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ENDANGERED SPECIES ACT REGULATIONS

On December 16, 2008, the United States Fish and Wildlife Service and the National Marine Fisheries Service (the "Services") published in the Federal Register amendments to the Endangered Species Act ("ESA") regulations regarding consultation between Federal agencies engaged in "actions" and the Services. 50 C.F.R. Part 402. The consultation requirement is grounded in section 7(a)(2) of the ESA, which requires every Federal agency, in consultation with and with the assistance of the Secretary of the Interior or of Commerce, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. Companies that plan to seek permits from a Federal agency may be impacted by these amended regulations. The changes become effective on January 15, 2009.

While the Services described the changes as "narrow," the regulations are controversial. Three environmental groups, Greenpeace, Defenders of Wildlife, and Centers for Biological Diversity, have filed a complaint in the U.S. District Court in San Francisco challenging the regulations. The California Attorney General also filed suit December 28, 2008 to block the regulations. Among other criticisms, environmental groups allege that the regulations allow less expert review by the Services of whether projects will adversely affect endangered species, allowing Federal agencies themselves to make that determination for their own projects. In addition, the environmental groups argue that the changes allow agencies to avoid considering the impact of greenhouse gas emissions on endangered species, such as the polar bear.

The changes to consultation apply when no "take" (harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting a listed species) is anticipated, and at least one of several other criteria are satisfied. The pre-existing "may affect" trigger for formal consultation is retained, except in the case of projects where no take is anticipated and the effects are: (1) wholly beneficial; or (2) cannot be measured or detected in a manner that permits meaningful evaluation (previously categorized as not likely to adversely affect); or (3) are manifested through global processes. The rule explicitly recognizes that the action agencies retain the ability to seek informal consultation with the Services, if, for example, they believe that they do not have the scientific expertise to make an accurate assessment of the project's impacts.

The Services cite as examples of the first two types as: construction, maintenance, or repair of small-scale bulkheads, docks, piers, and ramps; small-scale shoreline or streambank stabilization projects; routine bridge repair and maintenance; construction, maintenance or repair or replacement of culvert and tide gates; and construction, maintenance and repair of aids to navigation (buoys and moorings). In addition, the Secretary of the Interior provided an example of effects so insignificant that they cannot be detected or measured as a project that generates noise at such low levels that scientists cannot accurately detect its harm to a species.

With respect to the third type, "manifested through global processes," to determine that no formal consultation is needed, the action agency must also determine that the effects: (i) cannot be reliably predicted or measured at the scale of a listed species current range; or (ii) would result at most in an extremely small, insignificant impact on a listed species or critical habitat; or (iii) are such that the potential risk of harm to a listed species or critical habitat is remote. This exclusion is intended to apply only to those effects that lose their individual identity and only produce the potential to have an impact when they combine with other factors through a global process. The Services reasoned that section 7(a)(2) of the ESA is not an appropriate or effective mechanism to assess individual Federal actions as they relate to global issues such as global climate change and warming.

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The Services amended the meaning of “direct effects” in the “Effects of the Action” definition. It states that direct effects are not dependent upon the occurrence of any additional intervening actions for the impact to the species or critical habitat to occur. The Services further clarified “indirect effects” as “those for which the proposed action is an essential cause, and that are later in time, but still reasonably certain to occur.” An “essential cause” of a particular effect denotes that the action is necessary or indispensable for the effect to occur. The term “essential” is intended to limit the effects for which it is appropriate to hold the Federal agency responsible because there is a close causal connection between the Federal action and the effects on the species. If an effect would occur regardless of the action, the action is not an essential cause of the effect, and it would not be appropriate to consider its effects as an effect of the action. The definition of “indirect effects” now explicitly states that a conclusion that an effect is reasonably certain to occur must be based on clear and substantial information.

The regulations also clarify the “cumulative effects” definition to not include future Federal actions that have not undergone consultation. They include only the effects of future State, tribal, local, or private actions that are reasonably certain to occur in the action area. The preamble also makes clear that the “reasonably certain to occur” standard is a stricter standard than NEPA’s “reasonably foreseeable” standard.

The regulations also allow action agencies to terminate informal consultation at the end of 60 days (unless extended to 120 days) if the Services do not provide a written statement regarding whether they concur with the action agencies’ determination of whether formal consultation is required. Upon termination, the action agency may move forward with the action if the action will not result in take and is not likely to adversely affect listed species or critical habitat. Action agencies therefore can now move forward without a letter of concurrence or a request for formal consultation. The Services, the action agency, and the applicant may agree, however, to extend informal consultation for a specified period of time.

In addition, the definition of biological assessment (“BA”) was amended to reflect that a BA may be in a document prepared for other purposes, such as an environmental assessment or an environmental impact statement, but the action agency is required to provide the Services with a specific guide or statement as to the location of the relevant consultation information.

Holme Roberts & Owen has significant expertise with the Endangered Species Act. Please contact Robert Tuchman, Daniel J. Dunn, or Charlotte L. Neitzel if you have questions or needs.

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