes within the intent of *Congress* – that the prior regulations are well-established does not necessarily mean each would withstand scrutiny under a jurisdictionally proper challenge.

> define "consultation" nor does it define when the consultation obligation is triggered.

To the extent the Services are correct that they have administrative authority to define certain aspects of the form "consultations" must take under the Act, this is authority they have not formally exercised.[39] Rather, as the example above demonstrates, they have crafted blanket exemptions to a statutory "consultation" process.

> As another example, consider ESA Section 7(a)(3), which provides:
>
> [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. 16 U.S.C. § 1536(a)(3) (emphasis added).

Not all federally authorized projects may be subject to the Section 7(a)(3) "early consultation process." However, for those that are, the action agency *must* consult with the Services where the applicant has "reason to believe" that a listed species is present in the action area and the action "will likely affect such species." Again, there are no additional requirements for this mandatory duty. However, the proposed regulations would create additional requirements, requirements that are not consistent with the minimal requirements for "early consultation" (applicant has "reason to believe" the presence of listed species and "likely effect" on listed species).

As a third example, consider the role played by the Endangered Species Committee in the Section 7 consultation process. Congress specified only one exemption to the protections of Section 7, which it clearly and carefully defined and limited. 35 USC 1536 (e)-(h) (establishing the "God Squad," which determines when to allow a federal action to proceed despite known risks to species); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2546 (2007) (Stevens, J., dissenting) ("Congress carefully laid out requirements for the God Committee's membership, procedures and the factors it must consider in deciding whether to grant an exemption . . . . [T]he God Committee embodies the primacy of the ESA's mandate and serves as the final mechanism for harmonizing that Act with other federal statutes.") Thus, no other discretion should be implied to exist elsewhere. Even this single exemption only can occur after the completion of consultation. 35 USC 1536(g)(1); *Wash. Toxics Coalition v. United States DOI,* 457 F. Supp. 2d 1158, 1179 (W.D. Wash. 2006) (Congress has left no gap that could allow agencies to avoid consultation). The detailed strictures required to allow an exception to the mandate of Section 7 makes clear that consultation, and indeed the protection for species intended to follow that consultation, occur. Regardless of whether consultations are inefficient or

[39] Of course, even if they did exercise that authority, the form could not conflict with the dictates of the statute. *See Chevron*, 467 U.S. at 842-43.

burdensome, as the Services claim, they are required by the statute itself, and intended by Congress. Thus at step one of the *Chevron* analysis, the result is clear: exemptions to Section 7 consultation cannot be created by regulation.

The broader point here is not that just these provisions are in conflict with the proposed regulations. These provisions are evidence of Congressional intent, in the drafting of the consultation process, to establish a broad, protective, mandatory scope for the consultation process. The proposed regulations are in tension with that scope.

2. ***Section 402.03(b) ("No Take")***

In an apparent attempt to mitigate the effect of its blanket exemptions and comprehensive shift of authority from expert agencies to action agencies, the first paragraph of proposed Section 403.03(b) provides that its exemptions to consultation only apply if an action potentially subject to consultation is "not anticipated to result in take." While the proposed regulation itself is ambiguous, the preamble makes clear that federal action agencies may unilaterally make the determination as to what actions are "not anticipated to result in take."

> For all the subparagraphs set out under paragraph (b) a threshold requirement is that no take is anticipated. Action agencies must be aware that when they make a determination that their action falls under one of the subparagraphs of paragraph (b), they are asserting that they do not anticipate take.

This provision conflates two distinct regulatory components of the ESA without altering the illegal affect of proposed Section 403(b).

The protections offered by Section 7 and Section 9 (prohibiting species "take") differ in three significant ways. First, Section 7 protects all threatened and endangered species of plants and animals and all designated critical habitat, while Section 9 only protects species of fish and wildlife (threatened wildlife species are protected by regulation) listed pursuant to Section 4 of the Act. 16 U.S.C. § 1533. Second, Section 7 protects species as a whole, while Section 9 protects every member of every species of endangered fish or wildlife. Finally, Section 7 applies only to actions authorized, funded, or carried out by federal agencies, while Section 9 prohibits takings by any "person."

To authorize otherwise prohibited take associated with an action subject to Section 7 consultation, Congress provided the explicit multi-part process set forth in Section 7(b)(4)/(o)(2). These provisions begin by requiring a "no jeopardy" determination through consultation with the "Secretary" and ends with the authorization of incidental take. Congress never suggested that an action that is not anticipated to result in take should be automatically exempt from consultation.

More generally, take is not the only cause of species jeopardy and, therefore, an absence of take does not necessarily mean that a species is not in danger of extinction. For instance, scientists generally agree the habitat loss is the primary cause of species extinction. *See* Species Survival Commission, *Species Extinction: The Facts*, at 2, *available at* http://cmsdata.iucn.org/downloads/species_extinction_05_2007.pdf. The final rule promulgating the current definition of "harm" in the meaning of "take," "makes it clear that habitat modification or degradation, standing alone, is not a taking pursuant to Section 9." Fish and Wildlife Service, *Endangered and Threatened Wildlife and Plants; Final Redefinition of "Harm"*, 46 Fed. Reg. 54780 (Nov. 4, 1981).

There are two specific reasons that we are concerned that the "no take" provision will not necessarily eliminate all situations where there may be impacts to species that could rise to the level of jeopardy. First, as noted above, the determination of whether or not an anticipated take would occur would be made by the action agency. (Otherwise, the purported benefits of paperwork reduction from the regulatory changes would be non-existent, as the action agency would need the "no take" conclusion to be ratified by the Services.) But, as noted above, there are reasons to be skeptical that action agencies, when faced with limited or non-existent data, will conduct analyses that will be protective of listed species at the cost of interfering with the action agencies' own missions and goals. Instead, action agencies may interpret limited data about the possibility of a take from an action in a manner that is favorable to the proposed action and minimizes the possibility of a future take, or may not develop new or additional information that would allow for a better analysis of the question of take. Again, given the limited or non-existent information that often exists about listed species, the result may be that action agencies consistently underestimate the possibility of take – resulting in a much larger application of the proposed exemptions from the consultation requirements.

Second, there can be a wide range of situations where there is not an imminent or anticipated take that will directly result from the agency action, but where there may nonetheless be serious adverse future effects from the proposed action. These problems are particularly likely because of the interaction of the agency's proposed changes to the causation standards in the regulations and the consultation exemptions. As a result, there may be situations where (because of the causation standards that the agency has proposed) it is difficult to show that take will occur as a result of an action. However, the impacts of the action might nonetheless be significantly negative.

As an example, consider the impacts of an agency action that would destroy suitable, but unoccupied habitat for a listed species. That action, at least according to some courts, would not constitute take. *See Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Service,* 273 F.3d 1229 (9th Cir. 2001). At some point in the future, the species requires a shift or expansion of its range into the unoccupied habitat in order to survive. However, the destruction of the unoccupied habitat makes this change in range impossible, and the species

accordingly goes extinct. Under the revised regulations, no Section 7 consultation need take place for the original agency action.

The above hypothetical is not an improbable one. As one example, many species require extensive movements across the landscape to obtain a full range of resources for feeding, shelter, and breeding, even if they do not occupy all of that landscape at all points in time. As another example, consider the concept of metapopulation dynamics in conservation biology, which would indicate that the existence of suitable, unoccupied habitat that can be colonized in the future by the species may be essential for the future survival of the species. As a third example, consider a catastrophic event for the species – such as a hurricane or major fire – that renders existing occupied habitat unsuitable and so requires the species to move to new unoccupied habitat to survive. As a fourth example, consider climate change, which conservation biologists have established will require major range shifts for many species to survive. *See, e.g.*, Camille Parmesan, *Ecological and Evolutionary Response to Recent Climate Change*, 37 Annual Review of Ecology, Evolution and Systematics 637 (2007) (documenting scientific evidence of range shifts and other ecological and evolutionary changes by species in response to climate change). If unoccupied habitat that is now suitable for the species because of climate change is destroyed by federal actions, such destructions may well result in the extinction of the species because its currently occupied habitat is no longer suitable.

As another example of the potential for jeopardy without take, there is the possibility of a federal action that greatly increases the risk of a catastrophic event that would drive the species to extinction, but may also never result in any adverse effects to the species at all. For instance, a dam may be constructed above the sole population of a listed species. The failure of the dam would wipe out the species, but that event may never occur. There is no anticipated take, but the federal action may nonetheless create the possibility of jeopardy.

In all of the above scenarios, it is possible that (a) no take will be found, and (b) the negative impacts of the action on the species are "not capable of being meaningfully identified or detected in a manner that permits evaluation" (at least according to the action agency), and therefore no consultation would take place, even though the impacts on the species could be quite serious. In short, the absence of take is no guarantee of the absence of jeopardy. The structure of the ESA recognizes this possibility by providing two separate regulatory provisions to deal with each situation. The proposed regulatory changes improperly conflate the two.

3. ***Section 402.03(b)(1) ("No Effect")***

Section 402.3(b)(1) offers a blanket exemption from an action otherwise subject to consultation when "[s]uch action has no effect on a listed species or critical habitat." Again, a review of the preamble language makes it clear that any "no effect" determination would be made unilaterally by the federal action agency, not by the Services.

> In paragraph (b)(1) we propose to add language that action agencies are not required to consult on those actions for which they determine their action will have "no effect" on listed species or critical habitat.

While an exemption for "no effect" situations may seem innocuous, the questions remain who makes the decision and how. As noted above, federal action agencies may not have either the expertise or the incentives to determine whether a proposed action has an effect on protected species, yet the regulations would entrust them with making that determination. The "no effect" provision may provide a loophole through which action agencies are able to evade the consultation process.

Again, this provision flatly contradicts the language of Section 7(c), which explicitly requires the preparation of a biological assessment in order to apply the "best scientific and commercial data available" in making a may effect/no effect determination when protected species may be present:

> 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 for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. 16 U.S.C. § 1536(c)(1).

The biological assessment requirement provides no exception for agency actions that have "no effect" on the listed species. The proposed 402.03(b)(1) exemption flatly contradicts a procedural requirement explicitly imposed by Congress.[40] Again, while this is only a subset of the entire universe of actions that must go through consultation, it shows Congress' desire to lay out a mandatory and comprehensive consultation process that is not to be diminished by agency regulations.[41]

---

[40] The Services position may be – although this is unstated in the preamble to the Proposed Rule – that a unilateral determination by the action agencies that a proposed action will have no effect on the listed species performs the same functions and essentially is the same as a "biological assessment." After all, like the new "no effect" consultation exemption in the regulations, the biological assessment is done by the action agency. However, there are specific time frames in Section 7(c) which indicate that the biological assessment is to be incorporated into a broader review process. More importantly, Congress explicitly stated that the biological assessment procedures in Section 7(c) are to "facilitate compliance with the requirements of subsection (a)(2) of this section" (the section that lays out the mandatory duties for agencies to consult *with* the FWS). 16 U.S.C. § 1536(c).

[41] The Services contend that the "no effect" exemption from consultation is a long standing practice by the agency. Even if this is true, it would not excuse the illegality of the Services' position. As noted above, the fact that an interpretation has been illegal for an extended period of time is irrelevant, for time cannot cure a conflict between a regulation and the statute it purports to implement. See, e.g., *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) (holding that another part of the 1986 regulations creates an illegal conflict with the statute); *Sierra Club v. United States Fish and Wildlife Serv*., 245 F.3d 434, 441-42 (5th Cir.2001) (same).

The 402.03(b)(1) "No Effect" exemption is also illegal in light of the extremely narrow definition of "effect of the action" in proposed regulation Section 402.02. That proposed section provides: "If an effect will occur whether or not the action takes place, the action is not a cause of the direct or indirect effect. Reasonably certain to occur is the standard used to determine the requisite confidence that an effect will happen. A conclusion that an effect is reasonably certain to occur must be based on clear and substantial information." This provision contradicts the central regulatory mandate in Section 7(a)(2) that federal agencies "insure" that their actions do not jeopardize the continued existence of protected species. If consultation is only required to consider actions "reasonably certain" to affect species, then consultation cannot "insure" that actions will not jeopardize species. The two phrases cannot be reconciled.

4. ***Section 402.03(b)(2) ("Insignificant Contributor")***

Proposed Section 402.03(b)(2) provides a blanket exemption from consultation when an action "is an insignificant contributor to any effects on a listed species or critical habitat." Once again the blanket exemption contradicts the specific provisions of Section 7(a)(3) and 7(c).

As discussed above, these provisions require the initiation of consultation and preparation of a biological assessment in specific circumstances. These Congressional requirements directly contradict the blanket exemptions in the proposed regulations.

And here again, a review of the preamble language makes it clear that any "insignificant contributor" determination would be made unilaterally by the federal action agency, not by the Services. Again, Federal action agencies may have no expertise in determining whether a proposed action is an insignificant contributor to an effect on a protected species, yet under the proposed regulations they would clearly be entrusted with making that determination.

5. ***Section 402.03(b)(3)(i) (Effects "Not Capable of Being Meaningfully Identified or Detected")***

The proposed language for Section 402.03(b)(3)(i) excludes from all consultation duties any action where the action agency anticipates no take, and where "[t]he effects of such action on a listed species or critical habitat [a]re not capable of being meaningfully identified or detected in a manner that permits evaluation." We believe this proposal cannot be reconciled with the plain language of the statute. The Endangered Species Act requires that "each agency shall use the best scientific and commercial data available" to 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 destruction or adverse modification of [designated critical] habitat of such

species." 16 U.S.C § 1536(a)(2), (b)(3)(A).[42] An absence of information excuses neither an agency's obligation to insure against jeopardy, nor the Services' obligations to consult. *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (best scientific data available standard requires less than conclusive proof; Secretary must issue biological opinion regardless of insufficiency of data). The statute requires consideration of "the scientific information presently available," even if that data is inconclusive or unclear. *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 680 (D.D.C.1997). These cases clearly reject the approach embodied in the proposed amendments. The language in the Act simply does not tolerate the possibility of ignoring effects merely because they are difficult to detect or identify.

Further, the language and intent of the Act require precaution in the face of absent information, not refusal to analyze. Congress intended the Act to "give the benefit of the doubt to the species." H.R. Rep. No. 96-697, at 12 (Conf. Rep.), *as reprinted in* 1979 U.S.C.C.A.N. 2572, 2576. The Supreme Court further clarified Congress's intent: "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" *T.V.A. v. Hill*, 437 U.S. 153, 194-95 (1978); *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). The proposed regulation directly contradicts this requirement. Instead, it allows the action agency to avoid consultation and improperly insulates the action itself from any consideration or review by the Services.

Moreover, allowing the action agencies to exclude actions or effects from consultation because they are difficult to identify is arbitrary and capricious. The Services' in-house experts are better suited to review and consider the potential impacts to protected species, especially when the information available is limited. In a situation where the effects of an action on a species cannot be "meaningfully identified or detected in a manner that permits evaluation," giving the benefit of the doubt to the species means allowing the Services to further analyze the action's potential impacts. Ignoring an action's potential effects and insulating the action from review by the experts turns this precautionary attitude on its head and is not in keeping with the purpose and structure of the Act. An action agency employee, particularly one whose interests may lie in finding that the action is not likely to impact a listed species, appears much more likely to determine that an effect meets this criterion than a dedicated Service biologist, who is up-to-date on current conservation biology literature and trained in the most recent analytical and field techniques. Under the proposed regulation, however, the action agency employee would exempt the effect from consultation, with no opportunity for review by the disinterested scientist. Leaving this "gatekeeper" analysis with the wildlife experts within the

[42] At least one court has held that the statute imposed an affirmative burden on the agency to gather data. *Roosevelt Campobello Int'l Park Comm'n v. United States Envtl. Prot. Agency*, 684 F.2d 1041, 1052 n.9 (1st Cir. 1982) (denying a permit that had issued in the face of insufficient information regarding impacts to endangered species because the studies deemed necessary by the agencies were not performed).

Services, who have greater familiarity and expertise in analyzing remote or marginal impacts, makes more sense than farming it out to other, less able, agencies, particularly those agencies whose fundamental interests may conflict with the protection of species and habitat.

We do not believe the stated goal of efficiency is well served by this proposal, nor do we believe the Services have presented evidence that efficiency is such a problem that it requires a change of this magnitude. Efficiency can be gained by allowing the Services discretion to adopt the action agency's findings via informal consultation if they agree with the findings and believe them to be supported. Thus, no meaningful purpose is served by excluding actions whose impacts are "not capable of being meaningfully identified or detected in a manner that permits evaluation" from being reviewed by the Services' in-house experts.

Finally, we believe this exclusion is an improper attempt to allow the Services to evade their statutory responsibility to consult, even informally, as to the impacts of actions on climate change, and whether any action will impact the polar bear or other species likely to be in jeopardy due to global climate change.

6. *Section 402.03(b)(3)(ii) (Effects That Are "Wholly Beneficial")*

Proposed Section 402.03(b)(3)(ii) would allow federal agencies taking action to forgo consultation "when the direct and indirect effects of that action are not anticipated to result in take and . . . [t]he effects on such action on a listed species or critical habitat . . . [a]re wholly beneficial." The proposed regulation implies, and its preamble makes clear, that the action agency alone would determine that its action is "wholly beneficial," without input from the Services. This change is unlawful for the reasons stated above concerning Section 402.03(b) as a whole, and is also independently contrary to the Act and deleterious to the conservation of endangered and threatened species.

Section 7(a)(1) of the ESA provides that "Federal agencies shall, in consultation with and with the assistance of the Secretary . . . carry[] out programs for the conservation of endangered species and threatened species . . . ." 16 U.S.C. § 1536(a)(1). When the consultation regulations were originally promulgated, public comments asked the Services to insure that, in implementing such programs, "Federal agencies address recovery as well as detrimental effects through consultation." 51 Fed. Reg. 19926, 19929 (June 3, 1986). The Services replied that although other agencies' conservation programs were beyond the scope of the consultation regulations, "all Federal actions including 'conservation programs' are subject to the consultation requirements of Section 7(a)(2) if they 'may affect' listed species or their critical habitats." *Id*.

Thus, in 1986 the Services expressly interpreted *the statute* as requiring consultation – at least informal consultation and Service concurrence with a "Not Likely to Adversely Affect" ("NLAA") finding – even for a conservation program intended to benefit the listed species affected. Now, the Services

contradict that interpretation with no explanation beyond the assertion that this exclusion from consultation "broadly track[s]" the definition of "not likely to adversely affect" from the Final Endangered Species Consultation Handbook (March 1998). 73 Fed. Reg. at 47871. But there is a world of difference between an informal consultation in which the Services concur with an NLAA finding and an action agency reaching an NLAA conclusion on its own without any consultation at all.

Moreover, eliminating the consultation requirement for actions the action agency deems "wholly beneficial" to listed species writes the obligation of these agencies to create conservation programs "with the assistance of the Secretary" out of Section 7(a)(1) of the statute. The Services, no doubt, will remain "ready to assist" as they were in 1986, 51 Fed. Reg. at 19929, but as a practical matter the proposed regulation's intent to reduce the number of "unnecessary" consultations, 73 Fed. Reg. at 47871, will eliminate the Services' opportunity and ability to assist in conservation programs and in any other federal action that the action agency considers "wholly beneficial" to listed species. For the same reason, proposed Section 402.03(b)(ii) violates the requirement that agencies implement their ESA Section 7(a)(2) obligations "with the assistance of the Secretary."

Even if it were lawful, proposed Section 402.03(b)(ii) has pernicious effects and should not be adopted. Reasonable minds could differ on whether an action's effects would be "wholly beneficial" to endangered and threatened species. By allowing action agencies to avoid even informal consultation based on their own view of what is "wholly beneficial," proposed Section 402.03(b)(ii) precludes application of the Services' expertise in cases where the asserted benefits of the federal action are questionable or incorrect.

For example, governmental proponents of the Intercounty Connector, a planned highway in Maryland, have argued that the project is beneficial to eastern box turtles (a vulnerable though not listed species) even though the road will destroy the turtles' habitat. *See*, *e.g.*, C. Benjamin Ford, "Environmentalists Say Turtle Rescue Effort Falls Short," *Gazette.Net* Oct. 11, 2007 available at: *http://www.gazette.net/stories/101107/prinnew162807_32365.shtml* (last viewed Sept. 2, 2008) (state highway spokesperson says state "going above what was required to protect" turtles). The asserted benefit? The turtles would be relocated to other suitable habitat and monitored for several years, which is said to be an improvement over their current unmonitored condition in the wild.

As another example, consider the controversy over the desirability of collecting wild native fish for use as hatchery broodstock and releasing the hatchery-raised offspring. It has been argued that this practice would benefit the species involved by increasing wild populations. But it has also been argued this process causes harm both in the collection process and in the release of hatchery-raised fish. Under proposed Section 402.03(b)(ii), an action agency could conclude that such a proposal is wholly beneficial to the fish species, and evade consultation.

A third example involves a hypothetical construction project that can be built only with a federal permit or federal funding and that would be located adjacent to critical habitat for an endangered species of butterfly. The project proponent agrees that the final landscaping for the project will include extensive plantings of the butterfly's host plant species on the edge of the project nearest the butterfly's habitat. In such a circumstance, an action agency could well conclude, first, that no take is anticipated because the project would not actually destroy vegetation in existing butterfly habitat, and second, that the project's effects on the butterfly would be "wholly beneficial" because of the increased availability of host plants. Yet the Fish and Wildlife Service, were it consulted, could conclude that the project would indirectly have adverse effects by allowing easier access to the habitat by, *e.g.* off-road vehicles, and require reasonable and prudent alternatives to avoid adverse habitat modification or reasonable and prudent measures to avoid incidental take. It is wholly plausible that a situation similar to this hypothetical could arise, and if it happens to include a project considered locally important and a less attractive species, the action agency would face intense pressure to avoid the endangered species controversy entirely by making a unilateral and plausible – but also quite questionable – "wholly beneficial" determination. *Cf.* 58 Fed. Reg. 49881, 49885 (Sept. 23, 1993) (citing habitat degradation by off-road vehicle use among causes of endangerment of Delhi sands flower-loving fly); *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.D.C. 1997) (rejecting Commerce Clause challenge to application of ESA § 9 to Delhi sands flower-loving fly).

The point of these examples is not that the claim of wholly beneficial effects is necessarily wrong, but rather that the proposed regulation shifts the authority for making that determination from the Services to the action agencies and allows it to be made without even informal consultation. If the Services are correct, as stated in the preamble, that action agencies view the consultation process as cumbersome, in close cases action agencies will have an incentive to avoid consultation by selecting the "wholly beneficial" conclusion. To allow this incentive to operate without any application of the Services' expertise is contrary to the purposes of the Act and is precisely the evil that the consultation process was intended to avoid.

Indeed, it is easy to imagine that, as in the example of the box turtle given above, action agencies will modify proposed actions specifically to be able to claim beneficial effects from an action that might otherwise adversely affect listed species or critical habitat. Such a proactive response would be laudable, but it would mimic the generation of reasonable and prudent alternatives that is supposed to emerge from the consultation process, 16 U.S.C. § 1536(b)(3)(A), thus effectively nullifying Section 7(b)(3)(A) of the statute with respect to a potentially wide range of federal actions.

7. *Section 402.03(b)(3)(iii) (Effects That Are "Remote")*

Proposed Section 402.03(b)(3)(iii) would allow federal agencies taking action to forgo consultation when:

> [T]he direct and indirect effects of that action are not anticipated to result in take and ... [t]he effects on such action on a listed species or critical habitat ... [a]re such that the potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote." 73 Fed. Reg. at 47870-71.

The proposed regulation implies, and its preamble makes clear, that the action agency alone would determine that the risk of jeopardy or adverse modification or destruction of critical habitat resulting from its action is "remote," without input from the Services. This change is unlawful for the reasons stated above concerning Section 402.03(b) as a whole, and is also independently contrary to the Act and deleterious to the conservation of endangered and threatened species.

"Remote" is not defined in proposed Section 402.03(b)(iii), elsewhere in the proposed regulations, or in the preamble to the proposed regulations. Ordinary rules of construction, however, require that proposed Section 402.03(b)(iii) have meaning independent of Section 402.03(b)(i) and 402.03(b)(ii). *See, e.g., APWU v. Potter*, 343 F.3d 619, 626 (2d Cir. 2003) ("[A] basic tenet of statutory construction, equally applicable to regulatory construction, [is] that [a text] should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." (citation omitted)). Therefore, the terms of proposed Section 402.03(b)(iii) would allow action agencies to forgo consultation with respect to federal actions that (i) will have direct or indirect effects that are not wholly beneficial to endangered species – *i.e.,* that will have at least some adverse effect on an endangered or threatened species (a "neutral" effect not being an effect at all) - and (ii) will have effects that are capable of being meaningfully identified or detected in a manner that permits evaluation. In other words, proposed Section 402.03(b)(iii) excludes from the statutory consultation requirement federal actions that *will* risk jeopardy to listed species or *will* destroy or adversely modify critical habitat, albeit in a way that is "remote."

Eliminating the consultation requirement for federal actions that will cause remote but real jeopardy or critical habitat destruction cannot be squared with ESA Section 7's commands that:

> 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 . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction of adverse modification of [critical] habitat of such species . . . . 16 U.S.C. § 1536(a)(2).

The scenario posited by proposed Section 402.03(b)(iii) cannot be compared to an action agency's judgment, made under current law, that an agency action will

have no effect on listed species. Proposed Section 402.03(b)(iii) assumes an adverse effect resulting from federal action but allows the action agency to take the action without consultation based on its own determination that the effect is remote. In effect, proposed Section 402.03(b)(iii) would allow federal agencies to take actions leading, albeit remotely, to the extinction of listed species, in direct contravention of Section 7 of the Act. Regardless of the Services' "authority to determine ... when consultation is triggered…" the Services do not have authority to set a trigger inconsistent with the statute.

The proposed regulation's utter failure to define "remote" exacerbates its illegality. An effect might be remote in time, in space, in number of causal steps, or in degree of probability. And no matter which of these dimensions an agency chooses, remoteness is relative. Neither the text of the proposed regulation nor the preamble provides any meaningful guidance to action agencies in determining whether or not a given risk of jeopardy or adverse modification of critical habitat is "remote" enough to fit within the rule. Yet the regulation would permit action agencies to make that judgment entirely independent of the Services' expert advice. Proposed Section 402.03(b)(iii) is an invitation to arbitrary and capricious decisionmaking by action agencies. Its promulgation would be an arbitrary and capricious act of the Services.

The one illustration that the preamble provides of a "remote" adverse effect does not help. The preamble states that "any impacts associated with GHG emissions from the building of one highway ... 'are such that the potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat [from those GHG emissions] is remote.'" 73 Fed. Reg. at 47872 (brackets in original). The preamble fails to articulate the basis for this "remoteness" conclusion or whether it is in any way distinct from the also-asserted lack of "essential cause," "reasonably certain to occur," "significant contributor," and "capable of being meaningfully identified."

In the preamble, the Services state that they "have determined" that actions causing only "remote" adverse effects (or otherwise described by Section 402.03(b)) "will not cause adverse effects on listed species." 73 Fed. Reg. at 47871. The Services cannot rely on this "determination" to make proposed Section 402.03(b)(iii) lawful by claiming they have simply exercised their "authority to determine what constitutes 'consultation.'" *Id*. The proposed regulation itself makes clear that it does not require some kind of advance meta-consultation for all actions having certain types of effects on listed species or critical habitat, but rather that it is excluding actions with such effects from the consultation requirement *per se*. Moreover, for the Services to say that actions causing only remote adverse effects are deemed to have no adverse effects merely begs the question. The issue is not whether such actions violate the substantive mandate to insure against jeopardy; the issue is whether allowing an action agency alone to determine that its proposed action would have only remote effects violates the requirement that federal agencies insure against jeopardy "in consultation with and with the assistance of the Secretary." 16 U.S.C. § 1536(a)(2).

Even if it were lawful, proposed Section 402.03(b)(iii) has pernicious effects and should not be adopted. As with "wholly beneficial" effects under Section 402.03(b)(ii), proposed Section 402.03(b)(ii) precludes application of the Services' expertise in cases where the asserted remoteness of the adverse effects of the federal action is questionable or incorrect.

Because the "remoteness" of known harmful effects on listed species is not now a consideration in deciding whether consultation is required, it is difficult to predict how federal action agencies would apply their unguided discretion in implementing proposed Section 402.03(b)(iii). But there is a real risk that this regulation would allow action agencies to avoid consultation on actions that may jeopardize listed species or damage their critical habitat in ways that up to now have been avoided or ameliorated by the consultation process.

For example, from the mid-1980s through 1989 the FWS and the Federal Emergency Management Agency ("FEMA") engaged in a fierce debate about whether FEMA's implementation of the National Flood Insurance Program in the Florida Keys required consultation regarding the Program's effect on the Key deer. *See Florida Key Deer v. Stickney*, 864 F. Supp. 122 (S.D. Fla. 1994). The greatest threat to the Key deer was habitat loss by human building. *Id*. at 1231. Because availability of flood insurance through FEMA "encourages and facilitates this development" – indeed, is a 'but for' cause of development that could not be financed without the insurance – FWS determined that consultation was required. *Id.* at 1232. FEMA contended that in determining eligibility to participate in the National Flood Insurance Program, it "does not authorize, fund or carry out any actions that in any way expressly jeopardize endangered species." *Id*.

In essence, FEMA argued that because it approves only a flood insurance program prerequisite for construction projects in general, but not any particular construction project, the effect on Key deer of any particular project would be too distant from FEMA's action to be attributed to that action. This argument is aptly captured within the rubric of "remoteness." The Court roundly and rightly rejected the argument, deferring instead to FWS' interpretation. *Id.* at 1236, 1242. Proposed Section 402.03(b)(iii), had it been in effect, would have granted FEMA unilateral authority to determine that the possibility of jeopardy resulting from the National Flood Insurance Program was too remote to require consultation – to the detriment of the endangered Key deer.

The facile response that the FWS-FEMA dispute occurred nearly twenty years ago, and FEMA since then has more "experience" with ESA Section 7, will not suffice. Today's FEMA (like other action agencies) faces the familiar institutional imperative to protect and promote its primary missions, as did the FEMA of the 1980's. Even assuming that FEMA would today recognize under *current* Services policy that consultation would be required for in a situation like the Key deer's, proposed Section 402.03(b)(iii) represents a policy change that could be used to justify a decision to forgo consultation.

Even today, it is hardly hypothetical that a federal action agency would incorrectly characterize as "remote" the effects of its proposed action. In *Citizens for Better Forestry v. USDA*, 481 F.Supp.2d 1059, *motion to amend judgment denied*, 2007 WL 1970096 (N.D. Cal. 2007), *appeal pending*, No. 07-16573 (9th Cir.), the court rejected the U.S. Forest Service's contention that regulations constituting a "paradigm shift" in forest planning would have effects too "remote" to trigger consultation simply because implementing the regulations in a site-specific context would require an intervening act. 481 F. Supp. 2d at 1093, 1096-97. The Forest Service's argument echoed FEMA's *Florida Key Deer* argument: "any potential indirect effects of the [regulations] were remote and indiscernible…. [B]ecause there will need to be an intervening site-specific project before any adverse impacts result from the [regulations], there is insufficient causation." *Id.* at 1093.

Under current law, then, action agencies have asserted that the effects of their actions on listed species are too remote to warrant consultation, even in circumstances where the Services, the courts, or both recognize that the law *does* require consultation. The Services propose to allow an action agency to judge remoteness on the action agency's own accord and under the action agency's own standard. The inevitable result will be at least some failures to consult where consultation was required and at least some cases of jeopardy to listed species or adverse modification or destruction of critical habitat that could have been avoided.

The salutary effects of current law can be seen where consultation has resulted in relatively modest changes to a project that considerably reduced the risk of jeopardy to a listed species. It has been reported, for example, that where the indirect development effects of a highway project might have harmed a listed mussel species, consultation resulted in habitat restoration and protection within the watershed. Eric Biber, *The Application of the Endangered Species Act to the Protection of Freshwater Mussels: A Case Study*, 32 Envtl. L. 91, 127--28 (2002). In another reported instance, a bridge was modified to eliminate direct runoff from the bridge into the river, protecting listed mussels from the potentially fatal effects of a possible chemical spill on the bridge. *Id*. at 128. It is utterly plausible that in either of these situations, the action agency on its own might have concluded that the effects causing jeopardy to the mussels were too "remote" to warrant consultation – the development because its precise pattern and effects on water quality would purportedly depend too much on future decisions regarding the exact location and design of new construction, and the bridge runoff because of an asserted too-low probability of an accident right on the bridge spilling any particular compound toxic to mussels. In either case, proposed Section 402.03(b)(iii) would have permitted such a conclusion, which would have meant a missed opportunity to avoid jeopardy in a reasonable, practicable, affordable way.

The undefined and broad elimination of consultation in cases of "remote" harm to listed species would undercut the concept of "indirect effects" of agency action. As the above examples illustrate, if promulgated it would pose a serious

risk that threatened and endangered species would be jeopardized without benefit of the expert advice from the Services that Congress required.

For the foregoing reasons, the Services should withdraw and should not finalize proposed Section 402.02(3)(b)(iii).

8. ***Section 402.03(c) (Limitation on the Scope of Analysis of Actions that Fall Partly Within the Exceptions of 402.03(b))***

The proposed revisions would create a new 50 C.F.R 402.03(c) that would impose a drastic limit to the scope of consultation by allowing the action agencies to limit consultation to only those effects that are not excluded in the new 402.03(b).[43] The Services propose reviewing only those effects of an action that are not exempted by 50 C.F.R 402.03(b). Under the proposed rule, the action agency could exclude from consultation with the Services' experts all those impacts that:

> (1) [have] no effect on a listed species or critical habitat; or
>
> (2) [are] an insignificant contributor to any effects on a listed species or critical habitat; or
>
> (3)… (i) Are not capable of being meaningfully identified or detected in a manner that permits evaluation;
>
> (ii) Are wholly beneficial; or
>
> (iii) Are such that the potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote. 73 Fed. Reg. at 47874.

This amendment contravenes the plain language of the Act and compromises the integrity of Section 7 review. The plain language in Section 7 of the ESA, 16 U.S.C.S. § 1536(a), requires review of "agency actions." It does not envision review of partial actions. The proposed 50 C.F.R. 402.03(c) improperly divorces actions from their effects by permitting the action agency to submit only selected effects of an action for consultation, i.e. only those effects that do not fall under the exemptions in subparagraph (b). Congress intended review of agency actions as a whole, not merely review of selected effects of an action.

Moreover, these exclusions are not justified. First, the Services have presented no evidence, other than their unsupported statement, that they believe action agencies have developed some expertise since the mid-1980s. The Services have given no evidence that action agencies actually can and will perform the analysis

[43] The impact of the proposed 50 C.F.R. 402.03(c) on actions causing take is unclear. The proposed 50 C.F.R. 402.03(c) reads in part, "If one or more but not all of the effects of an action fall within paragraph (b) of this section, then consultation is required only for those effects of the action that do not fall within paragraph (b) of this section." Subparagraph (b) is expressly limited to those actions that do not cause take. It appears, then, that the proposed 50 C.F.R. 402.03(c) would allow an action agency to consult on only those effects of an action that cause take or otherwise fall outside of subparagraph (b), while excluding the effects of the same action that do fall within subparagraph (b). If that is not the intent, the proposed regulations should be changed to so reflect.

required to determine which effects actually do require expert opinions from the Services' biologists.[44] Second, segregating the analysis of impacts between agencies exposes species to risks, in the form of incomplete analysis, which could result in the very jeopardy the Act was intended to avoid. If the Services, during consultation, are not permitted to consider all the effects, they will be less able to properly identify and implement a range of alternatives and measures under 16 U.S.C. 1536 (b)(3)(A) that may be required to avoid a finding of jeopardy.[45] As the Service recognized in its proposed definition for "Effects of the action," the impact of an action cannot be viewed simply as a series of isolated, independent effects. Unknowingly, the Services' efforts to minimize the known impacts of an action may aggravate the impacts that were excluded from its analysis. The Services have provided no evidence to suggest that segregating the analysis between the action agency and the Services will not defeat the statute's requirement that each agency insure the survival and recovery of listed species. Fundamentally, the Act's language requires holistic consultation with the Services for all parts of all actions.

Finally, this amendment is an improper attempt to implement through regulation a change to the scope of the Endangered Species Act that should be made by Congress. It allows each action agency to determine whether to invite consultation as to the impacts of its actions on global climate change. For example, the highway funding example posed in the preamble to the proposed changes (*see* 73 Fed. Reg. at 47872) would likely result in increased climate change through increased tailpipe greenhouse gas emissions. But if the action agency deemed those emissions to have but a remote risk to any protected species, or to be an insignificant contributor to that risk, it could prevent the action agency from considering the impact at all. This could result in nonsensical analysis. Assume that the highway construction would degrade some, but not all, of the winter nesting grounds for an endangered migratory bird, whose summer feeding grounds in the coastal arctic are likely to be drowned as a result of global climate change. This time, the action agency concedes an impact to the species will result from the highway in the winter grounds, and initiates

[44] The Services actually are in possession of evidence that action agencies, even those whose mandates specifically include the protection of wildlife, are not well suited to making any level of impacts-analysis. *See also* supra Part I.C (discussing issues with allowing action agencies to conduct analyses required of the Services at length).

[45] If, as the regulations now read, actions that cause take are only analyzed with respect to the effects that fall outside subparagraph (b), this provision is even more troubling. The Services include Reasonable and Prudent Measures and Terms and Conditions in incidental take permits in order to minimize the impacts of incidental take, and often use them to address a lack of knowledge about the action's effects. For example, in approving actions with unknown impacts on a particular endangered species, the Services currently may use the Terms and Conditions of an incidental take permit to require monitoring of take and to require reinitiation of consultations if the take rises above an identified level. If the effects of an action that cannot be meaningfully identified include potential take of endangered species (for example, as would be excluded by proposed C.F.R. parts 402.03(b)(3)(i) and 402.03(c)), the regulations appear to preclude the Services' use of Terms and Conditions to monitor the populations of species and ensure that high levels of take (resulting in jeopardy) did not occur. The overall effects of the regulatory changes would be to reduce the Services' ability to obtain information about effects for which we currently have minimal information. *See also* infra Parts III.F.5 (discussing proposed C.F.R. part 402.03(b)(3)(ii)) and III.F.8 (discussing proposed C.F.R. part 402.03(c)).

consultation. But because it believes the increased tailpipe emissions from the traffic facilitated by the highway will be but a remote or insignificant contributor to climate change, the action agency, under the proposed amendments, can preclude the Services from considering the total impact to the species. By limiting the Services' review to only the degradation of the breeding grounds from highway construction, the action agency prevents the Services from analyzing the full impact on the bird species, decreasing the likelihood of a jeopardy finding even when the action could, in fact, put the species in jeopardy. This rule change thus would allow this action to proceed in a situation where we believe the Endangered Species Act, as written, would require precaution and protection.

For these reasons, we believe that decisions regarding which impacts to consider should stay with the wildlife experts within the Services. We do not believe limiting in any way the scope of the wildlife agencies' review of an action is proper, let alone legal. We believe a better approach, and one that is more consistent with the statute, would be to continue to allow the wildlife agencies to take a holistic approach to their review of actions, with the discretion to adopt the action agency's findings if adequate and supported by the best available scientific information.

IV. PROCEDURAL RECOMMENDATIONS FOR THE PROPOSED REVISIONS

Under the National Environmental Policy Act the Services Must Minimally Conduct an Environmental Assessment of the Proposed Changes

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 et seq., imposes procedural requirements on all federal agencies to consider the impacts of their actions on the environment. In particular, NEPA requires federal agencies to prepare a detailed environmental impact statement (EIS) for "all major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). The issuance, repeal, or revision of agency rules and regulations falls within the scope of "Federal actions" pursuant to NEPA. 40 C.F.R. § 1508.18(a).[46]

The Council of Environmental Quality (CEQ) has issued a series of regulations implementing the procedural requirements of NEPA. Two of those regulations are particularly relevant here. One, CEQ has listed a series of factors that an agency should consider in determining whether there will be a significant impact on the environment from an agency action. Included in those factors are:

> (1) the degree to which the proposed action affects public health or safety; (2) the degree to which the effects will be highly

[46] *See* Daniel R. Mandelker, *NEPA Law and Litigation* § 8:27 (2005 Suppl.) ("Federal agency rules and regulations are federal actions that may require the preparation of an impact statement."); *see also Citizens* for Better Forestry v. U.S. Dep't of Agriculture, 481 F. Supp.2d 1059, 1080 (N.D. Cal. 2007).

> controversial; (3) whether the action establishes a precedent for further action with significant effects; and (4) whether the action is related to other action which has individually insignificant, but cumulatively significant impacts. *Citizens for Better Forestry*, 481 F. Supp. 2d at 1080 (citing 40 C.F.R. § 1508.27(b)).

Two, CEQ has established a procedure by which federal agencies must decide whether an agency action will have "significant" impacts such that an EIS must be prepared. In general, a federal agency that has not decided to prepare a full EIS must prepare an Environmental Assessment (EA) to determine whether the environmental impact of the proposed action is significant. 40 C.F.R. § 1508.9. An agency may avoid conducting an EA, but only if it determines that a categorical exclusion (CE) identified in prior agency rulemaking appropriately applies to the proposed federal action. *See* 40 C.F.R. §§ 1508.4 and 1507.3(b)(2)(ii). In making that determination, an agency must use a "scoping process" to "determine the scope of the issues to be addressed and for identifying the significant issues related to a proposed action." *See Citizens for Better Forestry*, 481 F. Supp. 2d at 1081 (citing *Alaska Ctr. for the Env't v. United States*, 189 F.3d 851, 859 (9th Cir. 1999)).

In determining whether or not a CE should apply to a proposed federal action, the courts have held that the agency must specifically cite to the specific categorical exclusion that the agency is relying upon. *Citizens for Better Forestry*, 481 F. Supp. 2d at 1082. Moreover, courts have held that "[a]pplication of a CE is inappropriate if there is the possibility that an action *may have* a significant environmental effect." *Id.* at 1087.

Given the discussion earlier in these comments, there is no question that the Services should at the very least conduct an EA to determine whether an EIS might be appropriate for these changes to the ESA consultation regulations. The regulations – by the Services' own admission – are intended to affect the applicability of the ESA to the impacts of climate change on threatened and endangered species. By eliminating the ability of federal agencies to seriously consider how their proposed actions might impact greenhouse gas emissions that in turn may affect threatened and endangered species, the proposed regulations may have a direct effect on "public health and safety" by reducing protections for threatened and endangered species. Moreover, by concluding that ESA consultation need not play a constructive role in the federal government's response to climate change, the proposed regulations will reduce the government's overall ability to respond to climate change, with potential impacts on public health and safety broader than just the impacts on threatened and endangered species.

As noted above, the removal of a mandatory role for the Services in consultation for a wide range of federal activities also may have an impact on public health and safety. In particular, in situations where there are high levels of uncertainty as to the impacts of the proposed actions, expert and impartial review by the

Services will not occur. This may result in more actions that will have a harmful impact on threatened or endangered species.

The detailed comments provided above show that there is a serious amount of controversy over the potential effects of the proposed regulatory changes on the environment.[47]

The proposed regulations establish a procedural and substantive framework for the analysis of proposed federal actions on an ongoing basis. Accordingly, the regulations set a "precedent for further action with significant effects." *Citizens for Better Forestry*, 481 F. Supp. 2d at 1089 (concluding that proposed changes to Forest Service planning regulations warranted at least review pursuant to EA).

Moreover, by specifically exempting from consultation a range of actions, including those whose impacts are "not capable of being meaningfully identified or detected in a manner that permits evaluation" or that are "remote," and also by exempting from analysis the effects of an action that are not "essential" or that cannot be shown to be "reasonably certain to occur. . . be based on clear and substantial information", the proposed regulations may allow a large number of actions to occur without consultation that, while they have small impacts, are cumulatively important. The proposed regulations therefore may be related to other future federal actions "which [have] individually insignificant, but cumulative significant impacts." *See Citizens for Better Forestry*, 481 F. Supp. 2d at 1089 (citing 40 C.F.R. § 1508.27(b)).

Even if the Services believe that the proposed regulations may be beneficial for listed species as a whole – perhaps by allowing more actions that will be beneficial to listed species to occur without the paperwork burden of consultation – it must nonetheless conduct environmental review. The CEQ regulations make clear that a "significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. § 1508.27(b)(1).

Likewise, even if the Services believe that the future impacts of the proposed regulations on the protection of listed species is highly uncertain, that would also cut in favor of preparing at least an EA. *See* 40 C.F.R. § 1508.27(b)(5) (one factor determining whether a proposed action might be significant is the "degree to which the possible effects on the human environment are highly uncertain").

Finally, the CEQ regulations make clear that if the proposed federal action "may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the" ESA, it is more likely that the action will be considered significant such that full environmental review should take place. 40 C.F.R. § 1508.27(b)(9). Given that the proposed regulations could fundamentally

[47] *See* National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001) (holding EA for agency management plan was inadequate because, in part, controversy over potential impacts from the plan indicated significance of environmental impacts); *see also Citizens for Better Forestry,* 481 F. Supp. 2d at 1089 (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)).

change consultation for all listed species, this factor strongly suggests preparation of at least an EA may be necessary.

The fact that the proposed regulatory changes are programmatic in nature, rather than authorizing specific projects, does not change the applicability of NEPA. The CEQ regulations implementing NEPA state that "[e]nvironmental impacts statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations." 40 C.F.R § 1502.4(b). The courts have consistently required federal agencies to conduct NEPA analysis, including EAs and EISs, for a wide range of programmatic and regulatory changes similar to the proposed revisions to the ESA consultation process. *See, e.g.*, *California v. Block*, 690 F.2d 753 (9th Cir. 1982) (striking down national Forest Service rules regarding roadless area management for failure to comply with NEPA); *California ex rel. Lockyer v. U.S. Dep't of Agriculture*, 459 F. Supp. 2d 874 (N.D. Cal. 2006) (same); *Wyoming v. U.S. Dep't of Agriculture*, 277 F. Supp. 2d 1197 (D. Wyo. 2003) (same); *Citizens for Better Forestry*, 481 F. Supp. 2d 1059 (striking down national Forest Service planning regulations for failure to comply with NEPA). Moreover, the fact that numerous agencies have been able to conduct environmental review for programmatic regulatory changes shows that such review is feasible. *See, e.g.*, 73 Fed. Reg. 21468 (April 21, 2008) (finalizing regulatory changes to Forest Service planning regulations after preparation of EIS); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (agency prepared EIS for national coal leasing program).

Nor does that fact that elements of the proposed regulatory changes might be characterized as "procedural" mean that NEPA review is not required. For instance, the fact that the proposed changes to planning regulations for the National Forests might be characterized as procedural did not prevent the courts from concluding that, at the very least, an EA must be prepared for review. *See Citizens for Better Forestry,* 481 F. Supp. 2d 1059.

It would also be inappropriate for the Services to rely on a CE to avoid NEPA review where, as here, there is "the possibility that an action *may have* a significant environmental effect." *See Citizens for Better Forestry*, 481 F. Supp. 2d at 1087.

It is true that the proposed regulations would retain Section 7 consultation so long as there is a finding that there is anticipated take. Nonetheless, the exemptions may still result in significant changes to the scope of the ESA, and might have major impacts on listed species that should be analyzed pursuant to NEPA through an EA or EIS. For further analysis, please see our discussion above about how the absence of take does not necessarily mean that there will not be jeopardy to a listed species from a federal action. Supra Part III.F.2.

We would add that, in this context, the performance of at least an EA, if not a full EIS, will not be a fruitless and meaningless exercise in paperwork. The changes that the agency has proposed to the ESA consultation regulations are significant, and they will likely have significant impacts on how federal agencies conduct their activities and on the level of protection for endangered species.

As the comments above make clear, there are serious questions about the agencies' conclusion that the proposed changes will make the consultation process less burdensome and time consuming while providing as good or better protection for listed species in the Section 7 consultation process. Additional data about a range of factors would help narrow the uncertainty about the possible impacts of the proposed changes. Those factors include (but are not limited to): the number of consultations performed overall by federal agencies, the number of those consultations that would likely have fallen within the newly created exemptions, the quality of review and decisionmaking about wildlife impacts in various action agencies (in particular, pursuant to the new counterpart regulations), the potential extent of impacts of climate change on threatened and endangered species and the implications of those impacts being exempted from consultation review, the number of species that are subject to multiple threats and therefore which might receive less protection as a result of the changes to the definition of "effects of the action," etc. For all of these factors, the Services would not need to compile significant new data, but instead could use their existing files on consultation and recovery and the status of listed species to provide important insights on the implications of its proposed changes.

We conclude by noting that, if the Services should prepare an EA as we strongly urge them to do, they should also provide an opportunity for public comment in that process (unless they subsequently proceed to prepare a full EIS). *See Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 341 F.3d 961, 970-71 (9th Cir. 2003) (noting importance of public participation in the entire NEPA process, including preparation of EAs). The CEQ regulations specify that federal agencies preparing EAs "shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments." 40 C.F.R. § 1501.4(b). The regulations add that a 30-day comment period should be provided by agencies after a decision not to prepare an EIS where the proposed action is one in which an EIS would normally be prepared or is "without precedent." 40 C.F.R. § 1501.4(e)(2). Given the substantial revisions proposed by the Services to the consultation regulations – the first comprehensive revisions in over 20 years – and the analysis above, the proposed revisions would normally warrant preparation of an EIS and are "without precedent." Even if the specific provisions in §§ 1501.4(e)(2) do not apply, given the primary importance of public participation in the NEPA process and the significance of the proposed regulatory changes, public participation in the EA process is appropriate and necessary. *See Citizens for Better Forestry*, 341 F.3d at 970-71 (agency failure to allow public comments on EA for revisions to National Forest planning regulations violated NEPA regulations).

CONCLUSION

We urge the Services to withdraw the proposed regulatory changes, and instead to begin a more open-ended process of consulting with the full range of interested parties (including Congress), collecting relevant data, and exploring a full range of options to address the issues implicated in its proposal.

Respectfully submitted, by the following professors of environmental protection law... *(Institutions are named for purposes of identification only.)*

- Eric Biber, University of California Berkeley, Boalt Hall Law School
- Cynthia Drew, Seattle University School of Law
- Zygmunt J.B. Plater, Boston College Law School
- Edward Lloyd, Columbia University Law School
- Leah J. Russin, Stanford Law School
- Robert Abrams, Florida A&M University College of Law
- William L. Andreen, University of Alabama School of Law
- Peter A. Appel, University of Georgia School of Law
- Hope Babcock, Georgetown University Law Center
- Robert Benson, Loyola Law School Los Angeles
- Lynn E. Blais, The University of Texas School of Law
- Michael C. Blumm, Lewis and Clark Law School
- Lee P. Breckenridge, Northeastern University School of Law
- Wil Burns, Journal of International Wildlife Law & Policy
- Alejandro E. Camacho, Notre Dame Law School
- Cinnamon Carlarne, University of South Carolina
- David N. Cassuto, Pace University School of Law
- Fred Cheever, University of Denver Sturm College of Law
- Barbara Cosens, University of Idaho College of Law
- Stanley E. Cox, New England School of Law
- Debra L. Donahue, University of Wyoming College of Law
- Holly Doremus, University of California Berkeley & University of California Davis
- Myrl L. Duncan, Washburn University School of Law
- Daniel A. Farber, UC Berkeley School of Law
- David Favre, Michigan State University College of Law
- Richard Finkmoore, California Western School of Law

- Jeremy Firestone, University of Delaware
- Denise D. Fort, University of New Mexico School of Law
- Dale Goble, University of Idaho College of Law
- Steve C. Gold, Rutgers School of Law, Newark
- Carmen G. Gonzalez, Seattle University School of Law
- Noah Hall, Wayne State University Law School, Executive Director, Great Lakes Environmental Law Center
- Michael Harris, University of Denver Sturm College of Law
- Michael P. Healy, University of Kentucky College of Law
- Sean B. Hecht, UCLA School of Law
- Taiawagi Helton, University of Oklahoma College of Law
- David R. Hodas, Wideer University School of Law
- Oliver A. Houck, Tulane University Law School
- David Hunter, American University Washington College of Law
- Will A. Irwin, The George Washington University Law School
- Itzchak E. Kornfeld, Florida Coastal School of Law
- Becky L. Jacobs, University of Tennessee School of Law
- Steve Johnson, Mercer University School of Law
- Caroline A. Karp, Brown University
- Robert B. Keiter, University of Utah S.J. Quinney College of Law
- Michael J. Kelly, Creighton University School of Law
- John H. Knox, Wake Forest University School of Law
- Sarah Krakoff, University of Colorado Law School
- Katrina Fischer Kuh, Hofstra University School of Law
- Andrew Long, Florida Coastal School of Law
- Jeffrey S. Lubbers, Washington College of Law at American University
- William V. Luneburg, University of Pittsburgh School of Law
- Albert Lin, University of California Davis School of Law
- Linda A. Malone, William and Mary Law School
- James R. May, Widener University Law School

- Steve McCaffrey, University of the Pacific, McGeorge School of Law
- Patrick C. McGinley, West Virginia University College of Law
- Gary D. Meyers, University of Tasmania Faculty of Law
- Joel A. Mintz, Nova Southeastern University Law Center
- Kenneth M. Murchison, Paul M. Hebert Law Center, Louisiana State University
- R. Nils Olsen, Jr., University at Buffalo, The State University of New York
- Dave Owen, University of Maine School of Law
- Patrick Parenteau, Vermont Law School
- Robert Percival, University of Maryland School of Law
- David Raack, Ohio Northern University College of Law
- John Ragsdale, University of Missouri-Kansas City School of Law
- Peter L. Reich, Whittier Law School
- Alison Rieser, University of Hawaii at Manoa
- Daniel J. Rohlf, Lewis and Clark Law School
- J.B. Ruhl, Florida State University College of Law
- Mark Squillace, University of Colorado School of Law
- Terence Tierny,
- Marshall Tracht, New York Law School
- William Want, Charleston School of Law
- David A. Westbrook, University at Buffalo, State University of New York
- Richard Westin, University of Kentucky School of Law
- Annecoos Wiersema, Michael E. Moritz College of Law, The Ohio State University
- David A. Wirth, Boston College Law School
- Mary Christina Wood, University of Oregon School of Law
- Sandra Zellmer, University of Nebraska College of Law