October 14, 2008

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, VA 22203

RE: Comments on Proposed Revisions to the Endangered Species Act Section 7 Consultation Regulations, 73 Fed. Reg. 47868 (Aug. 15, 2008)

Dear Sir/Madam:

The Interstate Natural Gas Association of America (INGAA) submits the attached comments in response to the above-referenced notice by the U.S. Fish and Wildlife Service and NOAA's National Marine Fisheries Service (collectively, the Services) regarding a proposed rule to revise the Endangered Species Act Section 7 consultation regulations. Please consider and include these comments in the administrative record for the proposed rule.

INGAA is a national, non-profit trade association that represents the interstate natural gas pipeline industry operating in the United States, as well as interstate and inter-provincial natural gas pipelines operating in Canada and Mexico. INGAA's United States members, which transport virtually all of the natural gas sold in interstate commerce, are regulated by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act, 15 U.S.C. §§ 717-717w. INGAA advocates regulatory and legislative positions that are important to the interstate natural gas pipeline industry.

Natural gas has a prominent role in our nation's energy supply, and interstate natural gas pipelines are an integral part of the nation's energy infrastructure. Natural gas constitutes nearly 25% of energy consumption in the United States and domestic natural gas demand is expected to grow substantially over the next 20 years.[1] A recent INGAA Foundation study predicted that domestic natural gas consumption could approach 30 trillion cubic feet by the end of the next decade if gas supplies are

[1] *See* http://www.naturalgas.org/overview/uses.asp; http://www.eia.doe.gov/oiaf/aeo/demand.html

available.[2] An increase in natural gas supplies and delivery infrastructure is necessary to meet this growing demand. For instance, 1,582 miles of pipeline were constructed in 2006, with an additional 1,700 miles constructed in 2007.[3] The level of pipeline activity is anticipated to increase substantially over the next few years.[4]

Pursuant to the Natural Gas Act, FERC must approve all new interstate natural gas pipelines, and any expansions to existing interstate natural gas systems by issuing certificates of public convenience and necessity. The FERC process includes the consideration of effects to endangered and threatened species. To comply with the Endangered Species Act (ESA) and other requirements, FERC certificates often include conditions requiring applicants to obtain permits from many other federal, state, tribal, and/or local agencies before construction may begin. The time required to obtain these approvals and to coordinate with the various agencies has increased in recent years, undermining the predictability and timeliness of pipeline permitting.

Construction delays can be costly to pipeline companies and consumers. Beyond economic costs, such delays undermine the industry's ability to provide secure and reliable energy supplies needed to support economic growth while protecting both human health and environmental concerns. As with other regulatory approval processes, compliance with the ESA is a key factor in accomplishing efficient permitting and implementation of natural gas projects. At the same time, pipeline companies and consumers have an interest in helping to achieve the purpose of the ESA to recover endangered and threatened species to sustainable levels.

In light of these objectives, the INGAA Foundation commissioned a report last year, *Suggestions on How to Improve the Endangered Species Act*, which identified concrete recommendations that could be used to improve the ESA's application and administration. A number of the revisions included in the Services' proposed rule were previously identified by this INGAA Foundation report.

INGAA commends the Services for investing the time and effort necessary to streamline and improve the administration of the ESA while fulfilling the Act's species protection purposes. INGAA generally supports the Services' proposed revisions to the Section 7 consultation regulations, with a few clarifications and additions reflected in the comments below.

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[2] *See* INGAA Foundation, Review and Analysis of the Federal Energy Regulatory Commission Pre-filing and Traditional Filing Processes for Natural Gas Act Section 7 Applications at 1-1 (October 2007).

[3] *See* Energy Information Administration, Additions to Capacity on the U.S. Natural Gas Pipeline Network: 2007 at 1 (July 2008).

[4] *Id*. at 4.

I. Definitions (50 C.F.R. § 402.03)

A. Biological Assessment

The Services propose to modify the definition of "biological assessment" to clarify that action agencies do not necessarily have to create a separate document to comply with the requirement for a biological assessment. 73 Fed. Reg. at 47874. If the information required to initiate Section 7 consultation has been included in another document prepared for a different purpose, the action agency may use this document to initiate consultation. *Id.*

INGAA supports allowing the use of alternative documents in lieu of a biological assessment. This revision is appropriate because it is the information that is provided to the Service that matters, not the format or the title of the document. For instance, documents prepared as part of the environmental review process, such as the environmental report for a FERC application, or environmental assessments and environmental impact statements under the National Environmental Policy Act (NEPA), often contain sufficient information for ESA consultation purposes such that a separate biological assessment would be redundant.

However, in light of this proposed change, additional stand-alone guidance as to the recommended content of a biological assessment or an alternative document would be useful. The consultation regulations and the Services' *Final Endangered Species Consultation Handbook* currently provide some indication of what a biological assessment should generally include, but leave the actual contents to the discretion of the action agency.[5] In the experience of the natural gas pipeline industry, consultations on proposed actions are sometimes delayed when either the action agency or the Service seeks additional information that was not included in the biological assessment. Further, to the extent that information-content requirements for a biological opinion are not met in the underlying biological assessment, the Service's workload in preparing a biological opinion is increased, which may result in process delays. Thus, a more robust guidance document that describes what a biological assessment or alterative document should include, recognizing that the appropriate contents will vary on a case-by-case basis, could help alleviate these process delays.

B. Cumulative Effects

The Services propose to modify the definition of "cumulative effects" to clarify that the term has a different, narrower meaning under the ESA as compared to NEPA. 73 Fed. Reg. at 47869, 47874. Under NEPA, cumulative effects include those from past, present, and reasonably foreseeable future federal and non-federal actions. *Id.* at 47869 (citing 40 C.F.R. § 1508.7). By contrast, under the ESA, cumulative effects are

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[5] *See* 50 C.F.R. § 402.12(f); U.S. Fish & Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook at 3-11 (March 1998).

limited to the effects of future non-federal actions that are reasonably certain to occur in the action area of the specific action under consultation. *Id*. at 47874.

As the Services noted, this is not a new concept as both the current and the proposed definition of cumulative effects under the ESA are narrower than the NEPA regulatory definition. *Id*. at 47869. In fact, the Solicitor of the Department of the Interior recognized in 1981 that the consultation should not consider the anticipated impacts of future federal projects which have not been previously reviewed under Section 7. *See* Cumulative Impacts under Section 7 of the Endangered Species Act, 88 Interior Dec. 903, 907 (1981). The Services subsequently codified this policy in the definition of cumulative effects in the 1986 Section 7 consultation regulations. *See* Interagency Cooperation–Endangered Species Act of 1973, As Amended, 51 Fed. Reg. 19926, 19958 (June 3, 1986). Thus, the clarification that cumulative effects do not include future federal actions is consistent with the existing regulations and current agency practice.

In addition, using a different definition of the term "cumulative effects" under the ESA than under NEPA is appropriate in light of the differences between the two statutes. NEPA is a procedural statute only, requiring disclosure of all effects of the proposed action. By contrast, the ESA has substantive standards for protection of listed species, including the requirement of Section 7 consultation for federal actions.

In light of this distinction, the ESA definition of cumulative effects does not need to include future federal actions because those actions will undergo Section 7 consultation. In those future consultations, the effects of the current action will be considered part of the environmental baseline, so if the effects of the future proposed action when added to those of the current action would jeopardize the species, the future action could not go forth. NEPA does not have a similar limitation. Thus, the proposed rule's recognition of the different treatment of cumulative effects under the two statutes is proper. The Solicitor of the Interior has similarly reached this conclusion. *See* 88 Interior Dec. at 905-06.

C. Effects of the Action

The Services propose to modify the definition of "effects of the action" to further define "indirect effects" and "reasonably certain to occur." The proposed definition of "indirect effects" is those effects "for which the proposed action is an essential cause, and that are later in time, but are still reasonably certain to occur. If an effect will occur whether or not the action takes place, the action is not a cause of the direct or indirect effect." 73 Fed. Reg. at 47874. The proposed definition of "reasonably certain to occur" is "the standard used to determine the requisite confidence that an effect will happen. A conclusion that an effect is reasonably certain to occur must be based on clear and substantial evidence." *Id*.

INGAA agrees with and supports the proposed clarification to the scope of the effects of the action. The requirement that the project be an essential cause of an

indirect effect provides needed clarity to an area that is often the subject of confusion. The "essential cause" requirement is also consistent with case law that has interpreted causation requirements under the ESA. For instance, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697 n.9 (1995), the U.S. Supreme Court recognized that the ESA's regulatory definition of harm incorporates the ordinary requirements of proximate cause and foreseeability. See also *Ctr. for Biological Diversity v. U.S. Dep't of Housing & Urban Development*, 541 F. Supp. 2d 1091, 1100-01 (D. Ariz. 2008) (effects of groundwater pumping for commercial and residential development projects on listed species were not indirect effects of the federal financial assistance programs for such development projects; the agencies' actions were not the legal cause of harm to the listed species). INGAA requests, however, that the Services clarify that the "essential cause" requirement applies to the "interdependent" and "interrelated" portion of the definition as well. In other words, the agency action must be the essential cause of the interdependent or interrelated activities for those activities to be considered in the effects analysis.

Nevertheless, the regulations should retain the flexibility for the scope of the consultation to be tailored to a specific project. For instance, certain activities related to interstate natural gas pipelines do not require FERC approval under the Natural Gas Act, such as replacement of deteriorated facilities,[6] so FERC would not have Section 7 consultation obligations for such activities. However, another federal agency may have jurisdiction over a portion of one of these activities, such as the Army Corps of Engineers for a small waterway crossing. Based on the Services' preamble, the scope of the Corps' consultation would be limited to the effects of the waterway crossing, and would not consider the effects of the remainder of activity on listed species. 73 Fed. Reg. at 47870. This would mean that, if the remainder of the project would adversely affect listed species, the pipeline company would need to pursue an incidental take permit under Section 10 of the ESA for that portion of the project or risk take liability under Section 9. This two-prong approach to ESA compliance would result in additional administrative burden for both the applicant and the Service. The regulations should be structured such that, if requested by the applicant, the action agency's Section 7 consultation could consider species effects for the entire proposed action, eliminating the need for a second form of ESA compliance.

INGAA supports the requirement that the Services justify a determination that an indirect effect is reasonably certain to occur with clear and substantial information because it provides useful sideboards on the scope of the consultation that will reduce the agencies' unnecessary consideration of speculative or unlikely occurrences. This requirement is consistent with ESA case law. In *Arizona Cattle Growers' Association v. U.S. Fish & Wildlife Service*, 273 F.3d 1229, 1243-44 (9th Cir. 2001), the Ninth Circuit recognized that it would be unreasonable for the Fish and Wildlife Service to impose conditions through an incidental take statement on otherwise lawful land use

[6] *See* 18 C.F.R. § 2.55 for a list of activities that are excluded from Natural Gas Act Section 7(c) approval requirements.

where there was only speculative evidence that take was reasonably certain to occur. By analogy, as the proposed rule recognizes, the Service should have more than speculative evidence that an effect would be reasonably certain to occur before it can be deemed an effect of the proposed action.

INGAA also agrees with the Services' position that effects of an action for purposes of consultation do not include the contribution of its greenhouse gas (GHG) emissions to climate change and any associated impacts to listed species. This clarification will help avoid unnecessary consultations and ensure that the Services' limited resources are directed toward meaningful consultations on projects with the potential for identifiable and measurable impacts on listed species.

In addition, because any individual GHG contribution to climate change would not have measurable impacts on listed species, no jeopardy or adverse modification determination could be made, no take determination would be made, and no terms and conditions would be imposed to lessen such effects. Thus, the regulatory reach of the ESA likewise would not provide any benefit to listed species. The Service's position also finds support in the courts' interpretation of the ESA. *See Arizona Cattle Growers' Association*, 273 F.3d at 1244 (it is improper for the Service to issue an incidental take statement where there is only speculative evidence that habitat modification may actually kill or injure a listed species); *accord Defenders of Wildlife v. Bernal*, 204 F.3d 920, 924-25 (9th Cir. 1999) ("Harming a species may be indirect, in that the harm may be caused by habitat modification, but habitat modification does not constitute harm unless it 'actually kills or injures wildlife.'"). Because the potential impacts of GHG emissions are global in nature and reach, it is impossible to link the GHG emissions from a particular project to effects on listed species. Moreover, legislation pending before Congress has been specifically designed and written to address climate change concerns resulting from GHG emissions.

II. Applicability of Consultation Regulations (50 C.F.R. § 402.03)

The Services propose to modify the applicability of the Section 7 consultation regulations. The proposed rule states that federal agencies are not required to consult on an action when the direct and indirect effects of that action are not anticipated to result in take and:

> (1) such action has no effect on a listed species or critical habitat;
>
> (2) such action is an insignificant contributor to any effects on a listed species or critical habitat; or
>
> (3) the effects of such action on a listed species or critical habitat are not capable of being meaningfully identified or detected in a manner that permits evaluation, are wholly beneficial, or are such that the potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote.

73 Fed. Reg. at 47874.

Under the proposed rule, if all of the effects of an action fit within the above criteria, no consultation is required; if one or more but not all of the effects fit within the above criteria, consultation is required only on those effects that do not fit. *Id*. The Services emphasize that a threshold requirement for use of this provision is that no take is anticipated. *Id*. at 47870.

INGAA supports these revisions to the applicability of the Section 7 consultation provisions, which should streamline the process of evaluating impacts to listed species while maintaining the same level of species conservation under the Act. Presently, action agencies consult with the Services on thousands of proposed actions that ultimately receive written concurrence for "not likely to adversely affect" determinations. As the Services note, many of these projects have only insignificant, immeasurable, or beneficial effects on the listed species or pose a discountable risk of adverse effects. The concurrence process for such projects can cause project delays and diverts Service resources from projects in greater need of consultation. The proposed regulatory revisions should help reduce this number of unnecessary consultations.

The proposed rule is carefully crafted to ensure that listed species receive the same level of protection as under the current regulations. A critical provision in the proposed rule is the threshold requirement that the action agency may make a unilateral "not likely to adversely affect" determination only when the project is not anticipated to result in take of a listed species. The remaining criteria similarly ensure that this provision only applies to proposed actions that will not have a detectable negative impact on the species. However, the proposed revision could be improved by defining what constitutes a "remote" risk so that it is meaningful and readily measured or quantified.

In addition, it has been INGAA's experience that federal agencies that routinely engage in Section 7 consultation–such as FERC, the Bureau of Land Management, the Forest Service, and the Army Corps of Engineers–have their own highly qualified biologists with the expertise required to make "not likely to adversely affect" determinations. These agencies are good federal stewards of the nation's resources and will likely err on the side of caution in making these determinations. Those agencies that are lacking in such expertise or that are uncertain about their effects analysis still have the option of pursuing informal consultation with the Services. In addition, the proposed rule retains the existing authority of the Service to request a federal agency to enter into consultation if it identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. *See* 50 C.F.R. § 402.14(a); 73 Fed. Reg. at 47874. This authority provides an additional safeguard for the consultation process. Therefore, the proposed rule should reduce the administrative burden of the Section 7 consultation process without affecting the level of protection afforded to listed species.

III. Informal Consultation (50 C.F.R. § 402.13)

A. Grouped Actions

The Services have proposed to retain the informal consultation provisions for instances where the action agencies seek assistance from the Service in making the "not likely to adversely affect" determination. 73 Fed. Reg. at 47874. They propose to add language to note that informal consultation can include "a number of similar actions, an agency program, or a segment of a comprehensive plan," which is similar to language currently found in the formal consultation regulations (50 C.F.R. § 402.14(c)). *Id.* Unlike formal consultation, however, Director approval is not required for informal consultation on these grouped actions. *Id.*

INGAA supports this change because it makes the scope of the informal consultation process more consistent with the scope of the formal consultation process. As with the other provisions in the proposed rule, allowing similar actions to be reviewed in a single consultation will help simplify the consultation process and reduce the administrative burden on both the project proponent and the Service, while maintaining the same level of species conservation and protection.

B. Timelines for Informal Consultation

The Services also propose to add deadlines to help limit the duration of informal consultation and lend greater certainty to the process. In particular, they propose to allow action agencies to terminate consultation upon written notice if the Service has not acted on its request for concurrence within 60 days. 73 Fed. Reg. at 47874. However, within the 60-day period, the Services may extend the time for informal consultation an additional 60 days. *Id.* The Services explain that, without these proposed limits, informal consultation can sometimes require more time than formal consultation. *Id.* at 47872.

INGAA supports the establishment of timeframes for informal consultation. However, INGAA recommends that the time for Service action on a request for concurrence be limited to 30 days. The ESA consultation regulations currently provide that the Service has 30 days after the action agency's submission of a completed biological assessment to state whether it concurs with the findings of the assessment. 50 C.F.R. § 402.12(j). The Service should have the same length of time to respond to a request for concurrence on a "not likely to adversely affect" determination, especially since, as the Services have recognized, the analysis for informal consultation is less complex than for formal consultation. *See* 73 Fed. Reg. at 47872. Moreover, a 30-day period would be consistent with other agency response timeframes used during ESA consultation and in connection with other statutes. *See, e.g.,* 50 C.F.R. § 402.12(d) (Service must respond to a request for species information for the biological assessment within 30 days); 36 C.F.R. § 800.3(c) (establishing a 30-day time period for State Historic Preservation Officer response to a request for review of a finding or determination under the National Historic Preservation Act). For these reasons, the

Service's extension of the informal consultation concurrence period should be similarly limited to 30 days.

In addition, the proposed regulations would allow the Service to extend the concurrence period simply through written notification to the action agency without any justification, which will likely result in an automatic extension of most concurrence requests. By contrast, in the formal consultation context, when an applicant is involved, the Service and the action agency must agree to the extension and must provide the applicant with a written statement that justifies the extension and identifies the additional information required to complete the consultation. 50 C.F.R. § 402.14(e). The notification requirements for the informal consultation process should parallel the formal consultation process by requiring, at a minimum, that the Service provide a justification to the applicant as to why an extension is necessary.

Furthermore, a clarification to the applicability of this provision would be useful. Action agencies often designate a non-federal representative to undertake informal consultation. The proposed revision to the Section 7 consultation regulations does not expressly state that the timeframe for Service response applies to requests made by designated non-federal representatives on behalf of the action agency for concurrence with a "not likely to adversely affect" determination. The regulations should be revised to clarify that the time period for Service response applies to any request for Service concurrence, whether submitted by the action agency or its designated non-federal representative. Similarly, if the Service has not responded within the established time period, the designated non-federal representative should be able to terminate consultation upon written notice to the Service. The regulations should also be clarified to state that, if the Service has not responded to a concurrence request within the initial or extended timeframe, as applicable, the action agency may assume that the Service concurs with the request.

IV. Conclusion

The Services' proposed rule generally provides useful clarification regarding Section 7 consultation requirements, streamlines the consultation process in a manner that is consistent with the purposes of the ESA, and imposes constructive sideboards on the scope and the timing of such consultation. The additional clarification and revisions noted in INGAA's comments would further improve the administration of the ESA. INGAA appreciates the opportunity to submit comments on the Service's proposed revisions to the Section 7 consultation regulations.

Respectfully submitted,

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