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Proposed Modifications to the Endangered Species Act Regulations Clarify and Improve the Consultation Process

On August 11, 2008, Secretary of the Interior Dirk Kempthorne announced the U.S. Fish and Wildlife Service's and the National Marine Fisheries Service's (collectively, the "Services") intent to amend the regulations that implement Section 7 of the Endangered Species Act ("ESA" or "the Act"), which are found at 50 C.F.R. Part 402. Under Section 7, each federal agency (the "action agency") is responsible for ensuring, in consultation with the Services, that any action it authorizes, funds, or carries out is not likely to jeopardize any endangered or threatened species or adversely affect the critical habitat of such species (referred to as a "take"). The proposed rule was published in the Federal Register on August 15, 2008. [73 Fed. Reg. 47,868-75](#) (Aug. 15, 2008). If adopted, it will rewrite portions of the ESA Section 7 consultation process, significantly limiting the Services' need for review of actions proposed by other federal agencies, particularly in the context of informal consultations. Environmental groups, who call the proposal "illegal," will seek to block these modest and important changes. Senator Boxer of California has scheduled a congressional hearing for September 24 and has requested Secretary Kempthorne testify to defend the proposal.

The proposed rule, therefore, is important to any public or private entity that applies for federal permits or is regulated by a federal agency. The Services' proposal comes as a response to its experience implementing the ESA, judicial decisions regarding almost every aspect of Section 7, and in light of the new challenges faced from climate change. The proposed changes are described as "common sense modifications" to the regulations implementing Section 7 to reduce the number of unnecessary consultations. Specifically, the proposed rule would revise the regulations in the following ways:

- **Initiation of consultation:** The rule would revise the process associated with initiation of consultation and give greater discretion to the action agency. The Services would accept a variety of documents prepared for other purposes in lieu of a biological assessment and allow action agencies to determine the initial effects of their own actions, without concurrence from the Services;
- **"Effects of the action" and "Cumulative effects":** The rule would narrow the scope of both of these terms to those effects that are "reasonably certain to occur," based on "clear and

substantial information.” This would exclude from consideration those effects that may be speculative or unsupported by clear and substantial information. The proposal also specifies that the ESA definition of cumulative effects is narrower than the definition under NEPA;

- Causation Standard: The rule would clarify that to be considered effects of a federal action, cumulative, indirect, or otherwise, the action must be the “essential cause” of the effects. The Services explain that this standard requires a “close causal relationship,” between the action and the effect and is more than a “but for” standard;
- “No effect” actions: The rule would clarify that where the action has “no effect,” the action agency is not required to engage in consultation with the Services and excludes from consultation those actions with “discountable,” “remote,” or “insignificant” effects or effects that are “not capable of being meaningfully identified or detected” in order to reduce the number of unnecessary

consultations. The underlying premise behind this clarification is that the action agency need not engage in unnecessary consultation where the action under consultation is not anticipated to result in a take;

- Greenhouse gases: The proposal builds upon the ESA Section 4(d) rule the Services proposed earlier this year by reinforcing the Services’ view that there is no need to consult on greenhouse gas emissions’ contribution to global warming and associated impacts on listed species (e.g., the polar bear); and
- Time deadlines for informal consultation: The rule would impose a 60-day deadline for the Services to respond to an agency request for concurrence on actions that are not likely to adversely affect the continued existence of a listed species or result in adverse modification or destruction of critical habitat. If that time is not met (after allowing the Services an extension if requested), the action agency may terminate consultation and the project may go forward.

Comments on the Services’ proposed rule will be taken for a 30-day period and are due by September 15, 2008. The Services specifically request comment on the provision modifying the informal consultation process, the proposed deadlines to help limit the duration of information consultation and lend greater certainty to the process, and the proposal to allow an action agency to terminate informal consultation should a determination from the Services not be received within the specified time frame. After review of any comments submitted, the Services will determine whether to adopt the proposed rule.

Hunton & Williams’ Regulatory, Resources and Environmental law practice professionals have extensive experience providing guidance to clients on all aspects of the Endangered Species Act and other federal and state environmental laws affecting the regulated community. If you have questions about the substance or applicability of the proposed modifications to the Endangered Species Act regulations, or any other environmental issue, please contact us.