TESTIMONY OF NORMAN D. JAMES

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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

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Current Problems Arising Under Section 7 of the Endangered Species Act and Comments Concerning the Joint Proposal of the United States Fish and Wildlife Service and the National Marine Fisheries Service to Amend the Regulations Governing Interagency Consultation

My name is Norman D. James. I am an attorney with the law firm of Fennemore Craig in Phoenix, Arizona. I am appearing before the Committee on my own behalf, as an attorney who specializes in environmental and natural resources law. I have represented various public and private clients on matters concerning the Endangered Species Act ("ESA") in the Southwest since the early 1990s.

In my view as an attorney who represents public and private land and resource users, the time has come for Congress to take a hard look at how the ESA is being used and, increasingly, misused by Federal agencies and public interest groups to prevent legitimate land uses. As one commentator stated:

> The ESA is not the single most important federal environmental statute, but – whether one applauds or deplores this turn of events – the law is now a primary obstacle to land development and related activities in America.

George Cameron Coggins, *A Premature Evaluation of American Endangered Species Law*, *in Endangered Species Act: Law, Policy, and Perspective*, 1 (Donald C. Baur and

Wm. Robert Irvin eds. 2002).

My testimony today will address, first, how Section 7 of the ESA is supposed to work and how that statute actually works in the field. Put bluntly, over the past decade, the Section 7 consultation process has evolved into a land use regulation program, under which FWS field employees dictate the manner in which private projects are allowed to proceed. Section 7, however, applies only to Federal actions, and is limited by the scope of the Federal agency's regulatory authority. As I will discuss in this testimony, these limitations are frequently ignored, at least in Arizona.

Second, I will address the joint proposal of the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NFMS")[1] to amend the regulations governing interagency consultation under Section 7 of the ESA. *See Interagency Cooperation Under the Endangered Species Act; Proposed Rule*, 73 Fed. Reg. 47868 (Aug. 15, 2008) ("Proposed Rule"). The Proposed Rule attempts to address the problems that I describe below, and is consistent with, and supported by, existing law. It certainly is not a radical change, as certain groups contend. Consequently, the Proposed Rule is appropriate and, in my view, should be adopted by the Services.

A. Overview of Section 7 and the Consultation Process

Perhaps the most complex and troublesome provision of the ESA is Section 7(a)(2), 16 U.S.C. § 1536(a)(2), which requires Federal agencies to ensure that "any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the

[1] FWS and NMFS are referred to collectively as the "Services" and individually as the "Service" unless otherwise appropriate in context.

continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species" that has been designated as critical. Thus, Federal actions may not proceed if they would either jeopardize the existence of a listed species or destroy or adversely modify a listed species' critical habitat, unless an exemption is granted by Endangered Species Committee. This was the basis for the Supreme Court's injunction halting construction of the Tellico Dam in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), which would have resulted in the extinction of a listed species of fish.

Nevertheless, the applicability of Section 7(a)(2) is limited in certain important respects. On its face, this provision applies only to *Federal* actions, and not to actions undertaken by a State or local government or by a private individual or business. Moreover, Section 7(a)(2) applies only to activities "in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Last year, in *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518 (2007), the Supreme Court, applying the existing version of 50 C.F.R. § 402.03, confirmed that Section 7(a)(2) does not apply to Federal actions when the agency lacks discretion to consider impacts on listed species in its decision-making process.

In addition, the requirements of Section 7(a)(2) apply only to habitat that has been formally designated as "critical" under Section 4 of the ESA, 16 U.S.C. § 1533. The ESA does not protect "suitable" or "potential" habitat for species:

> The ESA provides for the designation of critical habitat outside the geographic area currently occupied by the species when "such areas are essential for the conservation of the

> species." 16 U.S.C. § 1532(5)(A)(ii). Absent this procedure, however, *there is no evidence that Congress intended to allow the Fish and Wildlife Service to regulate any parcel of land that is merely capable of supporting a protected species*.

Arizona Cattle Growers Ass'n v. U. S. Fish and Wildlife Serv., 273 F.3d 1229, 1244 (9th Cir. 2001) (emphasis supplied).

Section 7(a)(2) also imposes an obligation to "consult" with FWS or NMFS (depending on whether the species at issue is a terrestrial or a marine species) to ensure that the Federal action does not violate the provision's substantive "no jeopardy" requirement. The procedural requirements for consultation are set forth in the joint regulations of FWS and NMFS, codified at 50 C.F.R. Part 402. A violation of these consultation procedures can lead to an injunction halting the Federal action until consultation has been completed. *See, e.g., National Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 481 F.3d 1224 (9th Cir. 2007) ("The ESA imposes a procedural consultation duty whenever a federal action may affect an ESA-listed species.")

In deciding whether to consult, a Federal agency must initially determine whether its action "may affect" listed species or critical habitat, which depends on whether any members of a listed species or critical habitat are present in the "action area," i.e., the area directly and indirectly affected by the proposed Federal action. 50 C.F.R. § 402.02 (definition of "action area"). If no listed species or critical habitat are present, consultation is not required, and the action may proceed without violating Section 7. Notably, this determination is made by the Federal agency, not by the Services, as the courts have held. *See, e.g., Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1070-71

(9th Cir. 2005) (upholding agency's "no effect" determination); *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998) ("A finding of no effect [by the Forest Service] obviates the need for consultation with [FWS]"); *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1445 (9th Cir. 1996) (the Forest Service's "no effect" determination "obviates the need for formal consultation").

If the Federal agency believes that its action, while having some effect on listed species or critical habitat, is not likely to adversely affect the listed species or critical habitat, the agency may request that the Service concur with its evaluation. If the Service concurs, no additional consultation is required. This process is known as informal consultation. *See* 50 C.F.R. §§ 402.13, 402.14(b)(1). The vast majority of consultations are conducted informally under 50 C.F.R. § 402.13.[2]

If the Federal agency believes instead that the action is likely to adversely affect listed species or critical habitat, or if the Service does not concur with the Federal agency's determination that the impacts on listed species or critical habitat will not be adverse, formal consultation is required. 50 C.F.R. §§ 402.12(k), 402.14(a). During formal consultation, a more thorough analysis of the proposed action is performed, and at the conclusion of consultation, the Service prepares a written biological opinion. 16 U.S.C. § 1536(a)(3); 50 C.F.R. §§ 402.14(g), (h). This opinion will state whether the Service believes the proposed action is likely to jeopardize the continued existence of any

[2] During fiscal year 1999, for example, FWS informally consulted on about 12,000 actions, while conducting 83 formal consultations and issuing one "jeopardy" opinion. Terry Rabot, The Federal Role in Habitat Protection, *Endangered Species Bulletin* 11 (U.S. Fish and Wildlife Service Nov./Dec. 1999).

listed species or adversely modify critical habitat, and may contain reasonable and prudent alternatives to avoid jeopardy and an incidental take statement if members of a listed species are likely to killed or injured. 50 C.F.R. §§ 402.14(h), (i).[3]

If a "jeopardy" biological opinion is issued, the federal agency technically may proceed with the proposed action. *Cf. Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193-94 (9th Cir. 1988) (the Interior Secretary's failure to adopt NMFS's reasonable and prudent alternative does not violate Section 7). The Supreme Court has recognized, however, that a biological opinion "alters the legal regime to which the action agency is subject," and exposes the agency (as well as any permit or license applicant) to potential liability. *Bennett v. Spear*, 520 U.S. 154, 169-70 (1997). When there are no viable reasonable and prudent alternatives to avoid jeopardy, the agency is faced with either terminating the proposed action or applying for an exemption from the Endangered Species Committee.

The statutory time limit for Section 7 consultation is 90 days or such time as is mutually agreed to between the Federal agency and FWS. 16 U.S.C. § 1536(b)(1)(A). Within 45 days from the completion of consultation, the biological opinion must be issued. 50 C.F.R. § 402.14(e). As a practical matter, the 135-day time limit is often exceeded, even in the case of relatively simple Federal actions.

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[3] An action that causes the death or injury of members of a listed species violates Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B) *See also, e.g., Arizona Cattle Growers*, 273 F.3d at 1237-38. Therefore, the prohibition against the taking of listed species found in Section 9 could prevent a proposed Federal action from going forward even though Section 7 consultation has been completed. In this situation, formal consultation would be necessary in order to obtain an incidental take statement. *See Arizona Cattle Growers*, 273 F.3d at 1239-42 (discussing the relationship between incidental take statements and Section 7 consultation).

B. Current Problems With Section 7 Consultation and Examples

As other Federal regulatory programs have expanded, an increasing number of private land uses require some sort of Federal permit or approval or have some other Federal nexus that triggers consultation. At the same time, FWS[4] has become increasingly aggressive in exploiting the Section 7 consultation process to extract concessions from landowners and control how private land is used.

For example, many private construction activities currently require one or more Federal permits under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* Two of the most common permits are permits regulating the discharge of pollutants in storm water from construction sites, which are issued by EPA under Section 402 of the Clean Water Act, and permits authorizing the discharge of dredged or fill material into the waters of the United States, which are issued by the Army Corps of Engineers under Section 404 of the Clean Water Act. *See* 33 U.S.C. §§ 1342, 1344. In both instances, however, the authority of the agency is limited to regulating discharges of pollutants into jurisdictional waters – not the activity from which the discharge results. *See, e.g., Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 505 (2d Cir. 2005) ("the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges – not potential discharges, and certainly not point sources themselves"); *United States v. Mango*, 199 F.3d 85, 93 & n. 7 (2d Cir. 1999) ("Because the [Corps'] jurisdiction is limited to the issuing of permits for such discharges, ... any conditions imposed in a permit must themselves be related to

[4] The discussion that follows relates solely to FWS's consultation practices. The witness does not have personal experience with NFMS, which, as previously stated, has jurisdiction over marine species.

the discharge."); *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988) ("EPA's jurisdiction … is limited to regulating the discharge of pollutants.").

While it may seem obvious that the Federal action is the issuance of the Clean Water Act permit, FWS frequently (and usually without explanation) treats the *entire* project as the Federal action for consultation purposes, even if there is no discretionary Federal involvement in or control over the balance of the project. This error effectively "federalizes" the private project for the purposes of Section 7 consultation, and extends the scope of consultation to private land uses over which the agency lacks jurisdiction.

Moreover, FWS field employees do not appear to understand the causal relationship necessary for an impact to be considered an "effect" of a Federal action. "Effects of the action" include both the direct and indirect effects of the Federal action that is the subject of the consultation. 50 C.F.R. § 402.02. Under the definition, "direct effects" are the direct or immediate effects on listed species or critical habitat caused by the Federal action. "Indirect effects are those that are caused by the proposed action and are later in time, but are still reasonably certain to occur." *Id.* Cumulative effects, i.e., the effects of future state or private activities, are also considered. Those activities must be "reasonably certain to occur" in the area impacted by the proposed Federal action. *Id.*

For example, the immediate impacts caused by the construction of a street crossing or flood control structure within a watercourse subject to the Army Corps of Engineers' jurisdiction would constitute direct effects of the Corps' Section 404 permit, while future impacts caused by the placement of structures and fill material within the watercourse that are reasonably certain to occur (e.g., altered flood flows or increased

downstream sedimentation) would constitute indirect effects of the permit. In this example, the "action area" associated with the Corps' permit would include not only the portion of the watercourse directly impacted by the construction of the street crossing, but also any areas upstream or downstream of the crossing reasonably certain to be impacted in the future. Therefore, the proper scope of analysis would include the effects (including both indirect and cumulative effects) that are caused by the permitted activity and are reasonably certain to occur within that portion of the watercourse. *E.g.*, *Riverside Irr. Dist. v. Andrews,* 758 F.2d 508, 512 (10th Cir. 1985) (the relevant "action area" relating to a Clean Water Act permit for the construction of a dam included downstream aquatic habitat).

In many recent biological opinions, however, FWS has gone well beyond the limits imposed in the current consultation regulations and by the ESA itself, extending the scope of analysis to effects over which there is no Federal jurisdiction. For example, in consultations involving the impacts of issuing Clean Water Act permits on the cactus ferruginous pygmy-owl in southern Arizona, FWS has determined that the permit's "action area" includes all land within 19 miles of the project site. *E.g.*, *Final Biological Opinion on the Effects of the Thornydale Road Improvement Project in Pima County, Arizona*, 20 (Feb. 25, 2002).[5] These determinations were based on unpublished data suggesting that the dispersal distance of juvenile pygmy-owls may be as much as 19 miles – an area containing more than 725,000 acres! Thus, the "action area" was

[5] The FWS biological opinions that are discussed in this testimony are available at http://www.fws.gov/southwest/es/arizona/Biological.htm (visited September 19, 2008).

delimited by the maximum, potential movement of a member of the species, rather than the effects caused by the activities authorized under the Federal permit.

The specific Pima County project identified in the foregoing biological opinion involved the widening and improvement of 1.6 miles of a major arterial street, which would result in the permanent loss of approximately 1.4 acres of desert vegetation. The Federal action consisted of authorizing storm water discharges from construction activities under a general NPDES permit and a Section 404 permit authorizing the construction of certain minor flood control and drainage structures in a desert wash. The biological opinion contained no explanation of how the activities authorized by these Federal permits were reasonably certain to result in direct or indirect effects throughout the 725,000-acre "action area." FWS nevertheless required Pima County to acquire approximately 36 acres of suitable pygmy-owl habitat, to be set aside and managed in perpetuity for the benefit of the species, in addition to complying with numerous on-site conservation measures that had little to do with protecting aquatic resources under the Clean Water Act.

In a Section 7 consultation that addressed the effects of storm water discharges from the construction of 10 single-family homes on a 8.92-acre parcel in northwest Tucson, FWS required the landowner to maintain 76 percent of his property (6.7 acres) as natural open space, restore an additional 1.2 acres (including 0.69 acres on site) using specified vegetation, and record a conservation easement restricting various land use activities, including land uses on each lot outside a 6,300 square-foot building envelope, fence locations, pedestrian activities, artificial lighting, and outdoor cooking. *Biological*

Opinion on the Effects of the Proposed Pueblo Oasis Development in Pima County, Arizona (July 9, 2002). While this biological opinion contained a lengthy (and largely generic) discussion about the pygmy-owl, it contained virtually no site-specific information, included no discussion of current owl locations relative to the parcel and failed to identify the jurisdictional waters affected by the storm water discharge. The opinion simply noted that two juvenile owls used the parcel in 1998 and one juvenile owl used the parcel in 1999, and explained that the parcel contains suitable owl habitat. No incidental take statement was provided because the proposed action was not expected to "take" any owls.

The Pima County and Pueblo Oasis biological opinions are, unfortunately, typical of the biological opinions that have been issued by the FWS Arizona field office in connection with Clean Water Act permits during the past decade.[6] In these opinions, FWS largely ignored the effects on listed species and critical habitat resulting from the discharge of pollutants (the regulated activity). FWS instead focused on the impact of private real estate development activities (including off-site improvements) on habitat considered "suitable" for pygmy-owls and other listed species.

The fundamental flaw in the analysis employed by FWS is the implicit assumption that vegetation removal and other land use activities outside of jurisdictional "waters of the United States" are authorized or otherwise caused by a Clean Water Act permit.

[6] Other examples of biological opinions and the conditions imposed to protect habitat deemed "suitable" (but not designated as critical under the ESA) are found in Attachment A to this testimony.

Under the so-called "but for" test typically used by FWS to determine a Federal action's indirect effects, the Federal action (e.g., a Clean Water Act permit) cannot be the cause of an effect unless the Federal action is necessary for that effect to occur. Normally, a landowner may remove or thin vegetation on his property without a Federal permit. While the removal of vegetation may adversely impact the ability of a parcel of land to serve as habitat for a listed species, this impact is not attributable to the Federal permit because the removal of vegetation could take place in the absence of the permit. In other words, true "but for" causation does not exist because the Federal agency lacks authority to prevent or control the activity. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004) ("where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect").[7]

Using this flawed "but for" test, FWS has imposed conditions and requirements on landowners during the consultation process, such as those imposed in examples given above and in Attachment A, based on the Federal nexus provided by a Clean Water Act permit. These conditions and requirements have included the following:

- The acquisition and preservation of off-site conservation land (typically several times the area disturbed by the project)
- Land disturbance is limited to 30% or less within the development

[7] In the Clean Water Act, Congress declared that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use … of land and water resources." Congress did not intend that EPA and the Corps regulate real estate development or other upland land uses, nor do they have jurisdiction to do so under Clean Water Act, as the circuit court decisions cited previously have held.

- Open space within the development (including individual lots) must be permanently maintained and access must be restricted
- No use of pesticides within the development
- Restrictions on exterior lighting and outdoor activities, such as organized events and outdoor cooking
- An education program for construction workers and/or residents in the development
- Cats, dogs and other pets, if permitted outdoors, must be kept on leashes

These "conservation measures" are not imposed as terms and conditions in an incidental take statement in order to minimize "take," but are included as conditions of the Clean Water Act permit. If the permit applicant refuses to accept these conditions, he is faced with the prospect of a "jeopardy" determination and problems obtaining the permit, which would delay or even halt his project.

Given these sorts of difficulties, it is little wonder that private landowners and trade organizations are suing the Federal government with greater frequency. A narrower and more focused approach to consultation, in which the limits of Federal regulatory authority are recognized, would eliminate these abuses, conserve agency resources and reduce conflicts with the regulated community. The Services' proposed amendments to the Section 7 consultation regulations address the scope of Section 7 consultation and will provide helpful guidance to FWS field employees.

C. Comments Concerning the Services' Proposed Amendments to the Regulations Governing Interagency Consultation

The purpose of the Proposed Rule amending the current regulations governing Section 7 consultation is to "clarify when the section 7 regulations are applicable and the

correct standard for effects analysis," and "to establish time frames for the informal consultation process." *Id.* As discussed below, the proposed changes are consistent with, and supported by, existing law and, assuming they are actually followed in the field, will help to eliminate the problems I have discussed.

1. The Proposed Changes to the Definitions of "Effects of the Action" and "Cumulative Effects" in 50 C.F.R. § 402.02

The Services are proposing changes to the definitions of "effects of the action" and "cumulative effects" found in 50 C.F.R. § 402.02. These changes, although minor in nature, will clarify the scope of analysis required during consultation under Section 7.

With respect to the definition of "effects of the action," the Services propose to clarify, first, that "indirect effects" are those effects "for which the proposed [Federal] action *is an essential cause*, and that are later in time, but still reasonably certain to occur" and that "[i]f an effect will occur whether or not the action takes place, the action is not the cause of the direct or indirect effect." Proposed Rule, 73 Fed. Reg. at 47874 (emphasis supplied). In other words, there must be a reasonably close causal relationship between the effect and the proposed Federal action.

The Services also would add language to clarify that for an indirect effect to be "reasonably certain to occur" (the standard in the current definition), there must be "clear and substantial information" demonstrating that the effect will happen. *Id.* This requirement is mandated by the statutory requirement that the Services "use the best scientific and commercial data available" in fulfilling their obligations under Section 7. 16 U.S.C. § 1536(a)(2). The Supreme Court has explained that the purpose of this

requirement "is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise" and "to avoid needless economic dislocation" by preventing erroneous jeopardy determinations. *Bennett*, 520 U.S. at 176-77. The proposed changes to the definition of "indirect effects" are consistent with the Supreme Court's discussion of Section 7's requirements.

With respect to the definition of "cumulative effects," the Services would add language clarifying that cumulative effects do not include effects caused by future Federal activities. Proposed Rule, 73 Fed. Reg. at 47874. As discussed in the preamble to the Proposed Rule, the current definition already limits cumulative effects to effects caused by future State or private actions. *Id.* at 47869. The preamble also explains that cumulative effects are subject to the same "reasonably certain to occur" standard, which is narrower than the "reasonably foreseeable" standard embodied in National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(f), and that statute's implementing regulations and requires greater certainty concerning the likelihood of effects caused by future State and private projects. *Id.*

As the preamble explains, these basic concepts are contained in the existing definitions, which were adopted in 1986. *See Interagency Cooperation – Endangered Species Act of 1973, as amended; Final Rule*, 51 Fed. Reg. 19926, 19932-33 (June 3, 1986). The preamble to the 1986 rulemaking contains a helpful discussion of the scope of analysis that should be used to determine whether a proposed Federal action is likely to violate the "jeopardy" standard:

> Section 7 consultation will analyze whether the "effects of the action" on listed species, plus any additional, cumulative effects of State and private actions which are reasonably certain to occur in the action area, are likely to jeopardize the continued existence of that species. … [The jeopardy standard] is a substantive prohibition that applies to the Federal action involved in the consultation. In contrast, NEPA is a procedural in nature, rather than substantive, which would warrant a more expanded review of cumulative effects. Otherwise, in a particular situation the jeopardy prohibition could operate to block "nonjeopardy" actions because future, speculative effects occurring after the Federal action is over might, on a cumulative basis, jeopardize a listed species. Congress did not intend that Federal actions be precluded by such speculative actions.

Id. This discussion has never been repudiated by the Services, and continues to reflect the Services' fundamental policy regarding the appropriate scope of analysis to be used during the consultation process. The changes proposed in the Proposed Rule are consistent with that policy.

The changes to these definitions are also consistent with case law under NEPA.[8] In *Public Citizen*, *supra*, the Supreme Court addressed the proper scope of analysis under NEPA, holding:

> We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect. Hence, under NEPA and the implementing [Council on Environmental Quality]

[8] NEPA requires that Federal agencies take a "hard look" at the environmental effects of their actions prior to proceeding with them. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989). NEPA and its implementing regulations require Federal agencies to evaluate the "reasonably foreseeable" indirect and cumulative impacts (i.e., effects) of their actions. *See* 40 C.F.R. §§ 1508.7, 1508.8. In contrast to ESA Section 7, however, NEPA imposes no substantive environmental obligations on Federal agencies, but simply mandates that they satisfy certain procedural requirements. *Robertson*, 490 U.S. at 350-51.

> regulations, the agency need not consider these effects in its [environmental assessment] when determining whether its action is a "major Federal action."

The Court also stated that technical "but for" causation is insufficient to make an agency responsible for a particular effect under NEPA. Instead, there must be "a reasonably close causal relationship between the environmental effect and the alleged cause." 541 U.S. at 767 (quotation marks omitted).[9]

Although *Public Citizen* addressed causation in the context of NEPA, the Supreme Court relied on the reasoning of *Public Citizen* in *National Ass'n of Home Builders*, *supra*, in concluding that "[Section 7(a)(2)'s] no-jeopardy duty covers only discretionary agency actions and does not attach to actions … that an agency is *required* by statute to undertake once certain specified triggering events have occurred." 127 S.Ct. at 2536 (emphasis original). The Court explained that *Public Citizen*'s "basic principle," "that an agency cannot be considered the legal 'cause' of an action that it has no statutory discretion *not* to take," supports the reasonableness of the Services' long-standing interpretation of Section 7 as applying only to discretionary Federal actions. *Id.* at 2535.

The changes proposed by the Services are consistent with the Supreme Court's analysis in *Public Citizen*, and would clarify that both "indirect effects" and "cumulative effects," as defined in 50 C.F.R. § 402.02, must have a close causal relationship to the proposed Federal action, i.e., the proposed action must be an "essential cause" of the

[9] Included with this testimony, as Attachment B, is a paper that was written and presented by the witness at an ALI/ABA-sponsored conference in Washington, D.C., in November 2006. This paper discusses *Public Citizen* in greater detail, and explains how the *Public Citizen* standard for determining when an effect is properly attributed to a proposed Federal action under NEPA provides guidance in determining the correct scope of analysis under ESA Section 7.

effect. The changes would also emphasize that there must be clear and substantial information that an effect will actually occur, which will ensure that highly uncertain and speculative effects are not improperly considered by the Services. These changes are consistent with Section 7, and do not amount to a sea change, as some groups have groups have contended.

2. The Proposed Changes to 50 C.F.R. § 402.03 Concerning the Applicability of Section 7 to Proposed Federal Actions

The Services also have proposed amendments to 50 C.F.R. § 402.03, entitled "Applicability." The current version of this regulation provides that "Section 7 and the requirements of this part apply to all actions in which there is discretionary involvement or control." The Services propose to revise the regulation in two respects.

First, new subsection (a) restates the existing regulation, providing that "Section 7 of the Act and the requirements of this part apply to all actions in which the Federal agency has discretionary involvement or control." Proposed Rule, 73 Fed. Reg. at 47874. This change merely reaffirms the existing regulation and is consistent with existing law, including the Supreme Court's 2007 decision in *National Ass'n of Home Builders*, discussed previously. Before that decision was issued, however, the courts had recognized that a Federal agency may have decision-making authority (e.g., authority to issue permits authorizing the discharge of pollutants under the Clean Water Act), but nonetheless lack discretion to act for the benefit of listed species due to its limited regulatory authority (e.g., no jurisdiction over upland land uses). *See, e.g., In re Operation of the Missouri River System Litigation,* 421 F.3d 618, 630 (8th Cir. 2005)

("the ESA does not apply where an agency has no statutory authority to act with discretion"); *Ground Zero Ctr. For Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1091-92 (9th Cir. 2004); *American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297-99 (5th Cir. 1998); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 33-34 (D.C. Cir. 1992).

Second, the Services propose to add a new subsection (b) that would impose reasonable limits on the applicability of Section 7 to discretionary Federal actions. As previously explained, under Section 7(a)(2) Federal actions may not proceed if they would either jeopardize the existence of a listed species or destroy or adversely modify a listed species' critical habitat. New subsection (b) identifies certain discretionary actions that are excluded from the consultation process because either they have no effect on listed species or their "effects are so inconsequential, uncertain, unlikely or beneficial that they are, as a practical matter, tantamount to having no effect." Proposed Rule, 73 Fed. Reg. at 47870.

Subpart 50 C.F.R. § 402.03(b)(1), which provides that consultation is not required when a proposed action "has no effect on a listed species or critical habitat" (Proposed Rule, 73 Fed. Reg. at 47874), is a statement of the current law. As explained previously, agencies are currently responsible for determining whether to consult, and are not required to do so when no listed species or critical habitat are present in the project area. *E.g., Defenders of Wildlife*, 414 F.3d at 1070-71; *Newton County Wildlife*, 141 F.3d at 810; *Southwest Ctr.*, 100 F.3d at 1445. In their 1986 rulemaking, the Services emphasized that Federal agencies are responsible for complying with Section 7:

> Two commenters asked that the final rule empower the Director to require a Federal agency to consult. Although the Service will, when appropriate, request consultation on particular Federal actions, *it lacks the authority to require the initiation of consultation.* The determination of possible effects is the Federal agency's responsibility. The Federal agency has the ultimate duty to ensure that its actions are not likely to jeopardize listed species or adversely modify critical habitat. The Federal agency makes the final decision on whether consultation is required, and it likewise bears the risk of an erroneous decision.

Interagency Cooperation, 51 Fed. Reg. at 19949 (emphasis supplied). Consequently, the addition of subpart 402.03(b)(1) merely confirms existing law.

The remaining changes to 50 C.F.R. § 402.03 are consistent with the foregoing authorities and, more broadly, with the basic purpose of Section 7. In summary, consultation would not be triggered when the proposed action is an insignificant contributor to any effects to species (subpart 402.03(b)(2)) or when the effects of the proposed action are not capable of being meaningfully identified or detected in a manner that permits evaluation (i.e. the effects are highly speculative), are wholly beneficial, or are so remote that they pose no legitimate risk of causing jeopardy or adverse modification (subpart 402.03(b)(3)). In all cases, however, consultation is required if the Federal action is anticipated to result in the taking of members of a listed species.

These are appropriate and common-sense change recognizing that the ultimate purpose of the consultation process is to assist Federal agencies in ensuring that their actions will not violate the jeopardy standard. In other words, the Services' consultation procedures are not intended to ensure that a particular process is completed (in contrast, for example, to NEPA's procedural requirements), but instead to ensure that Section 7's

substantive standard is met. In fact, as stated in the Proposed Rule, the current, three-tiered consultation process is a product of the Services' 1986 rulemaking, and is not required by the ESA. Proposed Rule, 73 Fed. Reg. at 47871. In situations like those identified in proposed 50 C.F.R. §§ 402.03(b)(2) and (b)(3), where either a substantive violation is extremely unlikely to occur or listed species would actually benefit from the action, it would be a waste of agency resources and needlessly delay projects to engage in consultation.

In sum, the proposed amendments to 50 C.F.R. §§ 402.02 and 402.03 are not significant changes to the current consultation regulations, nor are they inconsistent with Section 7 or the case law interpreting and applying the statute. Instead, the amendments clarify the scope of analysis that is used in evaluating the effects of proposed Federal actions. In doing so, the amendments – if followed in the field – should provide much needed guidance to the Services' field offices and, in process, reduce disputes, conserve agency and applicant resources and avoid speculative decision-making by ensuring that the best scientific and commercial is used during the consultation process.

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