

# **ENDANGERED SPECIES ACT**

## (A Brief Summary of the Proposed Changes)

### **Background**

The Endangered Species Act (ESA) signed into law by President Nixon 12/28/73 was designed to protect critically imperiled species from extinction as a “consequence of economic growth and development untended by adequate concern and conservation.” The Act is intended to protect species and also “the ecosystems upon which they depend.” It encompasses plants and invertebrates and vertebrates. ESA is administered by two federal agencies, the US Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) which includes the National Marine Fisheries Service NMFS (collectively “Services”). NOAA handles marine species and FWS has responsibility over freshwater fish and all other species. Species that occur in both habitats are jointly managed. The Act contained a citizen’s clause that allowed citizens to sue the government to enforce the law.

### **Endangered ESA Law**

In August 2008 the George W. Bush administration proposed new regulations that would weaken the ESA by allowing federal agencies to determine whether projects such as highways, dams, mines, etc., will negatively affect endangered species, rather than following the regular protocol of seeking independent reviews from scientists on such issues. The proposed rule would:

- **Scale Back Consultation Requirements Under Section 7 of the ESA**

Under existing regulations Section 7 requires that each federal agency, in consultation with and with the assistance of the Services, insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. If a federal agency determines that its action “may affect” any listed species or critical habitat, then the agency must initiate consultation with the appropriate Service.

The proposed rule would substantially revise the regulations governing federal agencies’ consultation obligations under Section 7 of the ESA. According to the Services, the proposal is intended to clarify when Section 7 consultation obligations are triggered, establish time frames for the informal consultation process, clarify certain definitions, and correct the applicable standards for effects analysis. Most significantly, the proposed rule would now allow, in certain situations, federal action agencies to determine on their own when an action that “may affect” a listed species or critical habitat is “not likely to adversely affect” such species or habitat, without consultation with or the concurrence of the FWS or NMFS. Also, consistent with the Department of the Interior’s approach in the May 15, 2008 polar bear listing decision, the preamble notes that the proposed rule reinforces the Services’ view that agencies are not required to consult on an action’s greenhouse gas (“GHG”) emissions’ contribution to global warming and any associated impacts on listed species.

- **Informal Consultation No Longer Required and Formal Consultations Reduced**

Under the proposal, a federal action agency would not be required to initiate consultation if it determines that the effects of its action are not anticipated to result in take of any listed species

and: (1) the action will have no effect on a listed species or critical habitat; (2) the action is an “insignificant contributor” to any effect on listed species or critical habitat; or (3) the effects of the action on listed species or critical habitat (i) are not capable of being meaningfully evaluated, (ii) are wholly beneficial, or (iii) are such that the potential risk of jeopardy to the listed species or adverse modification of critical habitat is remote.

As a result of these proposed changes, the number of informal consultations is expected to drop dramatically. The proposed rule retains, however, the informal consultation process for situations where agency action does not satisfy the criteria above, or where the agency voluntarily seeks the relevant Service’s expertise.

- Introduces Deadlines into the Informal Consultation Process

Under the proposal, if the Service has not acted on a request for concurrence within 60 days, the action agency may terminate consultation by written notice. Before the end of the 60-day period, the Service may advise the agency that more than 60 days are necessary for review. In such cases, the Service would have an additional 60 days to complete the review. Finally, the proposed rule states that like formal consultation, informal consultation may include a number of similar actions, an agency program, or a segment of a comprehensive plan.

- Definitional Changes Would Narrow the Scope of Consultations

The proposed rule also changes three definitions in the Section 7 regulations. With respect to the effects analysis, the proposal would amend the current definitions of “effects of the action” and “cumulative effects.” First, the rule clarifies the causation and foreseeability requirements in the definition of “effects of the action.” Under both the existing and proposed regulations, effects must be caused by the action under consultation and reasonably certain to occur. The proposed rule adds that the action must be an “essential cause” of the effect. The preamble states that “essential” means that the action must be necessary for the effect to occur, and requires more than a technical “but for” causation. Thus, if an effect will occur whether or not the action takes place, then the action is not a cause of the direct or indirect effect, and it would be inappropriate to analyze that effect as such. The proposed rule also applies a “reasonably certain to occur” standard for determining whether an effect must be considered in the effects analysis, and such a determination “must be based on clear and substantial information.” The preamble states that effects cannot be speculative and must be more than just likely to occur. These changes are intended to focus the effects analysis on those effects that can be meaningfully addressed through consultation. Specifically with respect to GHG emissions, the preamble notes that GHG emissions from an individual action “are not an ‘essential cause’ of any impacts associated with global warming” and “are not reasonably certain to occur.” For both of these reasons, the Services conclude that “impacts associated with global warming do not constitute ‘effects of the action’ under the proposed revision to that definition.”

Second, the proposed rule would clarify that the ESA “cumulative effects” definition is narrower than the National Environmental Policy Act (“NEPA”) definition of that term. Under the ESA, cumulative effects must be “reasonably certain to occur,” which is a stricter standard than NEPA’s “reasonably foreseeable” standard. Further, cumulative effects under the ESA do not include future federal actions, because those actions will eventually be subject to Section 7 analysis and their effects will be considered at that time.

- Amend the Definition of “Biological Assessment”

The proposed rule would clarify that action agencies do not have to create a new document to comply with the requirements for a biological assessment under the ESA. If the information required to initiate consultation is included in a document prepared for another purpose, such as an environmental assessment or environmental impact statement, then the agency may submit that document as the biological assessment. The agency must simply describe where the relevant analysis can be found in the alternative document.

In conclusion the proposed changes target the ESA's consultation process, which serves as the main safety net for species on the brink by allowing scientists to determine if listed species will be harmed before moving forward with activities such as logging, mining or filling of wetlands.

### **Comment Period**

The proposed rules were entered into the federal register on August 14 and are subject to a 30-day public comment period before being finalized by the Department of the Interior. Deadline for comments is September 15, 2008. No emails or faxes will be accepted. Interested parties can comment at: [www.regulations.gov](http://www.regulations.gov).

### **External Links**

The proposed changed draft document can be found here: [www.doi.gov/news/08\\_News\\_Releases/AT50PR2008\\_08\\_13\\_FR.pdf](http://www.doi.gov/news/08_News_Releases/AT50PR2008_08_13_FR.pdf).

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