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Public Comment Processing  
*Attention:* 1018-AT50  
Division of Policy and Directives Management  
U.S. Fish and Wildlife Service  
4401 North Fairfax Drive, Suite 222  
Arlington, Virginia 22203

August 3, 2009

**RE: Interagency Cooperation Under the Endangered Species Act  
74 Fed Reg. 20421**

To whom it may concern,

Thank you for the opportunity to comment on potential improvements to the U.S. Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) (collectively “Services”) regulations on interagency consultation under the Endangered Species Act (“ESA”) in 50 C.F.R. Part 402. The present consultation regulations have been in place for more than twenty years, with few modifications. Implementation of the ESA needs to reflect the lessons learned during that time. The Northwest Mining Association (“NWMA”) supports efforts to reduce unnecessary and redundant bureaucracy such that the Services can more appropriately focus their respective attentions on their mandate to protect our nation's precious resources while affording the various action agencies the ability to efficiently fulfill their legal obligations.

NWMA is a 114 year old, 1,650 member, non-profit, non-partisan trade association based in Spokane, Washington. NWMA members reside in 40 states and are actively involved in exploration and mining operations on public and private lands, especially in the West. Our diverse membership includes every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. NWMA’s broad membership represents a true cross-section of the American mining community from small miners and exploration geologists to both junior and large mining companies. More than 90% of our members are small businesses or work for small businesses. Most of our members are individual citizens.

NWMA’s members have extensive first-hand experience with the ESA § 7 consultation process and are very much aware of and frustrated with the delays associated with both informal and formal consultation under the ESA. Potential revisions to these regulations, how they impact our members exploring and operating on National Forest System and BLM administered federal

lands, and the associated NEPA analysis, are particularly important to NWMA. Additionally, application of these regulations to NPDES permitting under § 402 or wetland fill permitting under § 404 of the Clean Water Act, and any other federal regulatory permitting scheme impacting NWMA member operations, are of acute interest to NWMA members.

Given the breadth and history of resource development by NWMA members, we submit the following comments:

2008 Amendments (See 73 Fed Reg. 76272, December 16, 2008)

NWMA was generally supportive of the set of amendments to § 7 of the ESA that were instituted in December of 2008 and rescinded with the Federal Register notice of May 4, 2009. The 2008 amendments simply clarified the consultation process, and we recommend the Services adopt these common sense revisions. Federal agencies still were required to follow all existing consultation procedures, except in specific and limited instances where an action is not anticipated to adversely impact any member of a listed species and that action fulfills one of the following criteria:

- Where the action has no effect on a listed species or critical habitat;
- Where the action is wholly beneficial;
- Where the effects of the action cannot be measured or detected in a manner that permits meaningful evaluation using the best available science; or
- Where the effects of the action are the result of global processes and cannot be reliably predicted or measured on the scale of species current range, or would result in an insignificant impact to a listed species, or are such that the potential risk of harm to a species is remote.

Furthermore, agencies still could voluntarily engage in the informal consultation process. NWMA strongly urges the Services to reinstate the 2008 amendments to § 7. Doing so would allow agencies to focus on real threats to species, while other routine projects and activities can proceed with certainty and timeliness.

Renewable Energy Development & Economic Stimulus

The Obama Administration and Congress have agreed that power supplies, and the transmission system to deliver that power, are not sufficient to meet existing demands. They also are advocating the mandated construction of a large amount of renewable energy development, particularly in the West, on a very aggressive timeline. That vision will require construction of substantial infrastructure. Infrastructure development also is a key component of the President's economic stimulus plans, intended to quickly create jobs. The current ESA interagency consultation process must be streamlined and disciplined to achieve these goals.

### Biological Assessment

NWMA members support a modification to the regulations to unify the NEPA process and the biological assessment required by the Services. This reform would eliminate duplicative studies and document production by making clear that action agencies do not necessarily need to create a new document to comply with the requirement for a biological assessment.

Mining projects must undergo extensive environmental analysis, either through Environmental Assessments or Environmental Impact Statements. In addition, mining projects on public lands submit plans of operation to federal land managers and mined land reclamation plans to state regulatory agencies. These submissions are subject to thorough environmental review. Analyses of potential impacts to listed ESA species, essential fish habitat, and coastal zone management area effects are all included in the NEPA process. Rather than the current two step process whereby (1) the NEPA process fully analyzes a proposed action and then is stayed while (2) a separate stand-alone analysis is crafted late or even after conclusion of the NEPA process, unifying the processes would necessitate early communication between the Services and the action agency, eliminating an often reactionary role for the Services.

The current practice of requiring a new, stand-alone biological assessment is redundant, costly, unnecessarily time-consuming, and rife with potential conflict between the NEPA analysis and the biological assessment. The result is further project delay and litigation without providing an iota of additional protection to threatened or endangered species or critical habitat. Unifying these processes would be a sound recognition of these deficiencies and have the effect of promoting better, unified, and quicker government decisions.

### Cumulative Effects

Regarding the definition of "*cumulative effects*," NWMA has concerns that the phrase itself is too close in terminology to "cumulative impacts" under NEPA, and therefore should be further clarified. If the Services unify the biological assessment and NEPA analysis processes, the likelihood is that far greater numbers of NEPA documents will suffice for biological assessments, meaning that there will be the inclusion of the two terms, and concomitant standards, in the same document. Given the clear definitional differences and substantially different scope of analysis, the potential for confusion or merging of the ESA and NEPA standards is substantial.

NWMA suggests that the rule be revised to identify the appropriate term as "*cumulative effects under the ESA*" or "*ESA cumulative effects*" or "*aggregate effects*" or "*incremental effects*" or some other terminology that more clearly separates it from NEPA's "cumulative impacts."

### Effects of the Action

Regarding the definition of "*effects of the action*," NWMA supports requiring an effect to (1) be "an essential cause," (2) "reasonably certain to occur," and (3) supported by "clear and substantial

information." The requirement that an effect is "reasonably certain to occur" if based on "clear and substantial information" could be further improved if examples of what "clear and substantial information" means. Though the standard is narrower than NEPA's "reasonably foreseeable" standard and is focused on eliminating speculative determinations, it is highly likely that this analysis will be in a NEPA document where the two standards will apply to the same set of facts.

For example, an EA or EIS might contain information that serves as the basis for a determination that there is no effect under the ESA because it is not "reasonably certain to occur," while for NEPA purposes the same effect is "reasonably foreseeable." The risk of these two distinct standards merging begs for additional regulatory language to prevent it. For that reason, NWMA recommends that "clear and substantial information" be further defined to mean "information of a scientifically defensible nature which establishes an effect as an essential cause."

Of course, if the scope of NEPA "cumulative" and "reasonably foreseeable" effects analysis would be similarly clarified and refined to more realistic and useful parameters through a future CEQ NEPA rulemaking, that would further improve cost-effectiveness and lead to more meaningful and consistent NEPA as well as ESA analysis.

#### Applicability

Regarding "*Applicability*," NWMA supports the view from the 2008 amendments to § 7 that there is no requirement to consult on greenhouse gas emissions' contribution to global warming and its associated impacts on listed species (e.g. polar bears). Overall, that amendment would undoubtedly streamline the permitting process. Future revisions to the ESA should clearly exempt from further consultation actions that have "no effect," actions which are "insignificant contributors" to any effect, and those effects which are incapable of identification, wholly beneficial, or pose too remote a risk.

Under the current rules, NWMA members have experienced a "not likely to adversely effect" determination by an action agency only to be delayed by formal consultation and development of a biological opinion that ultimately found No Jeopardy, but by that time the project construction season was lost. This has significant economic impacts on projects, with little or no benefit other than a check in the procedural process.

#### Informal Consultations

Regarding "*Informal Consultations*," NWMA firmly believes there is a need to establish deadlines for the consultation process. Sixty (60) days with the potential for an additional 60 day extension is eminently reasonable. Additionally, a provision permitting an action agency to terminate consultation if the Services fail to issue a written determination within the prescribed time frame is an essential element of any future proposed amendment. Without the ability of the action agency to take some affirmative act(s) at the end of the 60 or 120 days, the

implementation of deadlines is eviscerated of any real utility. These are critical improvements on the process which the NWMA would heartily support.

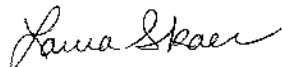
#### Programmatic Implementation

A programmatic § 7 approach to encompass several species and their common habitat types would be advantageous to the regulatory and land management agencies as well as to project proponents. Programmatic approaches could save time and money, while protecting a suite of associated resources and habitats. However, it appears many agencies lack the ability to efficiently institute a programmatic approach due to a number of factors, including complexities with stakeholder interests, land use, geographic range, and communication problems. NWMA recommends the Services examine expedited ways to implement programmatic reviews under § 7 of the ESA.

#### Conclusion

Thank you for consideration of these comments. NWMA members support the protection of threatened and endangered species and recovering species to biological health. Unfortunately, the ESA has evolved over the years to a focus of adding species to a list rather than actual recovery. In fact, according to U.S. Fish & Wildlife Service data, the ESA has achieved a less-than-one percent success rate in species recovery. We believe our nation can do better. We strongly urge the Services to consider these potential improvements to the ESA § 7 consultation regulations, and to move quickly to adopt them.

Respectfully submitted,



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Executive Director  
Northwest Mining Association