



October 10, 2008

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*Attention:* 1018-AT50, Division of Policy and Directives Management  
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4401 North Fairfax Drive, Suite 222  
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Re: Proposed Rule, *Interagency Cooperation under the Endangered Species Act*,  
Docket # FWS-R9-ES-2008-0093, 73 Fed. Reg. 47868 (Aug. 15, 2008)

Dear Sir/Madam:

The Center for Progressive Reform (CPR) submits these comments concerning the above-referenced proposed rule, *Interagency Cooperation under the Endangered Species Act*, issued by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services) on August 15, 2008. CPR is a nonprofit research and educational organization of academics specializing in the legal, economic, and scientific issues that surround federal regulation. CPR's network of scholars across the nation is dedicated to protecting health, safety, and the environment through analysis and commentary.

***Summary***

The Services propose sweeping and harmful changes to the regulations governing consultation on federal actions under the Endangered Species Act (ESA). CPR urges FWS and NMFS to withdraw this ill-considered proposal, which will undercut the ESA's stated purposes of conserving listed species and the ecosystems upon which they depend. At a minimum, we respectfully request that FWS and NMFS extend the public comment period to at least 120 days to ensure sufficient time and a diversity of venues for interested stakeholders to comment and provide productive feedback.

Our major concern is a general one, that this proposal displays an unseemly rush to ease the restrictions of the ESA as this Administration is leaving office. The timing of and explanation for this proposal raise doubts that the Services are motivated by a

sincere belief that comprehensive reform of the consultation regulations is needed. If that were the intent, however, it would call for a far more systematic evaluation of experience under the existing regulations. Comprehensive reform would imply consideration not only of ways in which the existing process may be too protective (the focus of this proposal) but also of ways in which the existing process is, according to the federal courts, not sufficiently protective. It would also require a far more systematic process of data gathering and evaluation.

We also have three specific concerns with the proposal. First, we believe it is both inconsistent with the ESA and poor policy to allow action agencies to decide, without oversight by FWS and NMFS, whether consultation is required. Second, in the reduced number of cases in which interagency consultation would still be required, the proposal would impose new limits on its scope. Third, the proposal would compound that problem by also introducing a stringent burden of proof that must be met before some effects can be considered. The changes proposed would effectively reverse the historic, and court endorsed, practice of giving the benefit of the doubt to protected species and would inject new opportunities for discord and delay into the consultation process.

### ***The Process: An Unseemly Rush to One-Sided 'Reform'***

On May 9, 2008, White House Chief of Staff Joshua Bolten issued a memorandum directing all federal agencies to avoid issuing proposed rules after June 1, 2008, or final rules after November 1, 2008, in the absence of “extraordinary circumstances.”<sup>1</sup> The White House declared those deadlines a matter of good government, ensuring that new rules would undergo careful and transparent review.<sup>2</sup> The Services issued this proposal on August 15, well after the White House’s deadline, with no mention of the Bolten memorandum or explanation of why “extraordinary circumstances” require this rulemaking at this time.

This proposal is an example of precisely the sort of poorly thought-out “midnight regulations” the Bolten memorandum was intended to prevent. In their haste and their commitment to relaxing the strictures of the ESA, FWS and NMFS have failed to clearly define what they see as the problems with the current consultation regulations or to articulate how their proposal will improve the consultation process. They have neglected to consider areas where the regulations clearly do need revision, and they have ignored important sources of information.

The Services justify this proposal in two ways, neither of which makes a case for the “extraordinary circumstances” required by the Bolten memorandum for rulemaking so late in the Administration’s final term. First, they note that the consultation regulations have not been comprehensively reviewed or revised since 1986. Second, they point to the new challenges

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<sup>1</sup> Memorandum from Joshua Bolten, White House Chief of Staff, to the Heads of Executive Departments and Agencies and the Administrator of the Office of Information and Regulatory Affairs (May 9, 2008), available at [http://www.whitehouse.gov/omb/inforeg/cos\\_memo\\_5\\_9\\_08.pdf](http://www.whitehouse.gov/omb/inforeg/cos_memo_5_9_08.pdf) (last visited Sept. 7, 2008).

<sup>2</sup> See, e.g., Charlie Savage and Robert Pear, *Administration Moves to Avert a Late Rules Rush*, N.Y. TIMES, May 31, 2008.

posed by global climate change. We explain below why neither justification supports the proposal.

*Asserted Justification No. 1: 'The Regulations Haven't Been Revised Since 1986'*

FWS and NMFS initially justify this proposal on the grounds that:

With the exception of two section 7 counterpart regulations for specific types of consultations, there have been no comprehensive revisions to the implementing section 7 regulations since 1986. Since those regulations were issued, much has happened: The Services have gained considerable experience in implementing the Act, as have other Federal agencies, States, and property owners; there have been many judicial decisions regarding almost every aspect of section 7 of the Act and its implementing regulations; and the Government Accountability Office has completed reviews of section 7 implementation.<sup>3</sup>

This justification, of course, does nothing to explain the timing of the proposal. In fact, this statement neither suggests a problem with current practice nor shows how these proposed changes would improve the decision process. The current regulations have been in place throughout the two terms of this Administration. No new studies, data, or events (other than the polar bear listing) justify the sudden rush to revision. The agencies have had nearly eight years to evaluate any problems with the consultation process and to gather information, yet they have made no effort to do so.

It may be that a comprehensive review and revision of the consultation rules would be desirable, but FWS and NMFS have provided little evidence to that effect. They cite only to a 2004 GAO report which noted that action agencies consider the consultation process burdensome and recommended clearer resolution to the question of when consultation is required.<sup>4</sup> In fact, the chief finding of that report was that due to the lack of complete and reliable data,

federal managers and congressional decision makers cannot have an accurate picture of how long the process takes to complete, how much it costs, and whether resources are adequate to meet workload demands. In addition, the Services cannot confirm or deny complaints about the lengthiness of the entire consultation process or know where the most significant problems arise.<sup>5</sup>

In other words, there was not (as of the end of 2003) enough data available to tell whether consultation was being demanded unnecessarily or taking too long. The 2004 GAO report surely would have justified the launch of a systematic data collection effort on the extent and outcome

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<sup>3</sup> U.S. Fish and Wildlife Service & National Marine Fisheries Service, Proposed Rule, *Interagency Cooperation under the Endangered Species Act*, 73 Fed. Reg. 47868.

<sup>4</sup> 73 Fed. Reg. at 47869.

<sup>5</sup> GENERAL ACCOUNTING OFFICE, ENDANGERED SPECIES: MORE FEDERAL MANAGEMENT ATTENTION IS NEEDED TO IMPROVE THE CONSULTATION PROCESS, GAO-04-93, at 3 (Mar. 19, 2004).

of consultation proceedings, and indeed the National Wildlife Federation had called for such an effort in 2003.<sup>6</sup> It is hardly a convincing ground for hurriedly launching wholesale changes four years later, without any attempt to better understand the contours of any problem. That 2004 report is further undercut as a justification for wholesale revision of the consultation rules by subsequent GAO testimony to Congress, reporting that FWS and NMFS “did not believe that disagreements about the consultation process require additional steps.”<sup>7</sup>

A comprehensive evaluation of the consultation rules might well be desirable at this point, but a useful comprehensive evaluation would look very different than the present proposal. A comprehensive review should begin with a clear analysis of the problem. As just explained, there is little data available about how the consultation process operates, the level of resources the wildlife and action agencies devote to it, the effects it has on federal projects, or the extent to which it effectively protects listed species. In gathering and interpreting data, the agencies should consider both the efficiency of the process and its conservation effectiveness, since those may be in tension. The data currently available, while certainly limited and in some cases dated, do not seem to support the claim that action agencies are unnecessarily forced to go through a burdensome consultation process.<sup>8</sup> FWS and NMFS have not discussed those studies, nor have they made any effort to collect more up-to-date information. Although they cite the collective experience of stakeholders as one justification for revising the regulations, FWS and NMFS have not canvassed their own experience, nor have they surveyed action agencies, applicants for federal permits, or environmental groups. By allowing only a short comment period (originally 30 days, now extended to 60), FWS and NMFS have made it very difficult for stakeholders to supply the needed data.

A comprehensive review should also be supported by a thorough canvassing of judicial decisions. The Services cite the “many judicial decisions regarding almost every aspect of section 7 of the Act and its implementing regulations” that have been handed down since 1986 as one of the many developments that justify comprehensive revisions.<sup>9</sup> But the Services have made no attempt to catalogue or analyze those judicial decisions. Such an analysis might suggest that the consultation rules need to tighten constraints on action agencies and the Services alike, rather than loosening them. We have not comprehensively reviewed the caselaw. But we do know that a number of decisions have found that action agencies have improperly refused to

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<sup>6</sup> *Endangered Species Act: Review of the Consultation Process Required by Section 7: Hearing before the Subcommittee on Fisheries, Wildlife, and Water of the Senate Committee on Environment and Public Works*, 108th Cong., 94 (2003) (statement of John F. Kostyack, Senior Counsel, National Wildlife Federation).

<sup>7</sup> GOVERNMENT ACCOUNTABILITY OFFICE, *ENDANGERED SPECIES ACT: SUCCESSES AND CHALLENGES IN AGENCY COLLABORATION AND THE USE OF SCIENTIFIC INFORMATION IN THE DECISION MAKING PROCESS*, GAO-05-732T at 5 (2005).

<sup>8</sup> See, e.g., *Endangered Species Act: Review of the Consultation Process Required by Section 7: Hearing before the Subcommittee on Fisheries, Wildlife, and Water of the Senate Committee on Environment and Public Works*, 108th Cong., 94 (2003); Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993); GENERAL ACCOUNTING OFFICE, *ENDANGERED SPECIES ACT: TYPES AND NUMBER OF IMPLEMENTING ACTIONS* (GAO/RCED-92-131BR) (1992).

<sup>9</sup> 73 Fed. Reg. at 47868.

consult,<sup>10</sup> and that the Services have issued unlawfully lenient biological opinions or have unlawfully narrowed the scope of consultation.<sup>11</sup> In fact, although the Services fail to mention it in this proposal, their current regulatory definition of “destruction or adverse modification” (of critical habitat) has been held unlawfully narrow by two courts of appeal, seven and four years ago.<sup>12</sup> To the extent that the Services seek clarity and consistency in the consultation process, their review should begin with that definition.

*Asserted Justification No. 2: ‘New Challenges Posed by Global Climate Change’*

The second justification given for this late, hurried proposal is that FWS and NMFS face “new challenges . . . with regard to global warming and climate change.” Undoubtedly, there are challenges to considering climate change in ESA consultation proceedings. But in this proposal FWS and NMFS make no effort to grapple with those challenges. Instead, they seek to escape any responsibility for dealing with the problems greenhouse gas (GHG) emissions pose for endangered and threatened species. That reaction is inconsistent with both the purposes and the text of the ESA.

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,”<sup>13</sup> with the stated goals of conserving species and the ecosystems upon which they depend. It is deliberately framed to protect species against the full range of threats they face, from habitat modification as well as direct exploitation.<sup>14</sup> Climate change, which is already modifying habitats in many ways, is undoubtedly now a leading threat to biodiversity, and may be the single most important threat.<sup>15</sup> While it may not be easy to address GHG emissions through ESA consultation, that is no justification for refusing to fully implement the law. If the agencies need relief from the “burden” of implementing the ESA against the threats of climate change, they must seek that relief from Congress.

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<sup>10</sup> *E.g.*, Florida Key Deer v. Paulison, 522 F.3d 1133 (11th Cir. 2008); Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109 (10th Cir. 2003), *vacated as moot*, Rio Grande Silvery Minnow v. Keys, 355 F.3d 1215 (10th Cir. 2004); Defenders of Wildlife v. Administrator, 882 F.2d 1294 (8th Cir. 1989); Washington Toxics Coalition v. EPA, 413 F.3d 1024 (9th Cir. 2005).

<sup>11</sup> *E.g.*, Pacific Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation, 426 F.3d 1082 (9th Cir. 2005); Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv., 524 F.3d 917 (9th Cir. 2008).

<sup>12</sup> Sierra Club v. U.S. Fish and Wildlife Serv., 245 F.3d 434, 441-42 (5th Cir. 2001); Gifford Pinchot Task Force v. United States, 378 F.3d 1059, 1069-1071 (9th Cir. 2004); *see also* New Mexico Cattle Growers Ass’n v. U.S. Fish and Wildlife Serv., 248 F.3d 1277, 1283 & n. 2 (10th Cir. 2001).

<sup>13</sup> Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978).

<sup>14</sup> Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 699 (1995).

<sup>15</sup> *See, e.g.*, David B. Wake & Vance T. Vredenburg, *Are We in the Midst of the Sixth Mass Extinction? A View from the World of Amphibians*, 105 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 11466 (2008); Kent E. Carpenter et al., *One-Third of Reef-Building Corals Face Elevated Extinction Risk from Climate Change and Local Impacts*, 321 SCIENCE 560 (2008); Barry W. Brook, Navjot S. Sodhi, & Corey J. A. Bradshaw, *Synergies Among Extinction Drivers Under Global Change*, 23 TRENDS IN ECOLOGY AND EVOLUTION 453 (2008); Cagan H. Sekercioglu et al., *Climate Change, Elevational Range Shifts, and Bird Extinctions*, 22 CONSERVATION BIOLOGY 140 (2008); Walter Jetz, David S. Wilcove, & Andrew P. Dobson, *Projected Impacts of Climate and Land-Use Change on the Global Diversity of Birds*, 5 PLOS BIOLOGY e157 (2007); J. Alan Pounds et al., *Widespread Amphibian Extinctions from Epidemic Disease Driven by Global Warming*, 439 NATURE 161 (2006); Chris D. Thomas et al., *Extinction Risk from Climate Change*, 427 NATURE 145 (2004).

Furthermore, FWS and NMFS, the agencies entrusted with implementing the ESA to achieve its conservation purposes, should be carefully considering the ways in which the statute may be useful in addressing this immense threat to biodiversity. They could, for example, evaluate how consultation might take into account the GHG emissions produced (directly or indirectly) by federal actions. They could also consider whether section 7(a)(1), which requires all federal agencies to affirmatively implement programs for the conservation of endangered species, might prove a useful tool for understanding and reducing GHG emissions with a federal nexus. They could attempt to engage EPA in the development of interagency procedures that might allow parties to satisfy GHG-related requirements of both the ESA and the Clean Air Act. Instead of doing any of these things, however, the Services have taken the opposite approach, searching diligently for any interpretation that might help them avoid considering climate change at all. Before abdicating responsibility, the Services should be expected, at a minimum, to critically examine how the ESA might be used to address climate change and to request public comments on what might and might not work.

We note the stark contrast between the Administration's rush to change the ESA consultation rules and its reluctance to issue rules limiting greenhouse gas emissions from automobiles. The Supreme Court issued its opinion in *Massachusetts v. EPA* on April 2, 2007. On July 30, 2008 (nearly 16 months later), EPA issued its regulatory response—an Advance Notice of Proposed Rulemaking (ANPR) that seeks public comment on a range of issues related to the Court's ruling.<sup>16</sup> The ANPR provides a comment period of almost four months, closing on November 28, 2008. Only after considering comments will EPA be ready to propose any regulations. Since the comment deadline is less than two months before the upcoming change in administration, it seems quite likely that the current Administration will, in the name of soliciting public comment, put off any regulation of GHGs under the CAA until it leaves office. The common thread seems to be the desire to avoid any regulatory limitations on GHG emissions, notwithstanding the requirements of law.

Finally, the Services assert that “the narrow scope of the proposed revisions” justifies the abbreviated comment period on this proposal.<sup>17</sup> Yet, as discussed below, the scope of the proposed revisions to the consultation rules is unclear, and their impacts are potentially sweeping. CPR's primary recommendation to the Services is that they withdraw the proposed changes to the consultation rules. Should FWS and NMFS choose not to withdraw their proposed rule, however, CPR requests that at a minimum the comment period be extended to at least 120 days. Not only would a 120-day comment period better reflect the significance of the proposed changes, but because it would match the comment period provided by EPA for its ANPR on regulation of GHG emissions under the Clean Air Act, it would also ensure a consistent opportunity for public input across agencies on rules governing the treatment of GHG emissions.

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<sup>16</sup> U.S. Env'tl. Prot. Agency, Advance Notice of Proposed Rulemaking, *Regulating Greenhouse Gas Emissions under the Clean Air Act*, 73 Fed. Reg. 44354 (Jul. 30, 2008).

<sup>17</sup> 73 Fed. Reg. at 47873.

### *Letting the Fox Guard the Chicken Coop*

Beyond the process the agencies have followed in proposing these changes to the consultation regulations, CPR objects to three substantive aspects of the changes. The first is permitting action agencies to decide for themselves, without review by FWS or NMFS, that their actions are not likely to adversely affect listed species, and therefore do not require consultation. We believe this proposed change exceeds the authority of FWS and NMFS under the ESA, and is therefore unlawful. Even if it were legally permitted, we believe the proposed change is bad policy.

The ESA requires that all federal agencies “in consultation with and with the assistance of” FWS and NMFS, “insure” that their actions are “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.<sup>18</sup> “To facilitate compliance with” that provision, the statute requires that federal agencies planning actions ask FWS and NMFS whether any listed species may be present within the action area.<sup>19</sup> If so, the action agency must complete a biological assessment “for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action.”<sup>20</sup> Current regulations require that the action agency submit its biological assessment to FWS or NMFS for review, and initiate formal consultation unless the wildlife agency concurs in writing with its judgment that the action is not likely to adversely affect any listed species.<sup>21</sup> The proposed regulations would allow the action agency to avoid consultation without seeking the concurrence of FWS or NMFS if the action agency, on its own, determines: 1) that the action will not cause take of a listed species; and 2) it will have no effect or be only “an insignificant contributor” to any effects on listed species or critical habitat, or its effects “are not capable of being meaningfully evaluated,” are wholly beneficial, or pose only a remote threat of jeopardy or adverse modification of critical habitat.<sup>22</sup>

The proposed regulations are inconsistent with the ESA. When it enacted the ESA, Congress gave protection of endangered species priority over the primary missions of all federal agencies.<sup>23</sup> Congress understood that action agencies might resist that reordering of priorities. It therefore did not leave implementation of the Act to action agencies alone. Instead, it explicitly required in section 7 that action agencies fulfill their ESA responsibilities “in consultation with and with the assistance of” FWS and NMFS, agencies with expertise in conservation and a core conservation mission.<sup>24</sup> Congress intentionally set up section 7 to require a dialogue between action agencies and wildlife agencies. The wildlife agencies may not abdicate their role, delegating to the action agencies final authority for determining whether any dialogue is

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<sup>18</sup> 16 U.S.C. § 1536(a)(2).

<sup>19</sup> 16 U.S.C. § 1536(c)(1).

<sup>20</sup> *Id.*

<sup>21</sup> 50 C.F.R. § 402.12(j); 402.13(a); 402.14(b)(1).

<sup>22</sup> 73 Fed. Reg. at 47874.

<sup>23</sup> *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978).

<sup>24</sup> 16 U.S.C. § 1536(a)(2).

required. If change is needed to the dual roles of action and wildlife agencies, it is for Congress, not the Services, to make that change.

In fact, Congress has previously considered – and decided against – this change. In September 2005, then-Rep. Richard W. Pombo sponsored the so-called “Threatened and Endangered Species Recovery Act of 2005”<sup>25</sup> (TESRA). TESRA would have authorized the Services to identify actions that could be found to satisfy the requirements of Section 7 through unspecified “alternative procedures” rather than the normal consultation process.<sup>26</sup> As conservation agencies pointed out at the time, that provision could have “all but eliminate[d] the current requirement that each federal agency consult with the Services on any action which is likely to harm endangered or threatened species.”<sup>27</sup> Representative Pombo, and other opponents of aggressive conservation action, understood that legislative change would be needed to cut back on the Service’s role under Section 7. Congress (wisely, in our view) chose not to enact TESRA. Without mentioning TESRA, the Services in this proposal proceed as though Congress had authorized this sweeping change to the consultation process. It is not the executive branch’s role to rewrite statutes. If the Services believe the requirements of Section 7 consultation are burdensome, inefficient, or unnecessary, they must seek relief from Congress.

The Services have also failed to mention another important piece of background information relevant to this proposal. They have already experimented with delegating the authority to make “no adverse affect” determinations to action agencies. These experiments have been far less sweeping than what is proposed here – they have been limited to a small number of agencies and a limited category of actions, and they have included important mechanisms for ensuring that the action agencies have the needed expertise and that the Services retain oversight authority. Even with those limitations, a recent report by the Services strongly suggests that shifting the responsibility for determining whether or not actions will adversely affect listed species dramatically changes the process.

In 2003, the Services adopted “joint counterpart regulations” authorizing public land management agencies to determine for themselves whether consultation was required for projects authorized under the National Fire Plan.<sup>28</sup> In order to gain that authority, land management agencies were required to enter into “Alternative Consultation Agreements” with the wildlife agencies, which set out staff training procedures, standards for determining that actions would not adversely affect listed species, and programs for recordkeeping and periodic evaluation.<sup>29</sup> The Services retained oversight authority and responsibility.<sup>30</sup> In 2004, the Services issued similar joint counterpart consultation regulations allowing EPA to determine

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<sup>25</sup> H.R. 3824, 109th Cong., 1st Sess. (2005).

<sup>26</sup> Threatened and Endangered Species Recovery Act of 2005, H.R. 3824, 109th Cong. §11(a)(2)(D) (2005).

<sup>27</sup> *Endangered Species Act Overhaul: Hearing on H.R. 3824 Before the H. Comm. on Resources*, 109th Cong. (2005) (Statement of Jamie Rappaport Clark, Executive Vice President, Defenders of Wildlife (testifying on behalf of Defenders of Wildlife, Environmental Defense and World Wildlife Fund)).

<sup>28</sup> 68 Fed. Reg. 68254 (Dec. 8, 2003), codified at 50 C.F.R. §§ 402.30-402.34.

<sup>29</sup> 50 C.F.R. § 402.33.

<sup>30</sup> 50 C.F.R. § 402.34.



whether consultation is required for actions implementing the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).<sup>31</sup> Like the Fire Plan regulations, these were contingent upon EPA entering into an Alternative Consultation Agreement with the Services, including: an explanation of actions taken to ensure that EPA's determinations would be consistent with the ESA; training and certification requirements for EPA personnel; and recordkeeping, oversight, and evaluation procedures.<sup>32</sup>

These experiments have met with mixed reactions from the judiciary. A federal district court struck down the FIFRA joint counterpart regulations in *Washington Toxics Coalition v. Department of Interior*, ruling that the ESA does not permit action agencies alone "to make the critical section 7(a)(2) determination" that consultation is not required.<sup>33</sup> The *Washington Toxics* court also found that the Services had failed to fulfill their own duties to insure that their actions are not likely to jeopardize listed species by delegating decisionmaking authority to EPA without any evidence that EPA would make those decisions properly.<sup>34</sup> In *Defenders of Wildlife v. Kempthorne*, a different district court upheld the Fire Plan joint counterpart regulations,<sup>35</sup> but only because it concluded that the Services could fulfill their statutory role in the consultation process through the Alternative Consultation Agreements and their retained oversight authority.

The sweeping delegations proposed here would fail judicial review under the standards articulated in these cases. Even if one agrees with the *Defenders v. Kempthorne* court that the ESA does not categorically prohibit this sort of delegation, this proposal lacks any oversight provisions or continuing role for the Services. Furthermore, as in *Washington Toxics*, the delegation decision itself appears to violate Section 7's requirement that the Services insure that their own actions do not cause jeopardy or adverse modification of critical habitat. The proposed rule cites absolutely no evidence that *any* action agencies, let alone the full range of federal agencies, will use scientifically appropriate procedures in implementing their new responsibilities.

Indeed, the Services have ignored their own findings suggesting that action agencies cannot be counted on to make scientifically defensible determinations of no adverse affect. In January 2008, pursuant to their obligations under the National Fire Plan joint counterpart regulations, the Services issued a report reviewing the performance of the Forest Service and Bureau of Land Management (BLM) under those regulations. The review did not purport to evaluate whether the land management agencies' conclusions that consultation was not required were substantively correct; it looked only at whether those conclusions were supported by the best available scientific evidence and sound reasoning. The report confirms Congress's wisdom in mandating that action agencies consult with the more expert Services. NMFS concluded that not one of the 10 evaluations performed for species under its jurisdiction adequately identified the effects of the action, properly noted the listed species that might be affected, or used the best

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<sup>31</sup> 69 Fed. Reg. 47732 (Aug. 5, 2004), codified at 50 C.F.R. §§ 402.40-402.48.

<sup>32</sup> 50 C.F.R. § 402.45.

<sup>33</sup> *Washington Toxics Coalition v. Dep't of Interior*, 457 F. Supp. 2d 1158, 1179 (W.D. Wash. 2006).

<sup>34</sup> *Id.* at 1182-83.

<sup>35</sup> *Defenders of Wildlife v. Kempthorne*, 2006 WL 2844232, slip op. at 18-19 (D.D.C.).

available scientific information.<sup>36</sup> FWS found that 31 of 50 evaluations by the land management agencies did not meet all of six review criteria, and 8 of the 50 did not meet any of the criteria.<sup>37</sup> Although the Services do not discuss the report's conclusions, a reporter for the journal *Science* asked the Forest Service and BLM about the report's conclusions for an article about this proposed rule. A spokesperson for the BLM could only say that the agency now has more expertise and expects "improved outcomes" in the future,<sup>38</sup> without providing any evidence that might justify others sharing that confidence. The Forest Service also claimed that it had increased training, but again without any details.<sup>39</sup>

The delegations reviewed in the Services' recent report represent the best case for delegation. Both BLM and the Forest Service have years of experience with consultation. Under the applicable Alternative Consultation Agreements, BLM and Forest Service personnel had undergone training regimens approved by the Services. The Services had examined and approved the action agencies' planned approach to reviewing their actions. And the action agencies knew that their efforts were subject to ongoing review. Yet they still failed to meet basic standards for careful assessment of their actions. Given the evidence that action agencies do not properly evaluate the effects of their actions on listed species even under a carefully tailored program (with trained personnel and ongoing review), the broad and unfettered delegation proposed here, to all action agencies with respect to all of their actions, is not legally supportable. Any delegation of the power to determine that actions will not adversely affect listed species must be supported by an individual determination that the agency in question has the needed expertise and commitment to be trusted with these decisions, and some provision for oversight and review, at least until the agency establishes a record for making these decisions appropriately.

Even if the broad delegation the Services now propose were legally permissible, it would remain a bad idea. FWS and NMFS argue that action agencies have gained the expertise needed to determine for themselves whether consultation is required. The Services' own review of the National Fire Plan experience, however, shows that even agencies with considerable consultation experience, after training designed by FWS and NMFS, do not have the expertise to make scientifically credible or logically defensible determinations that their actions will not adversely affect listed species. Even if some action agencies do currently have the expertise they would need, there is no assurance that will continue. Just as the Services are proposing these rule changes, for example, the Bureau of Reclamation, which frequently must consult on the effects of its water project operations on listed species, is in the process of cutting its environmental

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<sup>36</sup> FWS, NMFS, BUREAU OF LAND MANAGEMENT, AND FOREST SERVICE, USE OF THE ESA SECTION 7 COUNTERPART REGULATIONS FOR PROJECTS THAT SUPPORT THE NATIONAL FIRE PLAN, PROGRAM REVIEW: YEAR ONE 12 (Jan. 11, 2008), available at <http://www.nmfs.noaa.gov/pr/pdfs/laws/fireplanreview.pdf>.

<sup>37</sup> *Id.* at 18.

<sup>38</sup> Erik Stokstad, *New Regulations Would Lessen Influence of Fish and Wildlife Experts*, 321 *SCIENCE* 1030 (Aug. 22, 2008).

<sup>39</sup> *Id.*

staff.<sup>40</sup> In times of lean budgets, many mission-oriented action agencies may look first to what they regard as less important, ancillary functions, such as environmental review, to make cuts. Furthermore, the Services' own emphasis in this proposal on the new challenges posed by climate change to the consultation process undercuts their claim that the action agencies have the needed expertise to take over this part of the process. Although no agency has substantial experience evaluating the impacts of climate change on listed species, FWS has at least begun to study these questions.<sup>41</sup> It simply cannot be said, at this challenging time for wildlife conservation, that all federal action agencies have the expertise needed to evaluate their projects in light of the newly-recognized threats of climate change.

Furthermore, expertise is not the only issue. Information about both the status and the needs of endangered or threatened species is notoriously incomplete and imperfect. Agencies evaluating that information necessarily rely to a great extent on their professional judgment. That judgment is a product not only of evidence and professional training, but also of professional and political orientation and perceived mission. Where the evidence is equivocal (as it frequently will be), agencies committed to their own development or extraction missions will be more likely than agencies with a primary conservation mission to conclude that consultation is not required.<sup>42</sup> In the ESA, Congress intended to set up a framework of "institutionalized caution"<sup>43</sup> under which the benefit of the doubt would go to listed species. This proposal would make significant inroads on that framework, offering action agencies the opportunity to give the benefit of the doubt to their own missions instead.

In this proposal, FWS and NMFS explain that they believe the action agencies will "have strong incentives to make these determinations [that consultation is not required] accurately." They offer no evidence to support that confidence. Based on the evidence of past behavior, we believe that many action agencies will be tempted to underestimate the potential effects of their actions on listed species in order to avoid consultation. The Services note that action agencies frequently find their consultation obligations "burdensome."<sup>44</sup> As we have already explained, the litigation record shows that agencies such as the Bureau of Reclamation, Army Corps of

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<sup>40</sup> See News Release, Public Employees for Environmental Responsibility, *Reclamation Jettisoning Environmental Functions* (August 18, 2008), available at [http://www.peer.org/news/news\\_id.php?row\\_id=1092](http://www.peer.org/news/news_id.php?row_id=1092) (last visited Sept. 8, 2008).

<sup>41</sup> See, e.g., *Planning for a Changing Climate and its Impact on Wildlife and Oceans; State and Federal Efforts and Needs: Oversight Hearing Before the Subcomm. on Fisheries, Wildlife, and Oceans of the H. Comm. on Natural Res.*, 110th Cong. (2008) (statement of Dan Ashe, Science Advisor to the Director, U.S. Fish and Wildlife Service, Dep't of the Interior), available at <http://www.fws.gov/laws/Testimony/110th/2008/AsheClimateChangeandAdaptiveWildlifeMgmt.html> (last visited Oct. 1, 2008).

<sup>42</sup> See, e.g., 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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090313); Holly Doremus, *Science Plays Defense: Natural Resource Management in the Bush Administration*, 32 ECOLOGY L.Q. 249, 282-87 (2005); Holly Doremus & A. Dan Tarlock, *Science, Judgment, and Controversy in Natural Resource Regulation*, 26 PUB. LAND & RESOURCES L. REV. 1, 25-28 (2005).

<sup>43</sup> *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

<sup>44</sup> 73 Fed. Reg. at 47869 (citing GENERAL ACCOUNTING OFFICE, ENDANGERED SPECIES: MORE FEDERAL MANAGEMENT ATTENTION IS NEEDED TO IMPROVE THE CONSULTATION PROCESS, GAO-04-93 (Mar. 19, 2004)).

Engineers, Federal Emergency Management Agency and even EPA have, in a variety of situations, fiercely resisted application of the ESA to their programs.<sup>45</sup> Action agencies have a history of construing their ESA obligations as narrowly as possible, even when doing so landed them on the losing end of litigation. This proposal will offer them one more avenue to do so, free of review by the Services. Surely many will take advantage of this loophole to evade full consultation on actions that do in fact threaten listed species. They will do so without consequences unless: the flaws in their analysis are discovered by FWS or NMFS (unlikely in the extreme, since the proposal removes review by the Services from the process); independent outside review succeeds in establishing that the review was inadequate (unlikely, because courts will tend to defer to the action agency's view of the science in the absence of review by an agency with greater expertise<sup>46</sup>); or a citizen group is able to mount a successful section 9 lawsuit (a difficult and resource-intensive undertaking in the absence of the information normally provided by informal and formal consultation).

In other contexts, this Administration has acknowledged the importance of outside review of technical analyses. In proposing guidelines for outside review of scientific judgments with regulatory consequences, the Office of Management and Budget explained in 2003:

. . . it might be thought that scientists employed or funded by an agency could feel pressured to support what they perceive to be the agency's regulatory position, first in developing the science, and then in peer reviewing it. . . . [G]enuinely independent and objective peer review can provide a vital second opinion on the science that underlies federal regulation . . .<sup>47</sup>

We are not blind fans of peer review.<sup>48</sup> In some circumstances, it may simply be an unnecessary extra step. But sometimes a second opinion is important and useful. This is one of those times: the action agencies often have a strong commitment to the missions their proposed actions serve, and information about what the effects of those actions may be on listed species is often incomplete or equivocal. The action agencies therefore have both the incentive and the opportunity to underestimate effects on listed species. There is good reason to suspect that their evaluations will be systematically (and even unconsciously) skewed against conservation in the absence of some review by experts less invested in the proposed actions. Given the recent attention to how a lack of governmental oversight has been, in part, responsible for the current

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<sup>45</sup> See notes 10-11 and accompanying text.

<sup>46</sup> See Michael C. Blumm & Stephen R. Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENVTL. L. REV. 277 (1990) (concluding that courts have given great weight to comments submitted by expert agencies in determining whether an action agency's NEPA analysis is legally sufficient).

<sup>47</sup> Office of Management and Budget, *Proposed Bulletin on Peer Review and Information Quality*, 68 Fed. Reg. 54023, 54024 (Sept. 15, 2003).

<sup>48</sup> For discussion of some of the problems peer review can pose for effective environmental protection, see Sidney A. Shapiro, *OMB's Dubious Peer Review Procedures*, 34 ENVTL. L. REP. 10,064 (2004); Wendy E. Wagner, *The "Bad Science" Fiction: Reclaiming the Debate over the Role of Science in Public Health and Environmental Regulation*, 66 LAW & CONTEMP. PROBS. 63 (2003).

financial crisis, it strikes us as highly irresponsible to foster further self-governance by retracting long-standing oversight practices.

### ***Contracting the Scope of Consultation***

When consultation cannot be avoided, the Services propose to limit its scope to exclude indirect effects unless the action can be described as the “essential cause” of those effects.<sup>49</sup> The Services’ assert that this change will “provide some additional clarity”<sup>50</sup> on the scope of consultation, and thereby “simplify the consultation process and make it less burdensome and time-consuming.”<sup>51</sup> Far from increasing clarity, the proposed change will increase confusion about which effects must be considered. The Services have not provided a definition of “essential cause,” nor is that a familiar term of art. Their explanation in the preamble does little to clarify. The Services explain that an action is the “essential cause” of an effect only if the effect would not occur without the action,<sup>52</sup> that is, the action is a “but-for” cause of the effect. They go on to say that something more than but-for causation is required, but leave unclear what will satisfy that additional requirement. Under the proposal, an action would not be considered the “essential cause” of an effect if it is only a “marginal contributor” to the effect,<sup>53</sup> apparently meaning that marginal changes to the proposed action (as opposed to its complete prohibition) would not make much difference to the effect.<sup>54</sup> The lack of clarity in the proposal demonstrates the need for a fuller explanation of the proposal and a longer comment period. Interested parties cannot effectively respond to the proposal if they are not sure how it will be implemented. They should not bear the burden of asking in their comments how every specific situation of concern to them will be evaluated.

The examples given by the Services suggest that their proposed changes could drastically alter the established law of consultation. It has long been established, for example, that consultation on a federally-funded highway project must include consideration of the residential and commercial development that can be expected to follow highway construction.<sup>55</sup> Yet given the Services’ examples, highway construction would not appear to be the “essential cause” of subsequent development. The highway does not determine the scope or precise placement of that development, and development is no more certain to follow highway construction than vehicle traffic and its associated GHG emissions, which the Services explicitly say would be excluded from consultation. At a minimum, the Services should revise their explanation of this proposal to clarify the extent to which it is and is not consistent with prior practice and caselaw. To the extent that the Services’ interpretation would allow agencies to avoid consultation on

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<sup>49</sup> 73 Fed. Reg. at 47869, 47874 (in proposed 50 C.F.R. § 402.02, definition of “Effects of the action”).

<sup>50</sup> *Id.* at 47869.

<sup>51</sup> *Id.* at 47870.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *See id.* (noting that a permit for a marina would be the “essential cause” of increased boat traffic because the permit will determine the capacity and configuration of the marina, but a permit for a pipeline to cross a navigable waterway is not the “essential cause” of the effects of construction and operation of the pipeline). The distinction is as clear as mud.

<sup>55</sup> *National Wildlife Fed’n v. Coleman*, 529 F.2d 359, 373-74 (5th Cir. 1976).

reasonably foreseeable indirect effects of their actions (such as future development or increased GHG emissions following highway construction), CPR submits that interpretation is inconsistent with the ESA. Section 7 requires that action agencies, in consultation with the Services, insure that their actions are not likely to cause jeopardy or adverse modification of critical habitat. Willful blindness to wholly foreseeable indirect effects is inconsistent with that duty.

It is possible to read the proposed regulations in ways that would be even more harmful to listed species. The Services' explanation of what it means for an action to be the "essential cause" of an effect can be read to foreclose consultation on any actions, no matter how harmful, if the species is already in jeopardy due to the effect of other actions. That is not the law. "Even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm."<sup>56</sup>

Nor should it be the law. By definition, listed species are "in danger of extinction" or likely to become so in the foreseeable future.<sup>57</sup> It will often be difficult or impossible to show that a listed species would be safe if not for a single proposed action. Paradoxically, these regulatory changes could suggest that the more dire the condition of a species, and the greater the number of threats to which it is exposed, the more limited the scope of consultation becomes. The Minerals Management Service, for example, might argue that it need not consult on the direct effects of arctic oil and gas leasing on the polar bear because the species is doomed by global warming in any case. That surely is not what Congress intended when it enacted Section 7. While consultation on arctic oil development cannot wholly solve the problem of global warming, it can make a difference to the probability of polar bear extinction and the speed with which extinction might arrive.

The proposed changes appear to be primarily intended to remove GHG emissions from the scope of consultation.<sup>58</sup> The text of the ESA does not permit the Service to evade responsibility for consultation on GHG emissions. GHG emissions will often follow quite directly from a federal action (such as funding a highway or leasing fossil fuel resources). Action agencies cannot insure that their actions will not jeopardize listed species without considering those effects.

We also note that these proposed changes will increase confusion and sow disagreement over the scope of Section 7 well beyond the global warming context. The vast majority of listed species are threatened by a combination of many different types of activities. Actors connected with various threats are already prone to finger-pointing and blame-shifting. Consider, for

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<sup>56</sup> National Wildlife Fed'n v. National Marine Fisheries Svc., 524 F.3d 917, 930 (9th Cir. 2008); *see also* National Wildlife Fed'n v. Coleman, 529 F.2d 359, 374 (5th Cir. 1976) ("irrespective of the past actions of others the appellees have a duty to insure that the highway and the development generated by it do not further threaten the crane and its habitat").

<sup>57</sup> 16 U.S.C. § 1532(6), 1532(20).

<sup>58</sup> 73 Fed. Reg. at 47872 (These regulations would reinforce the Services' current view that there is no requirement to consult on greenhouse gas (GHG) emissions' contribution to global warming and its associated impacts on listed species (e.g., polar bears).)

example, the many endangered and threatened runs of Pacific salmon species. Logging, fishing, irrigation, development, and hydroelectric power interests have spent years blaming each other for the plight of the salmon. But until now, they have all had to submit to consultation when their actions had a federal nexus.<sup>59</sup> Adding a murky requirement that regulators identify one or more “essential” threats which are somehow worse than all the others will provide each of these interests with a new argument that its activities should not be subject to consultation because they are less harmful than others. Consultation should ensure that all who contribute to extinction threats play a role in finding a solution. The Services’ proposed rule, however, would have just the opposite effect, fragmenting responsibility and encouraging the claim that undeniably harmful effects should escape review.

### ***Increasing the Burden of Proof***

The proposed rule would exacerbate the effect of the “essential cause” limitation by restricting consultation to those effects which can be shown by “clear and substantial information” to be reasonably certain to occur.<sup>60</sup> This is another respect in which the proposal suffers from a lack of clarity. “Clear and substantial information” is a new turn of phrase. It is not clear whether the Services intend it to invoke the more familiar “substantial evidence,” “clear and convincing evidence,” or some entirely new level of proof.

It seems clear that the Services intend this language to increase the evidentiary standard for requiring consultation to some extent. CPR believes that any increase in that burden is inconsistent with Section 7. The language of the statute indicates that the burden of proof must not be placed on the species: action agencies must “insure” that their actions are “not likely” to cause jeopardy or adverse modification of critical habitat. Interpreting that language, the Supreme Court noted in *TVA v. Hill* that Congress had deliberately adopted a strategy of “institutionalized caution.”<sup>61</sup> When it amended the Act the following year, Congress took care to specifically reiterate that the Act, as amended “continues to give the benefit of the doubt to the species,” and “to place the burden on the action agency to demonstrate to the consulting agency that its action will not violate Section 7(a)(2).”<sup>62</sup> At least until this proposal, the action agencies have explicitly given weight to Congress’s intent, stating in their Consultation Handbook that where information is lacking the species must be given the benefit of the doubt.<sup>63</sup> The federal courts agree.<sup>64</sup>

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<sup>59</sup> See Michael C. Blumm & Gregg D. Corbin, *Salmon and the Endangered Species Act: Lessons from the Columbia Basin*, 74 WASH. L. REV. 519, 549 (1999) (“our study of BiOps and associated litigation underscores the ESA’s remarkable scope, which allows scrutiny of hydroelectric operations, hatchery practices, harvest management, and habitat management”).

<sup>60</sup> 73 Fed. Reg. at 47870.

<sup>61</sup> *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

<sup>62</sup> H.R. CONF. REP. 96-697, reprinted in 1979 U.S.C.C.A.N. 2572, 2576 (1979).

<sup>63</sup> FWS & NMFS, CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING CONSULTATION AND CONFERENCE ACTIVITIES UNDER SECTION 7 OF THE ENDANGERED SPECIES HANDBOOK, 1-7, 3-12, E-2 (1998), available at [http://www.nmfs.noaa.gov/pr/pdfs/laws/esa\\_section7\\_handbook.pdf](http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf) (last visited Sept. 15, 2008).

<sup>64</sup> See, e.g., *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988); *Natural Res. Def. Council v. Kempthorne*, 506 F. Supp.2d 322, 361-2 (recognizing “benefit of doubt to the species” presumption and explaining that it guides

This proposed change would reverse that cautious approach, forcing conservation proponents to prove to some unspecified but apparently high degree of certainty that an effect will occur before it could be considered in consultation. This change is inconsistent with the ESA, because it would undermine action agencies' duty to insure that their actions do not cause jeopardy. It may also be inconsistent with the Act's requirement that agencies use the best available scientific information in fulfilling their duties under Section 7.

By excluding evidence of threats to species posed by agency action that fail to meet this vague but clearly heightened standard of proof, the regulations propose to adopt what has been characterized by Professor Thomas McGarity and others as the "corpuscular" approach.<sup>65</sup> With its roots in the famous *Daubert* case,<sup>66</sup> the corpuscular approach focuses on the inevitable flaws and uncertainties in individual studies.<sup>67</sup> Individual studies are either valid or invalid, relevant or irrelevant – and a conclusion based upon invalid or irrelevant studies cannot be relevant and reliable and must therefore be rejected.<sup>68</sup>

The corpuscular approach stands in sharp contrast to the long-used and universally-employed weight of the evidence approach to evaluating environmental problems. The weight of the evidence approach necessarily acknowledges that some studies may be more reliable than others, but considers the totality of the information in making judgments rather than eliminating certain studies or pieces of information entirely to the point that there is nothing left upon which to make a decision.<sup>69</sup> Stated differently, while a single piece of information can be quite unclear, it can still contribute to a conclusion when it is considered along with all the other singularly uncertain pieces of information. By excluding from consultation evidence of threats to species that does not rise to the level of "clear and substantial information," the proposed rule undermines the ESA's mandate to use the best available scientific information. The best available scientific information may be highly uncertain, but still must be considered.

Moreover, from a practical standpoint, such a requirement would put the cart well before the horse. The point of consultation is to generate information about the effects of proposed actions. The proposed rule sets up a Catch-22 for conservation: the wildlife agencies could not insist on consultation without clearly showing harm, but they would not have the information needed to make that showing without consultation. Because there are large data gaps in the

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agencies' consideration of available scientific data and determination of most reliable data and models); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp.2d 1115, 1127, 1135 (N.D. Cal. 2006); *Rio Grande Silvery Minnow v. Keys*, 356 F. Supp.2d 1222, 1233 (D.N.M. 2002).

<sup>65</sup> See, e.g., Thomas O. McGarity, *Our Science is Sound Science and Their Science is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities*, 52 U. KAN. L. REV. 897, 921-26 (2004).

<sup>66</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

<sup>67</sup> McGarity, *supra* note 64 at 924.

<sup>68</sup> McGarity, *supra* note 64 at 924.

<sup>69</sup> See Thomas O. McGarity, *On the Prospect of Daubertizing Judicial Review of Risk Assessment*, 66 LAW AND CONTEMP. PROBS. 155, 175 (2003).



information available about listed species,<sup>70</sup> requiring that the proponents of consultation meet a “clear and substantial information” standard will likely pose a substantial barrier to consultation.

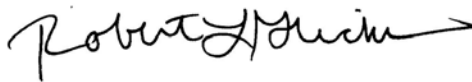
### ***Conclusion***

FWS and NMFS are correct that much has happened in the 35 years since the Act was first passed, and in the 22 years since the interagency consultation rules were last comprehensively revised. The growing recognition that climate change is the major challenge for the future calls for a fresh look at our conservation goals and how we approach them. However, for the reasons explained in these comments, this proposal—initiated in the eleventh hour of an outgoing administration with no clear justification and only the barest opportunity for public input—is no way to launch a productive discussion. Congress previously considered a legislative proposal to allow action agencies to proceed without consulting the Services, and rejected the idea. In light of the strong indications that such self-regulation would in fact jeopardize listed species, we believe Congress acted wisely in rejecting that change. CPR requests that FWS and NMFS follow suit and withdraw the proposed rule, or at a minimum, extend the public comment period to at least 120 days.

Sincerely,



Holly Doremus, J.D., Ph.D.  
Member Scholar, Center for Progressive Reform  
Professor of Law, UC Davis  
Professor of Law, UC Berkeley



Robert L. Glicksman, J.D.  
Member Scholar and Director, Center for Progressive Reform  
Robert W. Wagstaff Distinguished Professor of Law  
University of Kansas School of Law

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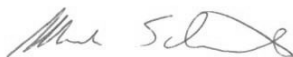
<sup>70</sup> See, e.g., Holly Doremus, *Data Gaps in Natural Resource Management: Sniffing for Leaks Along the Information Pipeline*, 83 IND. L. J. 407, \_\_\_\_ (2008).



Alejandro E. Camacho, J.D., L.L.M.  
Member Scholar, Center for Progressive Reform  
Associate Professor of Law  
Notre Dame Law School



Daniel J. Rohlf, J.D.  
Member Scholar, Center for Progressive Reform  
Associate Professor of Law  
Director, Pacific Environmental Advocacy Center  
Lewis and Clark Law School



Mark Schwartz, Ph.D.  
Professor, Conservation Biology  
Department of Environmental Science & Policy, UC Davis



Margaret Clune Giblin, J.D.  
Policy Analyst, Center for Progressive Reform