

WASHINGTON LEGAL FOUNDATION

2009 MASSACHUSETTS AVENUE, N.W.

WASHINGTON, D.C. 20036

(202) 588-0302

www.wlf.org

October 14, 2008

U.S. Fish & Wildlife Service
Public Comment Processing
Attn: 1018-AT50
Division of Policy and Directives Management
4401 N. Fairfax Drive
Arlington, VA 22203

Re: Comments on Proposed Rule on Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47868 (Aug. 15, 2008)

Dear Sir or Madam:

The Washington Legal Foundation (WLF) hereby submits these comments in support of the proposed rules by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively the "Services") on Interagency Cooperation under the Endangered Species Act (ESA). The Services are proposing these changes "to clarify certain definitions, when the section 7 regulations are applicable and the correct standards for effects analysis, and to establish time frames for the informal consultation process." 73 Fed. Reg. 47868.

As discussed below, WLF strongly supports these changes because they would streamline and expedite the consultation process between the Services and federal agencies to ensure that their actions do not jeopardize listed threatened or endangered species or adversely modify critical habitat. At the same time, the proposed regulations would make clear that the consultation process of Section 7 of the ESA is not applicable to agency actions regulating or affecting greenhouse gases (GHG) emissions because such emissions would not be an "essential cause" of any global warming impacts that may affect the habitat of a listed species, such as the polar bear. 73 Fed. Reg. 47872.

In short, neither ESA's Section 7 consultation process nor the listing of the polar bear or other species should be misused to regulate GHG emissions. Applying Section 7 in such a broad manner would unnecessarily have an adverse impact on energy production, development, agriculture, and economic growth. In that regard, WLF supports the comments submitted in support of this rulemaking proceeding, including those filed by the Utility Air Regulatory Group (UARG), the Edison Electric Institute (EEI) and the Western Business Roundtable.

Interests of WLF

WLF is a national non-profit public interest law and policy center based in Washington, D.C., that promotes free enterprise principles, regulatory reform, a limited and accountable government, and economic and property rights. WLF also devotes substantial resources to litigating cases raising environmental issues, including the National Environmental Policy Act (NEPA), global warming, and the ESA. *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Connecticut v. American Electric Power*, No. 05-5104-cv (2d Cir.) (pending); *Northern Alaska Environment Center v. Kempthorne*, 474 F.3d 969 (9th Cir. 2006); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 517 U.S. 687 (1995).

WLF also has submitted comments to FWS over the years opposing proposed listings of species as endangered or threatened, or designation of critical habitat under the ESA because of the lack of scientific evidence justifying such listings or designations. *See, e.g.*, 72 Fed. Reg. 1064 (Apr. 9, 2007) (Proposed Listing of the Polar Bear as Threatened); 71 Fed. Reg. 59700 (Oct. 11, 2006) (Withdrawal of Proposed Rule to List the Cow Head Tui Chub as Endangered); 67 Fed. Reg. 44933 (July 5, 2002) (Withdrawal of Proposed Rule To List the Southwestern Washington/Columbia River Coastal Cutthroat Trout as Threatened).

Section 7 Consultation Process

In general, Section 7 of the ESA (16 U.S.C. § 1536 "Interagency Cooperation") requires federal agencies to consult with the FWS or NMFS, as appropriate, to ensure that the agency's action, including the issuance of permits, licenses, funds, or other authorization, "is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species."¹ If the agency determines that an action will not affect listed species or critical habitat, no consultation is required. Conversely, a federal agency is required to consult if an action "may affect" listed species or critical habitat. The agencies may first conduct an informal consultation to determine whether a formal consultation is required.

However, as noted in the proposed rulemaking, a 2004 Government Accountability Office (GAO) Report on interagency collaboration during section 7 consultations noted that the entire consultation process was burdensome and suggested that the agencies resolve disagreements about *when* the consultation process is needed. 73 Fed. Reg. 47869. Accordingly, the Services proposed to amend the consultation regulations found in 40 C.F.R.

¹ Section 6 of the ESA, 16 U.S.C. § 1535, deals with "Cooperation with States" and Section 8 of the ESA, 16 U.S.C. § 1537, deals with "International Cooperation" regarding species and habitat protection.

Part 402 to clarify certain definitions, and more importantly, to delineate the applicability of section 7 so as to make clear, *inter alia*, that indirect effects of an agency action relating to individual sources of GHG on the global climate is not the kind of causal relationship that adversely affects a listed species or critical habitat sufficient to trigger the consultation process.

Definition of "Biological Assessment"

The Services propose to amend the definition of "biological assessment" in 50 C.F.R. § 402.02 to allow an agency to use documents other than those specifically designed for the purpose of interagency consultation, such as an environmental assessment or environmental impact statement produced under NEPA, which already contain much of the same information and analysis that would be produced by a separate document. A biological assessment is designed to evaluate the potential effects of an agency action on a species or habitat "that may be present in the action area." While this is a minor change to the definition, it is a common sense change that WLF supports because it will eliminate unnecessary delay and duplication and thus increase agency efficiency.

Definition of "Cumulative Effects"

The proposed rule would add a sentence to the current definition of "cumulative effects" in 50 C.F.R. § 402.02 to make clear that the effects that are "reasonably certain to occur in the action area" do *not* include future Federal activities. The Services intend that the definition of "cumulative effects" is narrower than the NEPA regulatory definition of "cumulative impact," which involve an environmental analysis of effects from not just future State or private activity, but also from future Federal activity. 73 Fed. Reg. 47868. This revision further clarifies the prior understanding of this regulation that future Federal actions will be subject to the section 7 consultation process when they take place in the future, and hence, those actions would be taken into account at the appropriate time.

Definition of "Effects of the Action" and Climate Change

The Services propose to amend the definition of "effects of the action" in 50 C.F.R. § 402.02 by clarifying the meaning of "indirect effects" as follows:

Indirect effects are those for which the proposed action is *an essential cause*, and that are *later in time*, but still are *reasonably certain to occur*. 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*.

42 Fed. Reg. 47874 (emphasis added). WLF supports these important changes because it makes clear that for the consultation provisions to be triggered, the "indirect effects" of an action on a species or habitat must be an "essential cause" (or proximate cause as noted by the comments filed by UARG and EEI) and not just have a technical "but for" causal connection.

To use the example provided by the Services, a permit for a pipeline to cross a narrow waterway should not require a consultation over the impacts of the construction and operation of the entire pipeline since the crossing, while perhaps satisfying the "but for" test, was only, at best, a "marginal contributor" to the effects of the project and not an "essential cause." 73 Fed. Reg. 47870. Moreover, as the Services properly note, there is no requirement to consult about the speculative impacts that an individual source of GHG has on global climate change because such a source is not an "essential cause" of any impacts associated with climate change. Indeed, the phenomenon of climate change will take place whether or not an individual source of GHG commences operation, and thus, the operation of an individual source of GHG does not even meet the current "but for" or actual causation threshold requirement.

WLF believes that this amendment to the regulations is necessary to avoid needless delay resulting from the consultation process where the impact of a federal action or program is highly unlikely or speculative. Moreover, such a revision would curtail inappropriate attempts by activists to use the ESA to regulate GHG emissions on the theory that such emissions cause climate change, which allegedly may affect species or their habitat, such as the polar bear and sea ice. Congress certainly never intended the ESA to be used to regulate the impacts of global climate change.

The Services' clarified causation and evidentiary standard is reasonable in light of the uncertainties and complexities of determining the causes of global warming and its effects on species and habitat as WLF argued in its comments submitted last year opposing the listing of the polar bear as a threatened species. For example, the National Academy of Sciences report "Climate Change Science: An Analysis of Some Key Questions" notes that a "causal linkage between the buildup of greenhouse gases in the atmosphere and the observed climate changes during the 20th century cannot be unequivocally established." National Academy of Sciences/National Research Council, *Climate Change Science: An Analysis of Some Key Questions*, at 17 (2001).

While some studies indicate that the Arctic is warming disproportionately to other parts of the world and that sea ice is currently diminishing, other studies show that, in slightly more than two years, the world's oceans actually lost 20% of the heat that they had gained from greenhouse gas changes in the last 50 years. J.M. Lyman, et al., *Recent Cooling of the Upper Ocean*, 33 Geophysical Research Letters L 18604 (2006); *see also* K. Wood & J.E. Overland, *Accounts from 19th-Century Canadian Arctic Explorers' Logs Reflect Present Climate Conditions*, 84 EOS Transactions of the American Geophysical Union 410 (2003) (examining

the logs of Arctic exploration vessels in the 19th Century to determine ice-edge minima and finding them to be very similar to current ice minima). There remains a great deal of uncertainty about the nature and extent of future global climate change and its impact on the Arctic ecosystem. Indeed, there are contrary global warming sea-ice models that must be considered. The FWS itself seemed to recognize in the proposed listing of the polar bear the uncertainty and need for further research and analysis but failed to draw the appropriate conclusion, namely, that there is not sufficient evidence to justify the proposed listing at this time.

More importantly, any emissions from a single source emitting GHG contributes an infinitesimal amount of carbon dioxide to the atmosphere. The United States contributes only about 22% of worldwide carbon emissions. Source: World Carbon Dioxide Emissions from the Consumption and Flaring of Fossil Fuels. Energy Information Administration, *International Energy Annual 2004*, Table Posted: July 19, 2006, available at <http://www.eia.doe.gov/pub/international/iealf/tabbleh1co2.xlsx>. Even assuming a decrease in emissions in the United States that may lead to climate change, emissions causing climate change will grow even faster in China as factories are built there that would otherwise have been built here. China's emissions are expected to exceed those in the United States within the next year or two and then to move far ahead. Accordingly, as WLF argued in its polar bear comments, any listing of the polar bear as threatened cannot halt alleged climate change. Because warming is caused by concentrations of greenhouse gases in the atmosphere and those concentrations build up slowly as greenhouse gases are added to the atmosphere, it does not matter where a greenhouse gas is released. It will make the same contribution to concentrations in the atmosphere – and all other climate effects -- whether it originates in California, Virginia, India, or China.

Section 402.03 Applicability

Finally, WLF further supports the addition of new language to Section 402.03 to delineate when Section 7 consultation is *not* applicable. For example, the proposed regulation makes clear in proposed 50 C.F.R. § 402.03(b) that consultation is *not* required by federal agencies when (1) they do not anticipate a "take" and they determine that their actions will have "no effect" on listed species or critical habitat [§ 402.03(b)(1)]; *or* (2) such action is an insignificant contributor to any effects on the species or habitat [§ 402.03(b)(2)]; *or* (3) the effects of action are (i) not capable of being meaningfully detected; (ii) are wholly beneficial, *or* (iii) the potential risk of jeopardy to the species or habitat "is remote."

As the Services make clear, these proposed 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)." 73 Fed. Reg. 47872. As further explained, GHG emissions from one source are not an "essential cause" of any impacts associated with global warming. Furthermore, any such

impacts "are not reasonably certain to occur based on clear and substantial information" as opposed to speculation. *Id.* And, as the Services properly acknowledge, an individual source of GHGs would also not be subject to consultation under proposed Section 402.03 because the individual source is an "insignificant contributor" to climate change impacts on listed species and because the effects of such a source cannot be "meaningfully identified or detected" and are simple too "remote." 73 Fed. Reg. 47872.

These changes are common sense exclusions to the consultation process and provide clearer guidance to the agencies as to when the formal consultation process should be invoked as intended by Congress, namely, those actions that are "likely to adversely affect" the listed species or critical habitat. Thus, these changes to the Applicability provision would make it abundantly clear that individual GHG sources should not be subjected to the Section 7 consultation process.

Conclusion

For the foregoing reasons and those submitted by other commenters supporting the proposed rules, WLF urges the Services to adopt expeditiously the proposed changes to 50 C.F.R. Part 402 because they will greatly clarify and improve the regulatory process.

Respectfully submitted,

Daniel J. Popeo
Daniel J. Popeo
Chairman and General Counsel

Paul D. Kamenar
Paul D. Kamenar
Senior Executive Counsel