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National Marine Fisheries Service
Office of Protected Resources
1315 East-West Highway
Silver Spring, MD 20910

Re: Revision of Regulations for Interagency Cooperation; Proposed Rule, 83 Fed. Reg. 35,178 (July 25, 2018); FWS-HQ-ES-2018-0009

I. INTRODUCTION

The American Exploration & Mining Association (AEMA) appreciates the opportunity to comment on the proposed rules that would revise the regulations governing interagency cooperation pursuant to the Endangered Species Act (ESA). AEMA generally supports the proposed rules to provide greater clarity and predictability in complying with the Section 7 consultation requirements. We also believe the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services), can and should do more to address certain issues that affect our members. Consequently, we are providing additional revisions to the regulations for your consideration.

II. COMMENTS

A. Proposed Changes to Part 402 Definitions

1. Proposed Changes to Definition of "Destruction or Adverse Modification.

AEMA supports the proposed changes to the definition of the term "destruction or adverse modification." The phrase "as a whole" should be added to the definition to clarify that the analysis considers the impact on the entire designated critical habitat, rather than just the action area or a critical habitat unit. This approach is consistent with, and supported by, the Ninth Circuit's decision in *Butte Environmental Council v. U.S. Army Corps of Engineers*, 620 F.3d

936 (9th Cir. 2010). We also support removing the second sentence of the definition of "destruction or adverse modification." As discussed in the preamble, this sentence has led to considerable confusion.

While the foregoing changes are appropriate, the discussion in the preamble indicates Services are continuing to follow the Ninth Circuit's decision in *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir.), *modified* 387 F.3d 968 (2004). That decision held erroneously that the purpose of critical habitat is to recover species, rather than ensure their survival. That decision in turn has spawned additional decisions that erroneously treat critical habitat as recovery habitat. *See, e.g.*, *Nw Envtl. Advocates v. EPA*, 855 F. Supp. 2d 1199, 1223 (D. Ore. 2012) (stating that "recovery is an essential component of the ESA that must be considered when an agency carves out critical habitat for a species or makes a jeopardy analysis," citing *Gifford Pinchot*); *Rock Creek All. v. U.S. Forest Serv.*, 703 F. Supp. 2d 1152, 1192-94 (D. Mont. 2010), *aff'd* 663 F.3d 439, 443 (9th Cir. 2011) (explaining that adverse modification occurs when an action diminishes the value of critical habitat for a species' recovery, following Gifford Pinchot).

By contrast, courts which have considered the structure of the ESA and intent of Congress have recognized that critical habitat consists of areas essential to the species' survival. For example, in setting aside the critical habitat for the Rio Grande silvery minnow, the district court stated:

> *"Thus, even though more extensive habitat may be essential to maintain the species over the long term, critical habitat only includes the minimum amount of habitat needed to avoid short-term jeopardy or habitat in need of immediate intervention*." A species long-term protection is properly addressed by a "recovery plan" developed for the "conservation and survival" of the species listed as endangered.

Middle Rio Grande Cons. Dist. v. Babbitt, 206 F.Supp.2d 1156, 1169 (D.N.M. 2000) (quoting *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 623 (W.D. Wash. 1991)) (emphasis added), *aff'd sub nom. Middle Rio Grande Cons. Dist. v. Norton*, 294 F.3d 1220 (10th Cir. 2002).

The italicized portion of the court's statement was quoted from the *Northern Spotted Owl v. Lujan* decision, which was perhaps the first reported case to address the statutory requirements for designating critical habitat. In that case, the FWS had listed the northern spotted owl but did not designate critical habitat for the species, as required by ESA Section 4(3)(A). The court held that the FWS's failure to act within the statutory time frame could not be excused by the need to conduct analyses or by ongoing efforts to develop a comprehensive conservation strategy for the spotted owl, given Congress's clear intent. Based on the legislative history, the court recognized that critical habitat plays a limited role under the ESA and must be designated concurrently with listing to ensure the species' survival.

The reality is, critical habitat is intended to ensure the continued existence of listed species, i.e., their survival; it is not recovery habitat. As a consequence, the definition of "destruction or adverse modification" should be clarified to incorporate a survival-based standard. Simply put,

impacts that may impede a species' recovery should not be treated as "destruction or adverse modification."

2. Proposed Changes to "Effects of the Action."

The Services are also proposing changes to the regulatory definition of "effects of the action" that are intended to simplify the effects analysis. The distinction between various types of effects (e.g., direct effects vs. indirect effects) would be eliminated. Instead, an effect must be caused by the action and be reasonably certain to occur to be considered. We support these changes in order to eliminate some of the confusion surrounding the effects analysis required during Section 7 consultation.

However, while helpful, these changes do not address the root of the problem with respect to the determining the effects of the action. First, Section 7 applies only to discretionary Federal actions, and not to private activities. *See* 50 C.F.R. § 402.03 ("Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control."). Notwithstanding this regulation, the FWS often treats the entire project as a Federal action, even though there is no Federal jurisdiction over much of the project. This mistake "federalizes" the entire project for the purposes of Section 7, resulting in the improper regulation of private land and resources.

Second, as the Services note in their preamble discussion, the standard that should be used to determine whether an effect is considered during Section 7 consultation is whether the effect is reasonably certain to occur, not whether an effect is merely possible. Nevertheless, speculative effects are often asserted by the Service, triggering consultation. Such effects include, for example, the effects of climate change at the project level, and the long-term effects of groundwater use on regional streams. This results in large part from confusion over what is meant by "but for" causation, which is used to extend the scope of the consultation to effects that are beyond the jurisdiction of the Federal action agency.

In the preamble to the proposed modifications, the Services state they will continue to use "but for" causation to determine the effects of the action. In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Supreme Court addressed the scope of analysis used under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(f). The Court stated that "but for" causation is insufficient to make an agency responsible for a particular effect. Instead, there must be "a reasonably close causal relationship between the environmental effect and the alleged cause." *Id.* at 767 (quotation marks omitted). It further held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.* at 770. The same reasoning applies to the consideration of effects under ESA, particularly in light of the limitation on the scope of Section 7 consultation imposed by 50 C.F.R. § 402.03.

To address these problems, and appropriately limit the scope of consultation to Federal actions, we recommend the following additional changes:

- Modify the Section 7 consultation rules to specifically define "effects of the action" to be consistent with 50 C.F.R. § 402.03 and to prohibit consideration of remote or speculative effects. The Services should use different terminology to emphasize that there must be a reasonably close causal connection between the effect and the proposed Federal action. In its 2008 rulemaking, for example, FWS clarified 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." Interagency Cooperation Under the Endangered Species Act; Proposed Rule, 73 Fed. Reg. 47,868, 47,874 (Aug. 15, 2008). A similar approach should be used here.

- Modify the Section 7 consultation rules to clarify that the scope of the action area is also limited by 50 C.F.R. § 402.03. Thus, when there is Federal jurisdiction over a portion of a project, the action area should be limited to that portion of the project.

3. Definition of "Environmental Baseline"

The Services are seeking public comment on potential revisions to the definition of "*environmental baseline*" as it relates to ongoing Federal actions, and whether the following language would address these issues described in the notice (83 Fed. Reg. at 35184):

> Environmental baseline is the state of the world absent the action under review and includes the past, present and ongoing impacts of all past and ongoing Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions in the action area which are contemporaneous with the consultation in process. Ongoing means impacts or actions that would continue in the absence of the action under review.

The Services must work to clarify language in the definition of "Environmental Baseline" as it relates to ongoing Federal actions. However, the precision of the phrase "state of the world" is subject to question. Services consultations typically are related to ESA listed species and their habitats and cover areas where Federal actions may occur. In general, the use of the word "world" in the proposed definition implies that the study area may be larger than the action area. The term "world" also poses the potential to produce ambiguity in the NEPA process as to the appropriate boundaries of the affects areas of the proposed action might actually be. Instead, the language should be modified as follows:

> Environmental baseline is the state of the ~~world~~ <u>action area</u> absent the action under review and includes the past, present and ongoing impacts of all past and ongoing Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact

of State or private actions in the action area which are contemporaneous with the consultation in process. Ongoing means impacts or actions that would continue in the absence of the action under review.

B. The Role of Project Proponent in Section 7 Consultation

A significant issue that has developed through the experience of Section 7 consultation is the appropriate flow of scientific information has been interrupted, if not completely halted, because agencies are hesitant to directly involve the project proponent. These comments directly address this process defect while maintaining the appropriate appearance and actuality of Federal decision making and division of responsibility under the ESA.

One of the significant benefits of continuous interaction and involvement between the project proponent and regulatory agency staff is to better facilitate mitigation measure development when effects and impacts are determined to be problematic and to meet stated goals of the ESA by NMFS or USFWS consultation teams. Project proponents are often left out of the room during these discussions and, as a consequence, regulatory staff may develop and propose mitigation or conclude that a project may have an adverse effect that the proponent and/or land management/lead agency may find environmentally unfavorable for other reasons besides ESA issues.

As a result, project proponents and other cooperating agencies are then forced to cease what may be otherwise productive discussions and offer counter proposals and advocacy as to why the proposed changes are unnecessary, unjustified, technically infeasible or economically unsound. This scenario involves unnecessary paperwork, consumes staff time and resources, and often causes cost overruns and excessive delay in project timelines. This outcome can be avoided if the project proponent is simply involved in the process at a more interactive level at an earlier time in the process and addressed the infeasibility of suggested project alternatives.[1]

1. A Project Proponent has a Right to be Involved in All Phases of Section 7 Consultation

As noted in the *Endangered Species Consultation Handbook* (Handbook), "[t]he [Endangered Species Act] [S]ection 7 process achieves greatest flexibility when coordination between all involved agencies and non-Federal representatives, and the Services, begins early." By law, Section 7 consultation is a cooperative effort involving affected parties engaged in analyzing effects posed by proposed actions on listed species and critical habitats. The Handbook

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1. Section 7 consultation regulations are not unique in the goal of improving conservation of listed species and the sustaining and improving the integrity of their respective habitats. The regulations at 36 CFR part 228, Subpart A (covering USDA Forest Service lands) and those at 43 CFR Part 3800, Subpart 3809 (covering USDOI BLM lands) expressly state goals of minimizing adverse environmental effects and undue or unnecessary degradation including protection of listed species and their habitats. Both sets of regulations and their respective agency handbooks and manuals for implementation provide for and strongly encourage within the implementation documents the necessity and importance of interaction of project proponents with regulatory agency resource staff in order to minimize impacts and effects throughout the permitting and subsequent exploration, development, operations, reclamation and closure phases of a mining project.

specifically emphasizes this point, and demonstrates the latitude available within Section 7 to allow project proponents and agencies to work together during the process:

> Section 7 consultation is a cooperative process. The Services do not have all the answers. Actively seek the views of the action agency *and its designated representatives,* and involve them in your opinion preparation, especially in the development of reasonable and prudent alternatives, reasonable and prudent measures, terms and conditions to minimize the impacts of incidental take, and conservation recommendations.

Handbook pp. 1-2 to 1-3 [emphasis added]

2. A Proposal to Provide Project Applicant Involvement Throughout Section 7 Consultation

Presently, the ESA regulations segregate project proponents into two classes of Section 7 consultation participants. An "applicant" is defined in 50 C.F.R. § 402.02 as anyone "who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action." A designated "non-Federal representative" by the lead Federal agency under 50 C.F.R. § 402.08 is authorized to be a part of informal consultation and/or prepare a biological assessment. The practical distinction in status is that a project proponent designated an "applicant" by the lead agency is afforded the opportunity to participate *at the end* of Section 7 consultation process. An "applicant" is empowered to object to and extension of the time to complete consultation, *see* 50 C.F.R. § 402.14 (e) ("A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant."), and a project "applicant" is afforded the opportunity to submit information for consideration during formal consultation, but it is through the auspices of the action agency, *see* 50 C.F.R. § 402.14 (d) ("The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation."

Endangered Species Act decision making, specifically in the context of Section 7 consultation, is grounded in scientific integrity. *See* 50 C.F.R. § 402.14 (d) ("The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available… .") In the overwhelming majority of Section 7 consultations involving mining on public lands, there is no more qualitative source of scientific and commercial data about the proposed action to be reviewed under the ESA by the Services than the project proponent. Project developers are uniquely knowledgeable about their proposed action and business model impacts on listed species and their habitat due to the overwhelming – at times crushing - resources expended to develop data before their plans of operation are approved by the Federal land management agencies.

Thus, project proponents are in the best position to *directly* inform the Federal action agencies and the Services to fulfill their obligations under the ESA. Project proponents are uniquely positioned with a thorough and complete understanding of the proposed action and any potential/alternative design modifications and operational procedures that, if necessitated, could

reduce the impact of the action on the Federally listed fish species and designated critical habitat. Unfortunately, the current process involves some opportunity to participate on the front end of Section 7 consultation through designation of non-Federal representative status under 50 C.F.R § 402.08, or at the end of consultation as a designated "applicant" after the Biological Opinion at issue may have already been carved in stone and it is too late to appropriately influence its outcome.

In order to provide continuity to the distinction of a project "applicant" and a "designated non-Federal representative,' under Part 402, the distinction between the two should be significantly narrowed in order to provide more informed and efficient Section 7 consultations. The regulations should make it clear that and "applicant" has the opportunity to be involved, along with the Federal agency, in all aspects of the consultation process that arise from the applicant's proposed action. It is understood that the Federal agencies should be cognizant of other laws regarding issues such as national security, classified information, confidentiality, and maintenance of privileges. But when those legal policy interests diverge, the Federal agencies should continue to involve the applicants to whatever extent is practicable.

Accordingly, it is recommended that a new section in Part 402 read as follows with respect to the role of a project "applicant" in Section 7 consultation:

> An applicant has a right to be involved in the consultation process consistent with the needs of the Service and the Federal agency to comply with the requirements of other applicable laws such as those pertaining to national security, classified information, confidentiality, and maintenance of privileges.

Similarly, with respect to a "designated non-Federal representative, the current regulations should be adjusted to allow the designated non-Federal representative to be involved in *all* levels of consultation instead of being limited to, under existing terminology, informal consultations and the preparation of biological assessments. Allowing the designated Federal representative to be involved at all stages of consultation will result in a more efficient, timely, and effective consultation process. Section 402.08 should be amended to read that:

> A Federal agency may, with the consent of the applicant, if any, designate a non-Federal representative for all matters pertaining to consultation consistent with the needs of the Service and the Federal agency to comply with the requirements of other applicable laws such as those pertaining to national security, classified information, confidentiality, and maintenance of privileges. The ultimate responsibility for compliance with section 7 remains with the Federal agency.

With this two-step approach, the current treatment in Part 402 between an "applicant" and "non-Federal representative" may be maintained for purposes of current regulatory construct, but the discrimination between those two designations in full participation in Section 7 consultation is addressed.

C. Section 402.13 Deadline for Informal Consultation

As noted in the regulations and Federal Register notice, there is currently no deadline for the Services to complete an informal consultation (unlike formal consultations), which by regulation should be completed within 90 days unless extended under the terms under 50 C.F.R. §402.14(e). This lack of firm timelines in some cases has led to major and unnecessary project delays, in some cases over periods ranging from a few months to in extreme cases delays of years. The Services are considering whether to add a 60-day deadline, subject to extension by mutual consent, for informal consultations and are seeking comment on: (1) whether a deadline would be helpful; (2) the appropriate length for a deadline; and (3) how to appropriately implement a deadline.

Establishing deadlines for informal consultations should be part of the Services' efforts to implement Executive Order EO-13777, "Enforcing the Regulatory Reform Agenda," Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects," and Department of the Interior Secretary's Order 3355 "Streamlining National Environmental Policy Act Reviews and Implementation of Executive Order 13807." We support a 60-day deadline that is firm and codified to ensure unnecessary delays are prevented and as an important part of keeping environmental reviews for projects timely and cost efficient while providing adequate time for environmental reviews. The 60-day deadline should apply for requests for concurrence. Shorter deadlines should be considered for requests for technical assistance.

D. Reinitiation of Consultation

AEMA supports the Services' proposal to amend part 402.16 to exempt land management plans under the Federal Land Policy Management Act (FLPMA) and the National Forest Management Act (NFMA) from reinitiation of consultation when a new species is listed or new critical habitat is designated. In addition to exempting these programmatic actions from reinitiation of consultation when new species are listed or new critical habitat is designated, the Services should amend part 402.16 to allow for the exemption of reinitiation of consultation upon the listing of new species or designation of critical habitat for other programmatic actions, where appropriate.

Similar to land management plans, other programmatic actions that trigger section 7 consultation provide a basis for ongoing related action which undergo site-specific consultation or similar analysis with respect to impacts to listed species and their habitat. In these circumstances, programmatic consultations often cover a broad range of habitats and it is impractical and unnecessary to reinitiate consultation for these programmatic actions every time a new species is listed in the affected area or new critical habitat is designated.

If a framework programmatic action or mixed programmatic action: 1) does not authorize, fund, or carry out an action that is likely to result in jeopardy to the continued existence of a listed species or destruction or adverse modification of critical habitat, as is the case for a framework programmatic action, 2) will be followed by a subsequent Section 7 consultation that will analyze the potential impacts to the listed species or designated critical habitat before a "may

affect" action occurs, or 3) has an existing programmatic biological opinion that can be supplemented to include newly listed species or designated critical habitat into an existing programmatic framework to avoid jeopardy or adverse modification, the programmatic action should be eligible for exemption from reinitiation of consultation under section 7 when a new species is listed or critical habitat is designated.

Finally, in cases where consultation is reinitiated for a proposed action which has already been substantially reviewed under prior consultation, the Services should clarify that the scope of reinitiated consultation is limited to the evaluation of new information, without triggering a need to reevaluate those issues previously addressed for the same proposal. Hecla Mining Company's Rock Creek Mine in Sanders County, Montana endured a 20-year delay from the initiation of consultation in 1998 until this year, due in large part to wholesale reinitiation of consultation after "new information" was periodically made available, largely caused by the significant passage of time caused by the consulting agencies' own delay. In cases such as this, the Services should work with action agencies to expeditiously analyze on new information that bears on the "may affect" determination and incorporate that review into the previous analysis compiled for those elements of the proposal that are unchanged.

E. Other Changes to the Section 7 Consultation Rules

The balance of the proposed changes to 50 C.F.R. Part 402 deal with various procedural matters relating to the formal consultation in addition to those discussed above. Many of these changes should simplify and streamline consultation, and we support these changes.

In particular, we support the attention the Part 402 rulemaking is giving to the issue of how the Services and the Federal agency proposed to account for elements of a proposed Federal action and non-Federal activity intended to blunt or mitigate adverse effects on listed species or habitat is one of most controversial and intensely-litigated issues under the Endangered Species Act.

For the former, the Services have required impossible precision in project design and complete assurance of future conservation benefits. For the latter, State and other non-Federal actions legitimately contributing to species and habitat conservation have been subjected to an unattainable standard of application and performance before qualifying as "reasonably certain to occur." The proposed regulations address two sides of the same coin on same issue – future conservation - in two key approaches that AEMA supports, discussed below.

1. Proposed 50 C.F.R. 402.14(g)(8) How the Services Should Consider Measures Included in A Proposed Action Intended to Avoid, Minimize or Offset Adverse Effects

The impossible level of demonstration that a measure in a proposed Federal action will in fact be implemented before the Service can appropriately account for it in a Section 7 jeopardy analysis is rooted in the Federal courts.

The case cited in the Preamble, *Nat'l Wildlife Fed'n* v. *Nat'l Marine Fisheries Serv.,* 524 F.3d 917 (9th Cir. 2008), emerged from the Biological Opinions for the Federal Columbia River Power System (FCRPS) litigated in Pacific Northwest. Plaintiffs challenged the inclusion the proposed action of future installation of Removable Spillway Weirs (a type of surface bypass collector) and other structural improvements to aid safe anadromous fish passage as means to project future habitat improvement in 2004 FCRPS NMFS Biological Opinion. The Ninth Circuit held that "such improvements may not be included as part of the proposed action *without more solid guarantees* that they will actually occur. Although NMFS maintains that '[t]he agencies are committed to installation of surface bypass collectors at all dams where feasible, as exemplified by the recent installation of such structures at three dams,' we are 'not persuaded that even a sincere general commitment to future improvements may be included in the proposed action in order to offset its certain immediate negative effects, absent specific and binding plans." *Id.* at 935-36 (emphasis added).

As correctly noted in the proposed rulemaking, "This judicially created standard is not required by the Act or the existing regulations." 83 Fed. Reg. at 35187. The Federal courts have imposed a level of guarantee on project design and performance that is impossible to achieve and has no footing under law. More importantly, however, this legal standard with no lawful footing in the ESA has placed the Services in the untenable position of controlling what should be an independent relationship between the action agency and the consulting agencies. Under the law, the ultimate authority for interpreting agency statutory authority and discretion lies with the Federal agency, not the Services. The judicially-imposed flyspecking of the proposed action by the Services is not what Congress intended through the allocation of agency responsibility of the ESA.

Further, the safety valves for unanticipated performance of the proposed action, *e.g.*, reinitiation of Section 7 consultation or even emergency consultation, if necessary, are ample administrative accommodation of the unanticipated performance of the proposed action on listed species and their habitat. These regulatory protections are consistent with the clear delineation of authority between the Federal agencies as Congress proscribed under the Act should something unforeseen occur with a proposed action covered under a Biological Opinion.

Finally, and perhaps most importantly, the establishment by the courts of *guaranteed* performance of actions designed to offset negative effects of other elements of any proposed action (in addition to its inherent scientific impossibility) will stifle development of scientifically based innovation directed toward species conservation. In the context of fish passage in the FCRPS discussed above, for example, absent some safe nesting place in the ESA for evolving engineering design and potential innovation to be applied in a conservation context, science and research are preordained to a perpetual state of inertia. No reputable engineer or scientist will ever provide a "solid guarantee" to an action agency on a prospective outcome of a project designed to conserve listed species and their habitat. However, the Federal courts have imposed precisely this impossibility through their judicial review of Section 7 Biological Opinions.

Accordingly, proposed 50 C.F.R. 402.14(g)(8) should proceed as written to a final rule. Any tendency by a Federal agency to veer toward sheer speculation in developing actions to avoid,

minimize or offset the adverse effects within a proposed Federal action affecting listed species and their habitat will be guided by the overarching requirement that such actions be supported by the "best scientific and commercial data available."

2. Actions "Reasonably Certain to Occur" in Analysis of the Effects of the Action and Cumulative Effects

"Cumulative effects" "are those effects of *future* State, tribal, local and private actions, not involving a federal action, that are *reasonably certain* to occur within the *action area* under consideration." UNITED STATES FISH AND WILDLIFE SERVICE & NATIONAL MARINE FISHERIES SERVICE, ENDANGERED SPECIES ACT CONSULTATION HANDBOOK (1988) [HANDBOOK] at 4-31 (emphasis in original.) The cumulative effects analysis is the last step or factor considered in formulating the biological opinion, and "[s]ometimes, cumulative effects can be the deciding factor in determining the likelihood of jeopardy or adverse modification." HANDBOOK at 4-32.

As with the discussion above addressing proposed 50 C.F.R. 402.14(g)(8), the most prominent judicial attention to what constitutes non-Federal actions "reasonably certain to occur" again have emerged from the Biological Opinions for the FCRPS. In *NWF v. NMFS*, 254 F. Supp. 2d. 1196 (D. Or. 2003), the National Marine Fisheries Service was challenged by National Wildlife Federation and other plaintiffs for relying on non-Federal off-site mitigation actions that were alleged to be speculative in terms on implementation and effectiveness. In the cumulative effects review in the 2000 FCRPS Biological Opinion, NMFS analyzed various actions of the States of Oregon, Washington, Idaho and Montana, as well as the Columbia River Treaty Tribes designed to have a beneficial impact on anadromous fish.[2]

The plaintiffs ENGOS contended that reliance on alleged uncertain and vaguely defined actions of non-Federal parties to protect and restore salmon habitat to avoid jeopardy was contrary to the "reasonably certain to occur" standard in the ESA regulations at 50 CFR § 402.02. The District Court agreed. Among others, the District Judge was troubled "by the absence in the record of any binding commitments by the States, treaty tribes, and private parties to fund or implement the responsibilities devolved upon them by [NMFS] in the 2000 BiOp." *NWF v. NMFS*, 254 F. Supp. 2d. at 1213-1214. The practical outcome of this misguided judicial direction to the Services has been to minimize, if not outright ignore, legitimate and innovative non-Federal programs aimed at species conservation consistent with the Endangered Species Act.[3]

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[2] Among others, the State of Oregon proposed implementation of the so-termed "Oregon Plan for Salmon and Watershed," which included funding related to water quality, water use, fish habitat and fish passage. In Washington State, the "Statewide Strategy to Recover Salmon" the "Watershed Planning Act," the "Wild Stock Recovery Initiative," and the "Forest and Fish Plan," proposed various water use and water quality improvements. Idaho's Forest Practices Act committed to diversion screening, improvement of fish passage, completion of watershed effects assessments, and in position 30-foot buffers along certain streams. Montana had proposed implementation of water quality restoration plans in permits in a watershed restoration project to be undertaken by local authorities. Similar commitments were also offered by several Pacific Northwest Tribes.

[3] The National Marine Fisheries has seemingly been guided by these judicial pronouncements in fashioning Biological Opinions under Section 7. For example, in the 2009 Biological Opinion on the Long-Term Operations of the Central Valley Project and State Water Project in California, non-Federal contribution to species conservation

Proposed 402.17 appropriately addresses the anomaly invented by the Federal courts between effects caused by but not included in the proposed action that are "reasonably certain to occur," and requiring that such actions be "guaranteed to occur." Stated simply, "reasonably" certain to occur under the current regulatory parlance is not "absolutely" to occur, and the proposed regulation addresses the precise issue under Section 7, namely, whether such effects can fairly be characterized as purely speculative. Here, when examining the question of the reasonable certainty that an will occur, the Services can appropriately consider past experience and information relevant to those hurdles that remain to be cleared in order for the action to proceed. After such an examination, if a reasonable person would expect these actions to occur, they should be considered "reasonably certain to occur." The proposed regulation is consistent with the Endangered Species Act as intended by Congress and not as it has been distorted by the Federal courts.

Other Changes to the Section 7 Consultation Rules

The balance of the proposed changes to 50 C.F.R. Part 402 deal with various procedural matters relating to the formal consultation in addition to those discussed above. Many of these changes should simplify and streamline consultation, and we support these changes.

Who We Are

AEMA is a 123-year old, 2,000 member national association representing the minerals industry with members residing in 42 U.S. states, seven Canadian provinces or territories, and 10 other countries. AEMA is the recognized national voice for exploration, the junior mining sector, and maintaining access to public lands, and represents the entire mining life cycle, from exploration to reclamation and closure. More than 80% of our members are small businesses or work for small businesses. Most of our members are individual citizens.

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were summarily dismissed due to their alleged speculative nature for reasons ranging from lack of time to implement such programs to fluid political processes:

> Future tribal, state and local government actions will likely be in the form of legislation, administrative rules, or policy initiatives and fishing permits. Activities are primarily those conducted under state, tribal or federal government management. These actions may include changes in ocean policy and increases and decreases in types of actives that currently occur, including changes in the types of fishing activities, resource extraction, or designation of marine protected areas, any of which could impact listed species or their habitat. *Government actions are subject to political, legislative and fiscal uncertainties.* These realities, added to the geographic scope, which encompasses several government entities exercising various authorities, and the changing economies of the region, make analysis of cumulative effects speculative."

Biological Opinion and Conference Opinion on the Long-Term Operations of the Term Operations of the Central Valley Project and State Water Project (June, 2009) at 447 (emphasis added) [NMFS 2009 LTO BiOp]. *See also id.* "Although state, tribal and local governments have developed plans and initiatives to benefit marine fish species, ESA-listed salmonids green sturgeon, and Southern Residents, *they must be applied and sustained in a comprehensive way* before NMFS can consider them "reasonably certain to occur" in its analysis of cumulative effects." (Emphasis added).

Thank you for the opportunity to comment on the need to revise and improve the section 7 consultation process.

Yours Truly,

Laura Skaer

Laura Skaer
Executive Director