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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
AT SAN FRANCISCO

NATURAL RESOURCES DEFENSE COUNCIL, CONSERVATION NORTHWEST, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, INSTITUTE FOR FISHERIES RESOURCES, SIERRA CLUB, and HUMANE SOCIETY OF THE UNITED STATES, Plaintiffs, v. UNITED STATES DEPARTMENT OF INTERIOR, UNITED STATES FISH AND WILDLIFE SERVICE, UNITED STATES DEPARTMENT OF COMMERCE, and NATIONAL MARINE FISHERIES SERVICE, Defendants,	Civ. No. C08- COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This action challenges regulations promulgated by the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively "the Services") pursuant to the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq. The new regulations will weaken wildlife and habitat protections under the ESA by allowing federal agencies to unilaterally determine, without the expert input or oversight by the Services required by law, that their actions will have no adverse effects on threatened and endangered species and their critical habitat. The new regulations redefine what constitutes an effect subject to mandatory consultations with the Services under Section 7 of the ESA, 16 U.S.C. § 1536 (hereinafter "Section 7"), greatly expanding the circumstances in which no Section 7 consultations are required. The new regulations also allow the termination of section 7 informal consultations without concurrence from the Services regardless of effects to species and their habitat.

2. The new regulations and the Services' actions in promulgating the regulations are arbitrary, capricious, and contrary to the requirements of the ESA. The Services also violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, by failing to prepare an environmental impact statement assessing the regulations, instead relying upon a flawed and incomplete environmental assessment.

PARTIES

3. Plaintiff Natural Resources Defense Council ("NRDC") is a non-profit environmental membership organization with more than 550,000 members nationwide and more than 82,300 members in California. NRDC maintains offices in Los Angeles and San Francisco and is headquartered in New York with additional offices in Washington D.C., Chicago and Beijing. NRDC works to protect threatened and endangered species and to improve regulations

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and policy to ensure the protection and conservation of species and their habitats. NRDC has brought lawsuits against numerous government entities in order to enforce the requirements of the ESA and to ensure species protection. NRDC members use the outdoors, including forests and waters of the various states, for recreation, wildlife viewing, fishing, and aesthetic pursuits. Their interests have been impaired and will be impaired by federal actions that proceed absent the full substantive and procedural protections afforded by the ESA.

4. Plaintiff Conservation Northwest ("Conservation NW") is a non-profit corporation organized under the laws of Washington state, with its principal place of business in Bellingham, Washington, and offices in Seattle, Spokane, and Republic, Washington. Conservation NW and its members are dedicated to protecting and restoring wildlands in Washington and southern British Columbia. Conservation NW carries out research and advocacy, and works with scientists, environmental activists, policymakers, and the general public to protect biological diversity and ecological integrity on public lands. Conservation NW members obtain educational, scientific research, and recreational benefits from the existence of threatened and endangered species and their critical habitat. Their interests have been impaired and will be impaired by federal actions that proceed absent the full substantive and procedural protections afforded by the ESA.

5. Pacific Coast Federation of Fishermen's Associations ("PCFFA") is the largest organization of commercial fishermen on the west coast, with member organizations from San Diego to Alaska, representing thousands of men and women in the Pacific fleet. Many of PCFFA's members' livelihoods depend upon fish as a natural resource and, until recent fisheries closures, they generated hundreds of millions of dollars in personal income to the region through commercial fishing. PCFFA's members have been impaired and will be impaired by federal

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actions that proceed absent the full substantive and procedural protections afforded by the ESA.

6. Institute for Fisheries Resources ("IFR") is a non-profit corporation that constitutes the conservation arm of PCFFA. IFR works to prevent water pollution and other adverse environmental impacts that affect the ecological health of fisheries, and to prevent further loss of habitat supporting marine fisheries (including preventing further loss of fresh water habitat used by salmon and steelhead). IRF has approximately 850 supporting members, most of them commercial fishermen whose livelihoods are directly or indirectly affected by the loss of salmonid habitat in Washington, Oregon, Idaho, and Northern California. IFC's members have been impaired and will be impaired by federal actions that proceed absent the full substantive and procedural protections afforded by the ESA.

7. Plaintiff Sierra Club is a national nonprofit organization of approximately 1.3 million members nationwide dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass endangered species protection. The Sierra Club's main office is located in San Francisco, California. Sierra Club's members have been impaired and will be impaired by federal actions that proceed absent the full substantive and procedural protections afforded by the ESA.

8. The Humane Society of the United States ("HSUS") is a non-profit charitable organization that promotes the protection of all animals and is committed to protecting, conserving, and enhancing the nation's wildlife and their habitats. HSUS is the largest animal protection organization in the United States, with over 10.5 million members and constituents.

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HSUS maintains a regional office in Sacramento, California, and has over 1.2 million members and constituents who reside in the State of California. HSUS participated in the public process surrounding the promulgation of the 2008 rule, and its members and constituents, who regularly enjoy studying, photographing, and observing wildlife in their natural habitats, have been and will be impaired by federal actions that proceed absent the full substantive and procedural protections afforded by the ESA.

9. Plaintiffs' members use and enjoy species' habitat for recreational, scientific, aesthetic, cultural, and commercial purposes. Plaintiffs' members derive, or, but for the threatened and endangered status of listed species, would derive, recreational, scientific, aesthetic, and commercial benefits from the existence of listed species through wildlife observation, study, photography, and recreational and commercial fishing. The past, present, and future enjoyment of threatened and endangered species by members of the plaintiff organizations has been and will continue to be irreparably harmed by the failure of the federal agencies, including FWS and NMFS, to comply with their obligations under the ESA, the NEPA, and the APA.

10. The above-described aesthetic, conservation, recreational, commercial, and scientific interests of plaintiffs and their respective members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely affected and irreparably injured by defendants' failure to comply with the ESA, the NEPA, and the APA, as described below. Plaintiffs have no adequate remedy at law.

11. Defendant U.S. Department of the Interior, acting through FWS, is responsible for administering the provisions of the ESA, including with regard to threatened and endangered terrestrial and freshwater species. 16 U.S.C. §§ 1532(15) and 1533.

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12. Defendant FWS is the agency within the Department of Interior to whom the Secretary of Interior has delegated significant authority for administering the ESA.

13. Defendant U.S. Department of Commerce, acting through NMFS, is responsible for administering the provisions of the ESA with regard to most threatened and endangered marine and anadromous species. Id.

14. Defendant NMFS is the agency within the Department of Commerce to whom the Secretary of Commerce has delegated significant authority for administering the ESA.

15. The Departments of Interior and Commerce, through their agencies FWS and NMFS, promulgated the regulations, issued the environmental assessment, and made the finding of no significant impact challenged in this action.

JURISDICTION AND VENUE

16. This action is brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), § 2201 (declaratory judgment), and § 2202 (further relief).

17. On December 16, 2008, Plaintiffs served a 60 day notice of intent to sue letter on the Services for failure to consult on the Final Rule in violation of section 7 of the ESA and for failure to use the best scientific and technical information available in developing and promulgating the new regulations. Failing a satisfactory response by Defendants, Plaintiffs will move to amend this complaint to include this claim at the conclusion of the 60-day notice period. Jurisdiction over ESA citizen suit actions is proper in the district court under 16 U.S.C. § 1540.

18. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) as plaintiff Sierra Club resides in this District, Plaintiffs have members and offices in California, and the Northern District of California is home to species listed as threatened or endangered that will be

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affected by the new regulation.

BACKGROUND

I. THE ESA SECTION 7 CONSULTATION FRAMEWORK

19. The ESA is our nation's commitment to the conservation of species and the ecosystems on which they depend. Congress passed the ESA in response to the extinction crisis to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species . . . ." 16 U.S.C. § 1531(b).

20. Under the ESA, the Secretaries of Interior and Commerce are charged with listing species as endangered or threatened. An endangered species is one that is "in danger of extinction throughout all or a significant portion of its range," 16 U.S.C. § 1532(6), and a threatened species is one that "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id. § 1532(20).

21. Section 7 of the ESA is entitled, "Interagency Cooperation." 16 U.S.C. § 1536. Section 7(a)(2) requires 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 or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." Id. § 1536(a)(2).

22. Under Section 7(a)(2), federal agencies (commonly referred to in the Section 7 context as "action agencies") must consult with the appropriate agency to determine whether their actions are likely to jeopardize listed species' survival or destroy or adversely modify designated critical habitat and if so, to identify ways to modify the action to avoid that result.

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The ESA establishes an interagency consultation process requiring expert assistance and oversight in order to ensure action agencies comply with their substantive Section 7(a)(2) duty to guard against jeopardy to listed species or destruction or adverse modification of critical habitat.

23. The independent scientific and expert review provided by the Services, including the obligation to apply the best scientific and technical information available to the analysis, serves as an essential check on action agencies who often lack the expertise necessary to analyze and ensure their activities will not adversely affect listed species and critical habitat, and to guard against instances where action agencies might seek to advance their primary mission rather than protect endangered species. The consultation process is thus integral to the substantive protections for species and their critical habitat that the ESA affords.

24. In 1986, the Services issued joint consultation regulations detailing the consultation process that all federal agencies must follow. The joint consultation regulations broadly define the scope of agency actions subject to consultation as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," including "the promulgation of regulations." See 50 C.F.R. § 402.02.

25. Agencies must consult on ongoing actions over which the federal agency retains, or is authorized to exercise, discretionary involvement or control. See, e.g., id. § 402.16. Agencies must also consult on ongoing actions "if a new species is listed . . . that may be affected by the identified action." Id.

26. Under the joint consultation regulations, the scope of agency actions subject to consultation includes actions taken by the Services. Different offices within the Services have consulted with the Endangered Species office of FWS or the NMFS Office of Protected Resources when the Services' actions fall within the scope of the joint consultation regulations.

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27. Under the joint consultation regulations, an action agency must initiate consultation under Section 7 whenever it undertakes an action that "may affect" a listed species or critical habitat. See id. § 402.14(a). The pertinent regulation states:

> Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b).

Id. The sole exception (paragraph (b)) occurs where "the Federal agency determines, with the written concurrence of the Director [of FWS or NMFS], that the proposed action is not likely to adversely affect any listed species or critical habitat." Id. § 402.14(b) (emphasis added).

28. The joint consultation regulations thus distinguish between two types of consultation: informal and formal. During both types of consultations, the action agencies and the Services have a statutory duty to use the best available scientific information. 16 U.S.C. § 1536(a)(2); 50 C.F.R. 402.14(g)(8).

29. Formal consultations culminate with the Services' issuance of a biological opinion, in which the Services determine whether an action is likely to either jeopardize the survival and recovery of a listed species or destroy or adversely modify a species' designated critical habitat. 16 U.S.C. § 1536(b); 50 C.F.R. 402.02 (definition of "formal consultation"). In order to make this determination, the Service must review all relevant information and provide a detailed evaluation of the action's effects, including the cumulative effects of other activities in the area, on the listed species and critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h).

30. As part of the formal consultation process, the Services must also formulate discretionary conservation recommendations to reduce or minimize the action's impacts on listed species or critical habitat. 50 C.F.R. § 402.14(g)(6).

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31. If the Services determine that the action is likely to jeopardize the species or adversely modify its critical habitat, the biological opinion must specify reasonable and prudent alternatives that will avoid such jeopardy or adverse modification. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(h)(3). If the jeopardy or adverse modification cannot be avoided, however, the agency action may not proceed.

32. The ESA's timelines for formal consultation are 60-150 days, 50 C.F.R. § 402.14(e), and they are routinely extended in order to provide the Services adequate time to conduct the often complex biological and ecosystems analysis necessary to complete consultation. The time needed to complete an adequate consultation can become lengthy due to failure of the action agency to provide needed information.

33. Informal consultations are those consultations in which the action agency determines that an action "may affect," but is "not likely to adversely affect" ("NLAA") the listed species or its critical habitat and the pertinent Service concurs in writing in that determination.

34. Informal consultation is often a give-and-take process through which the Services can obtain sufficient information about, or modifications to, the action to concur in the action agency's NLAA determination. During informal consultation, the Services may, and often do, suggest modification to the action that will avoid the "the likelihood of adverse effects to listed species or critical habitat." 50 C.F.R. § 402.13(b).

35. Under the joint consultation regulations, informal consultation does not conclude until the pertinent Service issues its written concurrence, and only then may the consultation be resolved without preparation of a biological opinion. If the Service does not concur, or if the action agency has determined that the action is "likely to adversely affect" the listed species, the

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agencies must conduct a formal consultation. Id. §§ 402.02, 402.14(a).

II. THE NATIONAL ENVIRONMENTAL POLICY ACT

36. The National Environmental Policy Act ("NEPA") is "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It was enacted in 1970 to put in place procedures to insure that, before irreversibly committing resources to a project or program, federal agencies "encourage productive and enjoyable harmony between man and his environment," "promote efforts which will prevent or eliminate damage to the environment," and "enrich understanding of the ecological systems and natural resources important to the Nation." 42 U.S.C. § 4321.

37. Section 102(2)(C) of NEPA requires federal agencies to prepare, consider, and approve an environmental impact statement ("EIS") for "every recommendation and report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Significant effects need not be certain to occur to trigger the EIS requirement--rather, "an EIS must be prepared if 'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.'" Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998) (quoting Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992)).

38. The fundamental purpose of an EIS is to force the decision-maker to ensure that the policies and goals defined in NEPA are infused into the actions of the federal government. 40 C.F.R. § 1502.1. An EIS analyzes the potential environmental impacts, alternatives, and mitigation opportunities for major federal actions.

39. The Council on Environmental Quality ("CEQ"), charged with issuing binding regulations implementing NEPA, has established a process for determining whether a major

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federal action has significant environmental effects warranting preparation of an EIS. Under the CEQ regulations, an agency may avoid preparing an EIS only if it: (1) prepares an environmental assessment ("EA") identifying and analyzing the action's environmental effects; and (2) makes a finding of no significant impact, which presents the agency's reasons for concluding that the action's environmental effects are not significant. Id. §§ 1501.4(b), (e); 1508.9; 1508.1.3.

40. An EA is a "concise public document" that serves, *inter alia*, to "provide sufficient evidence and analysis for determining whether to prepare an [EIS or FONSI]". Id. §1508.9. As with any document prepared under NEPA, an EA is intended to "ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." Id. § 1500.1(b).

41. Among other things, an EA must include an assessment of cumulative impacts, defined as the impact on the environment "which results from the incremental impacts of the action when added to other past, present and reasonably foreseeable future actions . . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. An EA is deficient if it fails to include cumulative impacts analysis. Center for Biological Diversity, 538 F.3d at 1215 (internal citations omitted); see also 40 C.F.R. §§ 1508.9 and 1508.25.

III. THE SERVICES' PREVIOUS ATTEMPT TO ENCOURAGE AND ALLOW AN ACTION AGENCY TO FOREGO SECTION 7 CONSULTATION WAS FOUND TO BE IN VIOLATION OF THE ESA.

42. After a series of court decisions regarding the Environmental Protection Agency's ("EPA") failure to consult with the Services regarding EPA's registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act, see, e.g., Washington Toxics Coalition v. Environmental Protection Agency, 413 F.3d 1024, 1035 (9th Cir. 2005), the Services

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promulgated a consultation counterpart regulation (the "pesticide counterpart regulation") that, in many ways, prefigures the regulations challenged in this action. In their pesticide counterpart regulations, the Services excused EPA from consulting over decisions to register individual pesticides, instead substituting EPA's pesticide registration analysis for the Section 7 consultation process. See 69 Fed. Reg. 4465 (Jan. 30, 2004).

43. Among other things, the pesticide counterpart regulations would have allowed EPA to make NLAA determinations on pesticide registrations without the Services' concurrence.

44. Some of the same organizations that are plaintiffs in this matter challenged the pesticide counterpart regulations as a violation of the plain language of Section 7. The district court for the Western District of Washington agreed, finding that Section 7 requires that a Section 7 determination cannot "be unilaterally made." Washington Toxics Coalition v. Secretary of Interior, 457 F.Supp.2d. 1158, 1179 (W.D. Wash. 2006). The court found the meaning of the Section 7 consultation requirement to be clear, requiring inclusion of, and oversight by, the Services for pesticide registrations: that agencies "shall . . . in consultation with" the Services, insure that their actions will not jeopardize listed species or modify critical habitat, could not be read as allowing no consultation or self-consultation on actions EPA deemed "not likely to adversely affect" listed species and/or habitat. Id.

45. The court further noted the clear Congressional intent behind the Section 7 consultation requirement: that unilateral decisions by federal agencies regarding the potential for their actions to affect species must not be permitted because such unilateral decisions are likely to lead to less protections for imperiled species based upon potential inherent conflicts between action agencies' primary missions and the need to ensure no jeopardy to listed species and their habitat.

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46. Experience demonstrates that the court was correct in that action agencies often lack the requisite expertise and/or will to adequately assess the impact of their activities on listed species and critical habitat without the expert input and oversight of the Services. There are numerous examples in the record of the Services failing to concur in action agency NLAA determinations or finding jeopardy where an action agency sought to avoid Section 7 consultation altogether. Action agencies often fail to use the best scientific and technical information available and simply make the wrong decisions regarding effects to species and habitat.

IV. THE RULE

A. The Proposed Rule

47. On August 15, 2008, Defendants officially proposed revising portions of the Services' joint consultation regulations. See Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 47868, 47875 (proposed Aug. 15, 2008) (to be codified at 50 C.F.R. pt. 402) (hereinafter the "Proposed Rule").

48. Defendants claim the Proposed Rule is needed to address "unnecessary" and increased Section 7 consultations, based largely on a GAO Report, ESA: More Federal Management Attention Is Needed to Improve the Consultation Process, GAO-04-93 (March 2004), and to address the applicability of Section 7 consultations to global warming's impacts on threatened and endangered species and critical habitat.

49. The Proposed Rule grants authority to action agencies to make determinations that their actions have "no effect" on threatened or endangered species or critical habitat, without consulting the Services and without obtaining any concurrence or other determination from the Services regarding such no effects determination. 73 Fed. Reg. at 47870.

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50. The Proposed Rule then redefines "effects of the action" such that certain effects on species and habitat are deemed not to be subject to Section 7 consultation.

51. Specifically, if the agency action determines that its proposed action is not an "essential cause" of the effect on a listed species or critical habitat, or if it cannot be proven by "clear and substantial information" that an effect is "reasonably certain" to occur, then the effects are not "effects of the action" subject to Section 7 consultation. 73 Fed. Reg. at 47874. Under the Proposed Rule, effects that fit within either one of these exceptions, even if adverse to listed species or critical habitat, can be disregarded by the action agency and the action agency can determine that it is excused from compliance with Section 7.

52. The Proposed Rule also identifies particular circumstances in which Section 7 consultation with the Services is not required. Under the Proposed Rule, action agencies are not required to consult with the Services when the action is not anticipated to result in take and:

> the action has "no effect" on listed species or habitat (using the new definitions of effects), or
>
> the action is an "insignificant contributor" to any effects on listed species or habitat, or
>
> the effects of the action on species or habitat are "not capable of being meaningfully identified or detected in a manner that permits evaluation," or
>
> the effects of the action on species or habitat are "wholly beneficial," or
>
> the effects of the action are such that the risk of jeopardy to species or habitat posed by the action is "remote."

73 Fed. Reg. at 47874. In all of these circumstances, "the proposed language allows a federal action agency to make a 'not likely to adversely affect' determination without concurrence from the Services . . . ." Id. at 47871.

53. The Preamble to the Proposed Rule also makes clear that one of its purposes is to

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exempt the effects of greenhouse gas emissions on listed species and their habitat from the Section 7 consultation requirements. Id. at 47872. Under the Proposed Rule, the effects of global warming on species and habitat are deemed not to be "effects of the action" and are declared exempt from Section 7 consultation requirements. Id.

54. Under the proposed rule, Section 7 consultations by the action agency are limited to only those effects that are not exempt under the new more stringent and narrow definitions set forth above, as opposed to an action agency being required to consult regarding the entirety of the proposed action. 73 Fed. Reg. at 47874 ("If one or more but not all of the effects of the action fall within [the categories of effects that are exempt from consultation], then consultation is required only for those effects of the action that do not fall within [the categories of effects that are exempt from consultation].").

55. Most of the "no effect" and all of the NLAA determinations that action agencies will be allowed to make unilaterally under the Proposed Rule would have, under the joint consultation regulations, required informal consultation and the written concurrence of the Services. And, if the Services did not concur in the NLAA determination, formal consultation would be required.

56. By contrast, under the Proposed Rule, the Services have predetermined that the effects on listed species will not be adverse because the Services have determined, with no justification in the record, that action agencies "are qualified to determine that their actions satisfy these criteria." 73 Fed. Reg. at 47871.

57. The Proposed Rule also sets a time-limit for completion of informal consultations and exempts action agencies from getting concurrences if the Services do not meet these deadlines. Specifically, the Proposed Rule imposes a 60-day time limit on informal consultation,

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which may be extended for an additional 60 days upon notice from the Services. If the Services are unable to complete the informal consultation process within the time limits, the action agency may, at their sole option, terminate consultation, move forward with their proposed action, and consider their Section 7 obligations satisfied. Id. at 47874.

B. Notice and Comment

58. On August 15, 2008, the Services published the Proposed Rule in the Federal Register, allowing 30 days for public comment.

59. At the time the Services published the Proposed Rule, Executive Order 12866, § 6(a), required agencies were to provide 60 days for public comments on proposed rules.

60. Near the end of the original 30 day comment period, the Services extended the time for comments for an additional 30 days. The Services held no public hearings on the Proposed Rule.

61. The Services received approximately 300,0000 comments on the Proposed Rule, a majority of which were opposed to its promulgation.

62. The Services, upon information and belief, categorized 100,000 of these comments as "form letters" and attempted to complete review of the remaining 200,000 of the comments in approximately 32 hours. Based upon the number of comments, the number of staff apparently involved in review of the comments, and the time for review, it appears that the Services reviewed seven comments every minute.

C. Analysis of the Proposed Rule under the National Environmental Policy Act ("NEPA")

63. On October 27, 2008, the Services published a Notice of Availability advising that the draft Environmental Assessment ("EA") for the Proposed Rule was available for public

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review. See Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 63667-63668 (Oct. 27, 2008). The notice advised that written comments on the draft EA must be received by the Services by November 6, 2008, eight business days later, to be considered. Id. at 63668.

64. The draft EA describes three alternatives. Alternative A is a "no action" alternative, under which no changes would be made to the existing joint consultation regulations. Draft EA at 5. Alternative B is the Proposed Rule, including the changes described supra in paragraphs 48 to 59. Id. at 5-10. Alternative C includes all of the same changes to the consultation regulations as Alternative B, but would "add an additional role for the Services that might increase confidence in the action agencies' determinations" where they choose not to consult with the Services under the new rule. This "additional role for the Services could include" guidance for action agencies, including templates to use in making NLAA determinations; training for action agencies, including on-line training modules; and periodic sampling of action agencies' "use of the new applicability standard." Id. at 10.

65. The draft EA also describes three alternatives that were considered but not analyzed. These are "a comprehensive revision to all aspects" of the consultation regulations; a modification to the joint consultation regulations that would only exempt from consultation actions whose effects would be "wholly beneficial"; and non-regulatory clarifications of the existing joint consultation regulations. Draft EA at 10-11.

66. For Alternative A, the no action alternative, the Services conclude that there will not be "any additional significant effects to the environment from continued implementation of the existing regulations." Draft EA at 13.

67. For Alternative B, the Proposed Rule, the Services also conclude that the rule

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"will not result in any significant environmental consequences," explaining that the proposed changes to the definition of effects of the action "elucidate[] the standard that is contained in the current regulatory framework," id. at 18 and 24, and while "there is likely to be some reduction in the number of informal consultations undertaken if the proposed regulation is adopted," federal agencies will "still have to meet the substantive standards of section 7(a)(2)." Id. at 19. In discussing the proposed time limits on informal consultation, the Services note that "the number of informal consultations that would be terminated [without concurrence from the Services] . . . cannot be predicted with certainty." Id. at 22. The Services conclude, nonetheless, that because informal consultations apply to actions "for which no take, let alone jeopardy or adverse modification, is anticipated," that the proposed changes will not have "any significant impact" on listed species or critical habitat. Id. at 23.

68. For Alternative C, the Services also conclude that there will be no significant environmental impacts. Id. at 25.

69. In the Final Rule, published in the Federal Register on December 16, 2008, the Services advised that they had issued a final EA and a Finding of No Significant Impact ("FONSI"). See Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 76272, 76286 (Dec. 16, 2008) (to be codified at 50 C.F.R. pt. 402).

D. The Final Rule

70. The Services published the Final Rule on December 16, 2008. Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 76272 (Dec. 16, 2008) (hereinafter the "Final Rule").

71. The Final Rule adopts substantially the same provisions as the Proposed Rule, with the exception of the changes set forth in the succeeding paragraphs.

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72. Unlike the Proposed Rule, the Final Rule specifies that the requirement that an agency action be an "essential cause" of the identified effect in order to be subject to Section 7 consultation applies only to indirect effects, not direct effects.

73. Whereas the Proposed Rule exempted any action that is an insignificant contributor to identified effects from Section 7 consultation, the Final Rule exempts from Section 7 consultation actions the effects of which are "manifested only through global processes and (i) cannot be reliably predicted or measured at the local scale, or (ii) would result at most in an extremely small, insignificant local impact, or (iii) are such that that potential risk of harm to species or habitat is remote."

74. The Proposed Rule provided that action agencies may be excused from Section 7 consultation if they determine the potential risk of jeopardy to listed species or habitat is remote. The Final Rule replaces this language with the language in paragraph 73, supra.

75. The Final Rule adds language providing that "[i]f the Federal agency terminates consultation at the end of the 60-day period, or if the Service's extension period expires without a written statement whether it concurs with a Federal agency's determination provided for in paragraph (a) of this section, the consultation provision in section 7(a)(2) is satisfied," and adds a new subdivision (c) that provides that the Service, action agency, and applicant may agree to extend informal consultation even after the 60 days for the purpose of a concurrence in an NLAA determination.

76. The most significant change between the Proposed and Final Rule is the Services' more-pointed statements and new provisions regarding effects to listed species and critical habitat from global warming. In the response to comments, the Services argue that "current models do not allow us to trace a link between individual actions that contribute to atmospheric

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carbon levels and localized climate impacts relevant to consultation." At no point in the Proposed Rule, the preamble thereto, the draft EA, the Final Rule, or the responses to comments do the Services actually cite to information they claim as the support for this wholesale exemption of global warming effects from Section 7 consultation, including the claimed "current models" or any other "best scientific information." The only reference to any support is to an exchange of letters with EPA regarding analysis of a "very large coal-fired power plant." The exchange of letters is referenced for the first time in the final response to comments. The letters were not made available to the public, nor cited in either the original proposed rule or the draft EA.

77. Publication of the Final Rule is a final agency action reviewable under the APA, 5 U.S.C. § 704.

CAUSES OF ACTION

COUNT I

VIOLATION OF DUTY TO CONSULT

(ESA, 16 U.S.C. § 1536(A)(2) AND APA, 5 U.S.C. § 701(2)(A))

78. Plaintiffs restate and reallege all preceding paragraphs.

79. The Final Rule allows and encourages action agencies to forego consultations with the Services on activities that may affect listed species, and could, either directly, indirectly, or cumulatively, jeopardize species' survival and recovery or result in the destruction or adverse modification of designated critical habitat.

80. Among other things, the Final Rule imposes a new standard of causation regarding effects to species, shifts the burden of scientific uncertainty (thus reversing the ESA's precautionary purpose and structure), excludes any analysis of effects from future federal

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actions, and constrains consultations to only individual effects of a federal action that have not already been discounted through the various mechanisms outlined above, as opposed to the action as a whole.

81. The Final Rule also delegates the Services' statutory consultation role to action agencies by allowing action agencies to make NLAA determinations without concurrence from the Services if the Services take longer than 60 (or 120) days to complete an informal consultation.

82. By promulgating the Final Rule, Defendants have exceeded their authority under the plain language of the ESA, 16 U.S.C. § 1536, have acted ultra vires, and have acted arbitrarily, capriciously, and not in accordance with the ESA, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

COUNT II

VIOLATIONS OF BEST AVAILABLE SCIENCE REQUIREMENT

(ESA, 16 U.S.C. § 1536(A)(2) AND APA, 5 U.S.C. § 706(2))

83. Plaintiffs restate and reallege all preceding paragraphs.

84. Section 7(a)(2) requires agencies to use the best available science in discharging their Section 7 duties: "In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

85. The clear and substantial information requirement of the Final Rule imposes a new standard regarding scientific certainty, narrower and more stringent than the standard of best scientific and technical information available imposed in the plain language of the ESA itself.

86. The Final Rule also excuses agency actions from Section 7 consultation where the "effects of the action are manifested only through global processes" and cannot be reliably

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predicted or measured at the local scale or result in small, insignificant local impacts or are such that the potential risk of harm (jeopardy) is remote. This provision imposes a new standard regarding scientific certainty that is narrower and more stringent than the best scientific and technical information available.

87. Defendants have acted arbitrarily, capriciously, and contrary to ESA Section 7(a)(2), in violation of the APA, 5 U.S.C. § 706(2)(A), by failing to ensure that action agencies and Section 7 consultations will use the best available science.

COUNT III

ARBITRARY AND CAPRICIOUS DECISION-MAKING

(ESA, 16 U.S.C. § 1536 AND APA, 5 U.S.C. § 706(2))

88. Plaintiffs restate and reallege all preceding paragraphs.

89. Among the stated rationales for the Final Rule is (1) that action agencies have developed sufficient expertise to make consultations unnecessary under the various circumstances outlined in the Final Rule, and (2) that the action agencies have incentives not to improperly bypass consultation because the action agencies will not want to be liable for a take of a listed species.

90. The evidence in the record fails to support and is contrary to Defendants' stated rationales for the rule.

91. The evidence in the record demonstrates that action agencies frequently make incorrect or grossly inadequate assessments leading to incorrect findings of no effect or NLAA, demonstrating a lack of expertise and/or an inability to put aside the pressures of their primary missions.

92. Further, the rationale that an action agency will be cautious in its assessment due

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to the potential liability for a take is legally incomplete and incorrect in that plants and habitat are not subject to the take provisions of Section 9 of the ESA.

93. Accordingly, Defendants acted arbitrarily, capriciously, and contrary to the record, in violation of the APA, 5 U.S.C. § 706(A), by adopting the new consultation rules for reasons that run counter to the evidence before the agency.

COUNT IV

PREPARATION OF AN INADEQUATE ENVIRONMENTAL ASSESSMENT

(NEPA, 42 U.S.C. § 4332 ET SEQ. AND APA, 5 U.S.C. § 706(2)(A))

94. Plaintiffs restate and reallege all preceding paragraphs.

95. Defendants are "agencies of the Federal Government" within the meaning of NEPA and are bound by regulations adopted by the Council on Environmental Quality. 40 C.F.R. § 1500.3.

96. The Final Rule constitutes a major federal action subject to NEPA. See 40 C.F.R. § 1508.18 ("major Federal action" includes agency regulations).

97. The EA asserts that the Final Rule will, and is intended to, reduce the number of Section 7 consultations with the experts at the Services. The EA, however, fails to analyze the potential environmental impact of such a reduction, particularly the risk that action agencies will make erroneous "no effect" or NLAA findings without the oversight or input of the Services.

98. The EA fails to assess or compare how the environmental effects on listed species and critical habitat would change should the Services implement Alternative C as opposed to Alternative B, admitting that the outcome of Alternative C is uncertain.

99. The EA fails to assess the impacts of early termination of informal consultations without concurrence from the Services, failing even to recognize the likelihood that adverse

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effects to species will result from such early terminations, particularly based upon the examples of action agency missteps in the past.

100. The EA fails to assess the cumulative impacts of the Final Rule, despite the fact that the Final Rule will have an effect on many action agency decisions across the country affecting many areas of the environment.

101. The EA fails to adequately explain how the Defendants' identified need for regulatory changes to the Section 7 consultation process will be satisfied by the Final Rule.

102. The deficiencies in the EA are such that the EA cannot support the Services' FONSI and an EIS is required.

103. By preparing an EA that fails to adequately assess the environmental effects of the new rules, fails to include an assessment of cumulative impacts, fails to adequately provide an assessment and comparison of the alternatives presented, fails to explain how the Final Rule will meet the Defendants' identified needs, and therefore fails to support a FONSI, Defendants acted arbitrarily, capriciously, and contrary to NEPA and the CEQ implementing regulations, in violation of the APA, 5 U.S.C. § 706(2)(A).

COUNT V

FAILURE TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT

(NEPA, 42 U.S.C. § 4332 ET SEQ. AND APA, 5 U.S.C. § 706(2)(A))

104. Plaintiffs restate and reallege all preceding paragraphs.

105. Under NEPA, an EIS must be prepared if substantial questions are raised as to whether a project may cause significant degradation of the environment. The CEQ regulations list factors that must be considered in determining the significance of an action's environmental effects, including whether the effects of actions are highly controversial, whether the effects are

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highly uncertain, whether the action establishes a precedent, whether the action contributes to cumulative effects, whether the action may adversely affect threatened or endangered species or their habitat, and whether the action threatens to violate federal environmental law. 40 C.F.R. § 1508.27(b).

106. The EA and FONSI base their conclusion that the Final Rule will not have a significant effect on the environment and therefore does not necessitate the preparation of an EIS, primarily on the premise that other federal agencies will always accurately determine when their actions do not necessitate consultation. According to the Final Rule and the EA, an agency action that does not necessitate consultation with the Services, by definition does not have any adverse effects on listed species, and therefore an EIS is not required. It is this very premise that must be analyzed in an EIS: that all federal agencies will unilaterally make effects determinations as accurately and consistently as determinations made in consultation with the Services.

107. The Final Rule is also highly controversial because there is a substantial dispute about the size, nature, and effects it will cause; it involves highly uncertain, unique, or unknown risks; sets new precedent for all future Section 7 consultations, including the treatment of all global warming pollution and including deadlines for informal consultations; will have cumulative impacts; will adversely affect listed species and their critical habitat; and violates the plain language of the ESA. Defendants were thus required to prepare an EIS before promulgating the Final Rule.

108. By failing to prepare an EIS, Defendants acted arbitrarily, capriciously, and contrary to NEPA and the CEQ implementing regulations, in violation of the APA, 5 U.S.C. § 706(2)(A).

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COUNT VI

INADEQUATE PUBLIC COMMENT PERIOD UNDER NEPA

(NEPA, 42 U.S.C. § 4332 ET SEQ. AND CEQ REGULATIONS, 40 C.F.R. § 1500 ET SEQ. AND APA, 5 U.S.C. § 706(2)(A))

109. Plaintiffs restate and reallege all preceding paragraphs.

110. The CEQ regulations implementing NEPA recognize that "public scrutiny [is] essential to implementing NEPA" and direct that "[f]ederal agencies shall to the fullest extent possible . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. §§ 1500.1(b), 1500.2(d); see also id. § 1506.6. More specifically, the regulations direct that "[federal] agenc[ies] shall involve . . . the public, to the extent practicable, in preparing [environmental] assessments." Id. § 1501.4(b). The regulations do not establish a specific minimum time period for public comment on an environmental assessment, but agencies must allow adequate time for meaningful public participation.

111. FWS and NMFS allowed only 10 calendar days – 8 business days – for the public to review the EA, prepare comments, and submit them in writing to FWS and NMFS. 73 Fed. Reg. 63667-63668 (Oct. 27, 2008).

112. The comment period was too brief to allow an opportunity for meaningful public participation in the preparation of the EA. This failure to meaningfully involve the public violates NEPA and its implementing regulations.

113. The Services failed to meaningfully respond to many of the comments that were submitted on the draft EA. The responses to comments are unsupported, conclusory, and misstate the comments submitted.

114. By failing to allow an opportunity for meaningful public input on the EA and by failing to take the requisite hard look at the comments that were submitted on the EA, the

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Services acted arbitrarily, capriciously, and contrary to NEPA and the CEQ implementing regulations, in violation of the APA, 5 U.S.C. § 706(2)(A).

COUNT VII

INADEQUATE PUBLIC COMMENT RESPONSE UNDER APA

(APA, 5 U.S.C. § 553)

115. Plaintiffs restate and reallege all preceding paragraphs.

116. Under the rulemaking provisions of the APA, an agency must publish notice of a proposed rule making in the Federal Register and must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b), (c).

117. The agency is required to review, consider, and respond to the comments and data submitted by the public. Id. § 553(c). An agency is only required to consider and respond to relevant comments; however, an agency may not choose to ignore relevant comments.

118. In this matter, the Services allegedly reviewed hundreds of thousands of comments in a matter of days at a rate where it was impossible for the Services to "review, consider, and respond" to comments such that they failed to provide interested persons an actual opportunity to participate in the rulemaking.

119. Defendants failed to respond to numerous significant comments regarding the legality and effect of the Final Rule on threatened and endangered species.

120. By failing to meaningfully review public comments and failing to respond to significant public comments, Defendants acted arbitrarily, capriciously, and contrary to the notice and comment rulemaking requirements of the APA, in violation of 5 U.S.C. §§ 553 and 706(2)(A).

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COUNT VIII

FAILURE TO MAKE DATA AVAILABLE FOR PUBLIC COMMENT

(APA, 5 U.S.C. § 553)

121. Plaintiffs restate and reallege all preceding paragraphs.

122. Integral to an agency's notice requirement is its duty to identify and make available all studies and data employed in promulgating the subject rule. An agency that fails to reveal portion of the technical basis for a rule in time to allow meaningful notice and comment commits procedural error.

123. In the Final Rule response to comments, the Services make oblique reference, for the first time, to an exchange of letters with EPA regarding analysis of a "very large coal-fired power plant" as the basis for the Final Rule's provisions pertaining to greenhouse gases and global warming. The letters were not made available to the public, nor cited in either the original proposed rule or the EA.

124. There is no reference to any other technical studies, articles, or data in either the original Proposed Rule, the preamble thereto, or the EA regarding the Proposed or Final Rules' provisions pertaining to greenhouse gases and global warming.

125. Based upon the Services' failure to make documents significant to its actions on the rule at issue here available to the public for comment, Defendants acted arbitrarily, capriciously, and contrary to the notice and comment rulemaking requirements of the APA, in violation of 5 U.S.C. §§ 553 and 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

A. Declare that the FWS and NMFS acted arbitrarily, capriciously, and contrary to

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the ESA, in violation of the APA, 5 U.S.C. § 706(2)(A), in adopting the Final Rule.

B. Declare that FWS and NMFS acted arbitrarily, capriciously and contrary to NEPA and the CEQ regulations, in violation of the APA, 5 U.S.C. § 706(2), by failing to prepare an EIS on the interagency consultation regulations, and by failing to evaluate alternatives to, and the full impacts of, the interagency consultation regulations;

C. Vacate and remand the Final Rule;

D. Award plaintiffs their costs and attorneys' fees in this action pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

E. Grant plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 16th day of December, 2008.

/s/ Kristen L. Boyles
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