August 3, 2009

Comments Processing, Attn: 1018-AT50
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

VIA FEDERAL E-RULEMAKING PORTAL (www.regulations.gov)

Re: Fish and Wildlife Service RIN 1018-AW73
National Oceanic and Atmospheric Administration RIN 0648-AX87
Interagency Cooperation Under the Endangered Species Act

Good afternoon:

Pursuant to the notice jointly issued in the referenced dockets by the Fish and Wildlife Service ("FWS") and the National Oceanic and Atmospheric Administration (collectively and individually, "the Services") and published in the May 4, 2009, issue of the *Federal Register*,[1] the Interstate Natural Gas Association of America ("INGAA") submits the following comments:

INGAA is a non-profit trade association that represents the interstate natural gas transmission pipeline industry. INGAA's members operate and maintain over 220,000 miles of natural gas transmission pipelines. Moreover, with the emergence of natural gas as the environmentally responsible fuel of choice for electric generation and direct consumption, the transmission pipeline network is expanding at record levels. As reported by the Energy Information Administration ("EIA"):

> During 2008, at least 84 natural gas pipeline projects were completed in the Lower-48 States, adding close to 4,000 miles of natural gas pipeline . . . to the national natural gas pipeline grid, at an estimated expenditure of $11.6 billion. These figures represent a three-fold increase over 2007 when $4.2 billion was spent on laying 1,674 miles of new pipeline . . . .[2]

While EIA projects less construction in 2009, the projected level will still exceed every other year this decade.[3]

INGAA's members and the Services have a mutual interest in improving the efficiency of the conference and consultation processes implementing section 7 of the Endangered Species Act ("ESA"). For interstate pipelines, improved efficiency speeds the ESA consultation process and makes it more predictable and less costly. For the Services, improved efficiency frees resources that can be re-deployed to better serve the ESA's goals and objectives. Improved efficiency also serves a broader public interest, fostering expansion of the infrastructure necessary to deliver clean, secure, abundant and domestically produced natural gas at a time when the nation is looking to natural gas more and more to meet its energy

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1 74 Fed. Reg. 20421.

2 Natural Gas Year-In-Review 2008, (EIA: Apr. 2009), *available at*:

http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngyir2008/ngyir2008.html#pipeline.

3 *Id*.

needs and climate change objectives. Consistent with our mutual interest, and the broader public interest, INGAA recommends a series of concrete and specific measures, each intended to streamline and improve the consultation process without compromising the Services' core responsibility to protect endangered and threatened species.

Before turning to specific recommendations, some background on interstate pipeline regulation is in order. Natural gas pipeline construction requires a certificate of public convenience and necessity issued by the Federal Energy Regulatory Commission ("FERC") under section 7 of the Natural Gas Act.[4] Under its regulations governing ESA compliance, FERC designates the project sponsor as FERC's non-federal representative.[5] Project sponsors are then required to contact the Services and undertake informal consultations as appropriate.[6]

For interstate natural gas pipeline construction, the Energy Policy Act of 2005 designates FERC as the lead agency "for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act [NEPA]." [7] FERC's construction certificate regulations integrate ESA compliance into its lead agency responsibilities. As part of its certificate application, an applicant must submit an environmental report consisting of 13 resource reports. As part of Resource Report 3, addressing fish, wildlife, and vegetation, the applicant must:

> Identify all federally listed or proposed endangered or threatened species and critical habitat that potentially occur in the vicinity of the project. Discuss the results of [informal consultation with the Services] and include any written correspondence that resulted from the consultation.[8]

More broadly, applicants must describe the aquatic life, wildlife and vegetation within the proposed project,[9] as well as their habitats;[10] the possible effects of the project on species and their habitats;[11] and site-specific mitigation procedures.[12]

INGAA's recommendations are drawn from its members' experience both as participants in informal consultations and as project applicants with a direct stake in effective and efficient interagency cooperation.

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4 15 U.S.C. § 717f(c).

5 18 C.F.R. § 380.13(b)(1).

6 *Id*., § 380.13(b)(2).

7 Pub.L. 109-58, 119 Stat. 594, § 313, *codified at* 15 U.S.C. § 717n(b)(1).

8 *Id*., § 380.12(e)(5).

9 *Id*., § 380.12(e).

10 *Id*., § 380.12(e)(2).

11 *Id*., § 380.12(e)(4).

12 *Id*., § 380.12(e)(7).

COMMENTS

I. Definitions (50 C.F.R. § 402.03)

A. "Biological Assessment"

INGAA recommends amending the definition to allow the use of alternative documents.

In a proposed rule issued August 2008,[13] the Services suggested modifying 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.[14] If another document contains the required information, the action agency may use this document for purposes of consultation.[15]

INGAA supports allowing alternative documents to be used in lieu of biological assessments. It is the information provided to the Service that matters, not the format or the title of the document. Documents prepared as part of the environmental review and NEPA process, such as the environmental reports within FERC applications, as well as environmental assessments and environmental impact statements, often contain sufficient information for ESA consultation purposes. In these circumstances, preparing a separate biological assessment elevates form over substance and creates an unnecessary burden for all involved.

INGAA separately recommends amending the definition to specify content requirements for biological assessments.

The consultation regulations and the Services' *Endangered Species Consultation Handbook* indicate some of the information a biological assessment should include, but leave the actual contents to the discretion of the action agency.[16] INGAA understands that at some level information contained in a biological assessment is project-specific and the full level of detail cannot be captured in generic content requirements. Still, establishing a set of content requirements would provide clear benefits to agencies and the public alike.

First, 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 information that was not included in the biological assessment. Sometimes the information is not included because it was never expressly requested, and those preparing the biological assessment simply were unaware of the Service's

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13 *Interagency Cooperation Under the Endangered Species* Act, 73 Fed. Reg. 47868 (2008) ("2008 Proposed Rule").

14 *Id*. at 47874.

15 *Id*. The proposal would have added this sentence to the definition: "A biological assessment may be a document prepared for the sole purpose of interagency consultation, or it may be a document or documents prepared for other purposes (*e.g*., an environmental assessment or environmental impact statement) containing the information required to initiate consultation.

16 *See* 50 C.F.R. § 402.12(f); Endangered Species Consultation Handbook at 3-11 (FWS and National Marine Fisheries Service: March 1998).

expectations. Content requirements would clarify the Services' expectations and better inform applicants and action agencies of the information required to support consultation.[17]

Second, when the content of a biological assessment is not sufficient the work required for the Services to prepare a biological opinion is increased, and delays ensue. Content requirements mitigate this problem, bringing better focus to biological assessments and allowing consultations to close within a better defined timeframe.

B. "Cumulative Effects"

INGAA recommends amending this definition to exclude the effects of future federal actions.

In the 2008 Proposed Rule, the Services suggested modifying the definition of "cumulative effects" to clarify that the term has a different, narrower meaning under the ESA than it does under NEPA.[18] Under NEPA, cumulative effects include those from past, present, and reasonably foreseeable future federal and non-federal actions.[19] Under the ESA, cumulative effects are 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.[20]

The narrower scope of the ESA definition is not new. In fact, the Solicitor of the Department of the Interior recognized in 1981 that the ESA consultation process should not consider the anticipated impacts of future federal projects.[21] Five years later, the Services codified this policy when they defined cumulative effects in their section 7 consultation regulations.[22] Thus, the clarification that cumulative effects do not include future federal actions is consistent with the existing regulations and current agency practice.

Distinct ESA and NEPA definitions are also appropriate given the differences between the two statutes. NEPA is a strictly procedural statute, requiring disclosure of all effects of the proposed action. In contrast, the ESA has substantive standards for protection of listed species, including the requirement of section 7 consultation for federal actions. The ESA definition of cumulative effects does not need to include future federal actions because those actions will undergo section 7 consultation when they are proposed, and at that time the effects of the current action will be considered part of the environmental

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17 Another way to communicate expectations and enhance efficiency would be to establish a database documenting how the Services applied the "best scientific and commercial data" standard to individual cases. INGAA suggests the database include each listing decision, biological opinion and determination of unforeseen circumstances, describing for each case the data that was relied upon, how the Service determined that the data was the best available, why the Service believed the selected data was accurate and reliable.

18 2008 Proposed Rule, 73 Fed. Reg. at 47869, 47874. With the proposed amendment, "cumulative effects" would have been defined as "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the particular Federal action subject to consultation. Cumulative effects do not include future Federal activities that are physically located within the action area of the particular Federal action under consultation."

19 *Id*. at 47869 (citing 40 C.F.R. § 1508.7).

20 *Id*. at 47874.

21 See, *Cumulative Impacts under Section 7 of the Endangered Species Act*, 88 Interior Dec. 903, 907 (1981) ("*Cumulative Impacts*").

22 *Interagency Cooperation–Endangered Species Act of 1973, As Amended*, 51 Fed. Reg. 19926 (1986).

baseline. NEPA and ESA are materially different, this difference translates into different concepts of cumulative effects,[23] and it is appropriate to reflect this difference in the regulations governing ESA consultation.

C. "Draft Biological Opinion"

INGAA recommends amending the consultation regulations to insert a new defined term, "draft biological opinion," to allow for biological opinions to be drafted by action agencies, non-federal representatives, applicants, and their agents, for review and approval by the consulting Service.

Under ESA section 7(b)(3)(A), responsibility for providing biological opinions rests with the Services. [24] In practice, the Services have also taken responsibility for writing these opinions.

There is no reason for the Services to bear the burden of initial drafting when other parties are willing to do it. The action agency, its non-federal representative, applicants, and third-party contractors should all be authorized to prepare draft biological opinions, including draft determinations concerning jeopardy and adverse modification.

The benefits of third-party drafting are wholly procedural. By relieving the Services of some of their writing responsibilities, third-party drafting expedites the consultation process and allows the Services to redirect resources to other tasks. Authorizing the use of draft biological opinions would not confer substantive rights. The drafts would not be substitutes for the Services' biological opinions; rather, the drafts would be provided to the Services simply to facilitate their development of biological opinions.

D. "Draft Preliminary Biological Opinion"

INGAA recommends amending the consultation regulations to insert a new defined term, "draft preliminary biological opinion," to allow for preliminary biological opinions to be drafted by action agencies, non-federal representatives, applicants, and their agents, for review and approval by the consulting Service.

As preliminary biological opinions are the early consultation counterparts to biological opinions, so draft preliminary biological opinions would are the early consultation counterparts to draft biological opinions. "Preliminary biological opinion" is a defined term in the consultation regulations, and "draft preliminary biological opinion" should be a defined term as well.

E. "Effects of the Action"

1. "Indirect Effects" — Essential Causation

INGAA recommends amending the definition of "indirect effects," which is nested within the definition of "effects of the action," to reflect judicially recognized principles of causation.

As currently defined, "indirect effects" are "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." The causation principle is essentially unbounded, and consultations have become mired in arguments over the potential effects of hypothetical, attenuated chains of events that might occur in the wake of a federal action. Lack of clarity regarding causation has also led to inconsistent results between and even within field offices.

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[23] *Cumulative Impacts*, *supra*, at 905-06.

[24] 16 U.S.C. § 1536(b)(3)(A).

In the 2008 Proposed Rule, the Services sought to bring a measure of discipline to the process by limiting indirect effects to the consequences that would be an "essential cause" of the proposed federal action.[25] With two refinements discussed below, INGAA supports this clarification. Adding the principle of essential causation provides needed clarity to an area that is often the subject of confusion. Moreover, an essential cause requirement is consistent with case law interpreting causation requirements under the ESA. For example, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[26] the U.S. Supreme Court recognized that the ESA's regulatory definition of harm incorporates the ordinary requirements of proximate cause and foreseeability.[27]

Two refinements should be included in the course of establishing the essential cause principle. First, the definition of "effects of the action" includes definitions for "interrelated actions" and "interdependent actions." The essential cause requirement should be applied to these defined terms.

Second, 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.[28] FERC does not have section 7 consultation obligations for such activities, but another federal agency, such as the Army Corps of Engineers, may have jurisdiction over part of an activity, *e.g.*, a small waterway crossing. Inflexible application of essential causation would limit the scope of the Corps' consultation to the effects of the waterway crossing, and would not consider the effects of the rest of the project on listed species.[29] If the rest of the project would adversely affect listed species, the pipeline company would need to pursue an incidental take permit under ESA section 10[30] or risk take liability under ESA section 9.[31] Handling a single, relatively modest activity through separate ESA proceedings results in additional burdens for both the applicant and the Service.

Whether in the definitions section or elsewhere, 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.

2. "Indirect Effects" — Reasonable Certainty of Occurrence

INGAA recommends specifying that the effects of an action are those which are reasonably certain to occur, as demonstrated by clear and substantial information.

As currently defined, "indirect effects" are "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." As a result, consultations have gotten caught up in disputes about what is or is not "reasonably certain."

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25 2008 Proposed Rule, 73 Fed. Reg. at 47869-70.

26 515 U.S. 687 (1995).

27 *Id*., at 697 n.9.

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

29 *See* 2008 Proposed Rule, 73 Fed. Reg. at 47870.

30 16 U.S.C. § 1539.

31 16 U.S.C. § 1538.

In the 2008 Proposed Rule, the Services suggested addressing this problem by specifying that:

> [R]easonably 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 information."[32]

INGAA supports this language because it avoids the unnecessary consideration of speculative or unlikely occurrences. Moreover, this requirement is consistent with ESA case law. In *Arizona Cattle Growers' Association v. U.S. Fish & Wildlife Service*,[33] the Ninth Circuit found it would be unreasonable to impose conditions through an incidental take statement on otherwise lawful land use, where there was only speculative evidence that take was reasonably certain to occur.[34] By analogy, speculative evidence is insufficient to establish an effect of a proposed action.[35]

F. "Proposed Biological Opinion"

INGAA recommends amending the consultation regulations to insert a new defined term, "proposed biological opinion," to avoid confusion with "draft biological opinion," a defined term that INGAA recommends the Services add to these regulations.

Earlier in these comments INGAA introduced the concept of draft biological opinions and urged this concept be incorporated into the consultation regulations. In the current regulations, the words "draft biological opinion" refer to a proposed opinion that is sent to an action agency "for the purpose of analyzing the reasonable and prudent alternatives" suggested by the Service to avoid jeopardy or adverse modification of habitat.[36] To avoid confusion, INGAA recommends amending this regulation by substituting "proposed biological opinion" for "draft biological opinion" and adding "proposed biological opinion" to the list of defined terms.

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32 2008 Proposed Rule, 73 Fed. Reg. at 47869 (quoting proposed regulatory text).

33 273 F.3d 1229 (9th Cir. 2001).

34 *Id.* at 1243-44.

35 Given the speculative nature of the evidence, for purposes of consultation the effects of an action should not include the contribution of the action's greenhouse gas ("GHG") emissions to climate change and any associated impacts to listed species. Excluding climate change from a section 7 effects analysis is further justified on a number of additional grounds. First, this approach accords with sound science. The potential impacts of GHG emissions are global in nature and reach, it is therefore impossible to link GHG emissions from a particular federal action to effects on listed species. Second, this approach avoids unnecessary consultations, ensuring that the Services' limited resources are directed toward projects in greater need of consultation. Third, this approach accords with judicial interpretations 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.' "). Finally, this approach places responsibility for setting climate change policy where it belongs, with Congress, which is dealing with these issues even as these comments are being filed.

36 50 C.F.R. § 402.14(g)(5).

G. "Reimbursable Agreements"

INGAA recommends amending the consultation regulations to insert a new defined term, "reimbursable agreements," to allow these agreements to be used in the FWS consultation process as authorized by Congress.

FWS defines a reimbursable agreement (also known as a cost recovery agreement) as "a contractual relationship under which [the Service] provides a product or service to a non-Service party, the costs of which are paid by the recipient."[37] These agreements have proven useful in the permitting context, especially where an agency has limited resources to process permit applications.[38]

Congress approved FWS use of reimbursable agreements effective Fiscal 2000.[39] Rather than taking advantage of these agreements, internally inconsistent FWS policies and procedures have hindered them. In particular, the Fish and Wildlife Service Manual states that FWS may enter into reimbursable agreements with private entities provided such entities are not "prohibited sources."[40] Prohibited sources include any entity that is seeking to obtain assistance from the FWS.[41] There is no question that the non-agency party to a reimbursable agreement is seeking FWS assistance, so it would seem that any party proposing a reimbursable agreement is a prohibited source by definition. INGAA urges adopting a more appropriate definition of reimbursable agreements, placing that definition in the consultation regulations and, as noted below, amending the substantive regulations to expressly provide for using these agreements to underwrite and facilitate the administration of section 7.

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

A. Threshold Criteria Defining When Consultation is Necessary

INGAA recommends establishing clear threshold criteria that narrow the scope of consultation, or avoid it altogether, when the action agency finds that no take is anticipated and makes a "not likely to adversely affect" determination concluding that the action's affect on species and habitat is beneficial, non-existent, insignificant or incapable of meaningful identification.

Today federal agencies consult with the Services on thousands of proposed actions where the agency has made a "not likely to adversely affect" ("NLAA") determination and consultation is undertaken primarily to gain the Services' concurrence. In 1986, when the consultations were first promulgated, this approach may have been warranted. Neither the Services nor the action agencies had much experience assessing effects on species or habitat, and the Services review of NLAA cases provided valuable experience for the agencies and Services alike.

As to major natural gas pipeline projects, the factors that motivated concurrence review of NLAA actions have been overtaken by events. Today the permitting federal agencies — FERC, the Bureau of

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37 267 FW 1, ¶ 1.2.

38 *See, e.g.*, 43 C.F.R. § 2804.14 (Bureau of Land Management regulations requiring the applicant to pay the agency's full reasonable processing costs for any application for a right-of-way grant that will require 50 or more hours to process).

39 Department of the Interior and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501A-135 (1999), *codified at* 16 U.S.C. § 754b.

40 *See* 267 FW 1, ¶ 1.11.

41 *Id.*.

Land Management, the Forest Service, and the Army Corps of Engineers — subject these projects to rigorous environmental review by biologists with the expertise and qualifications necessary to make NLAA determinations. These agencies are good stewards of the nation's resources, and in making NLAA decisions they will likely err on the side of caution.[42]

From the perspective of effective ESA implementation, subjecting these NLAA actions to concurrence review wastes resources that can and should be redirected to projects in greater need of consultation.[43] These concurrence reviews also cause needless project delays.

Under the 2008 Proposed Rule, consultation would not have been required for NLAA actions that met specific criteria. First, the action agency had to find that no take was anticipated. Second, the action agency had to find:

> (1) that the action has no effect on a listed species or critical habitat;
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> (2) that the action is an insignificant contributor to any effects on a listed species or critical habitat; or
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> (3) that 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. [44]

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.[45]

INGAA supports these revisions. First, they are carefully crafted to streamline the section 7 process without compromising species protection. The proposed threshold criteria apply only when the action agency finds both that the project is not anticipated to result in take and that the project will not have a detectable negative impact.

Second, the threshold criteria recognize that the ultimate responsibility for section 7 compliance lies with the action agencies.[46] FERC, the Bureau of Land Management, the Forest Service, and the

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[42] In the Services' words: "Many Federal action agencies have now had decades of experience with section 7. The Services believe that Federal action agencies are fully qualified to make these determinations in the limited circumstances provided for in the proposed rule." 2008 Proposed Rule, 73 Fed. Reg. at 47874.

[43] The Services characterized the matter precisely:

> In light of the tremendous workload and consumption of resources that consultations require, the Services believe it is not an efficient use of limited resources to review literally thousands of proposed Federal agency actions in which take is not anticipated and the potential effects are either insignificant, incapable of being meaningfully evaluated, wholly beneficial, or pose only a remote risk of causing jeopardy or adverse modification or destruction of critical habitat.

Id.

[44] 2008 Proposed Rule, 73 Fed. Reg. at 47874 (proposed 50 C.F.R. § 402.03(b)(1)(3)); see also 2008 Proposed Rule, 73 Fed. Reg. at 47870-72 (explanatory preamble).

[45] *Id*.

Army Corps of Engineers have the necessary qualifications to make NLAA findings and avoid unnecessary consultation. Agencies that lack such expertise still have the option of pursuing informal consultation with the Services.

Finally, the Services retain the authority to request an action agency to initiate consultation on finding that a proposed action may affect listed species or critical habitat.[47]

INGAA has one reservation about the proposed threshold provisions. One of the bases for avoiding consultation is that the effects of an action "are such that the potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat *is remote*." Given past disputes and delays over proximate cause and the likelihood of specific effects, INGAA is concerned that implementation of the threshold standards will be hampered by arguments about whether a particular potential risk is remote. Accordingly, INGAA recommends revising the third threshold criterion by defining "remote" risk in a way that is readily measured or quantified.

B. Recognized Tools for Generic Decision Making

For the most part, the consultation regulations presume that every individual project and permit has to be analyzed and considered on a stand-alone basis. Many projects are unique, but there are also numerous projects that are fundamentally similar to one another. For example, interstate natural gas pipelines continuously undergo routine maintenance and repair, which at times requires pipes to be uncovered, serviced and occasionally replaced. These activities often take place in a single ecosystem (or ecosystems that are not materially distinct from one another) following a single set of best practices or pre-defined operating procedures. Such projects lend themselves to generic decision making, and detailed, individualized analysis wastes resources that are better directed elsewhere.[48] INGAA therefore recommends amending the consultation regulations to recognize two tools for generic decision making: best management practices and blanket clearance letters.

1. Best Management Practices

INGAA recommends adopting regulations that narrow the scope of consultation, or avoid it altogether, when an action will follow best management practices that are established by the action agency and address the protection of endangered species.

As signatories to the Pipeline Repair MOU, the Secretaries of Interior and Commerce agreed to "work together at all appropriate administrative levels to define, regularly review, and where necessary, refine a set of Best Management Practices (BMPs) that, when used in making pipeline repairs, will aid the

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46 50 C.F.R. § 402.08.

47 50 C.F.R. § 402.14(a).

48 For interstate natural gas pipelines, there are times when the need for efficient section 7 consultation can be particularly acute. Under the Pipeline Safety Integrity Act of 2002, Pub.L. 107-355, and implementing regulations adopted by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), 49 C.F.R. Part 192, interstate pipelines must adopt integrity management plans that include safety inspections at fixed periods. If an inspection reveals an anomaly regarding pipeline integrity, the integrity management plan and, in some cases, PHMSA regulations, set a maximum time period for taking corrective action. Both in conducting inspections and addressing anomalies, timing is critical and prompt and efficient consultation is imperative. See generally, *Memorandum of Understanding on Coordination of Environmental Reviews of Pipeline Repair Projects* 3 (May 2004) ("Pipeline Repair MOU") available at:

http://www.fws.gov/habitatconservation/PSIA_MOU_FINAL_with_signatures_06_18_04.pdf

expedited consideration of permitting requests, minimize adverse impacts on the environment and reduce the need for post-repair remediation."[49] INGAA urges the Services to carry this commitment into the consultation regulations.

2. Blanket Clearance Letters

INGAA recommends adopting regulations that narrow the scope of consultation, or avoid it altogether, through the use of blanket clearance letters.

The ESA Handbook recognizes the use of "blanket clearance" letters to convey the Service's concurrence with "no effect" or NLAA determinations for specified categories of activities.[50] For routine or repetitive activities that have little or no effect on listed species, these letters eliminate the need for case-by-case review and save the Services time and effort. Surprisingly, the section 7 regulations do not discuss the use of blanket clearance letters.

To ensure that blanket clearance letters continue to be available, and that they can be employed to optimum benefit, the consultation regulations should be amended to provide for the use of blanket clearance letters. Beyond making it clear that such letters can be used, the Services should also adopt procedures for requiring their development and use whenever appropriate.

C. Intra-Service Consultation

INGAA recommends adopting regulations specifying that for incidental take permits the consultation requirement is satisfied by the permitting process itself.

Because the issuance of an incidental take permit is a federal action, it is subject to the consultation requirements of Section 7(a)(2). In effect, the Service has to consult with itself to ensure that issuing the incidental take permit is not likely to result in jeopardy to listed species or the adverse modification of its critical habitat.

As the Service acknowledges, the inherent circularity of this process breeds confusion. For example, the allowed incidental take is whatever is authorized under the permit, yet consultation results in an incidental take statement that defines what will and will not be considered a prohibited taking.[51] Intra-Service consultation also wastes resources, since consultation requires the preparation of a biological opinion and an incidental take statement that are ultimately superfluous.

For incidental take permits, intra-Service consultation is an unnecessary step that should be eliminated. The jeopardy consideration, which lies at the heart of formal consultation, is already part of the criteria used to determine whether an incidental take permit will be issued. ESA section 10(a)(2) requires the Service to ensure that the taking under an incidental take permit "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild."[52] In light of the regulatory definition of jeopardy, the section 10(a)(2) requirement is equivalent to a finding that the taking will not "jeopardize" the continued existence of any endangered species. Further consultation is simply unnecessary, and the consultation process should be deemed satisfied by the permitting process itself.

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49 Pipeline Repair MOU 8 (agreement ¶ E).

50 *See, e.g.*, Consultation Handbook at 3-15 (example of blanket clearance letter).

51 50 C.F.R. § 402.14(*i*)(5).

52 16 U.S.C. § 1539(a)(2).

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

A. Grouped Actions

INGAA recommends allowing similar projects to undergo informal consultation as a group, similar to the way grouped actions can undergo formal consultation under current regulations.

In 2008, the Services proposed amendments to provide that informal consultation can include "a number of similar actions, an agency program, or a segment of a comprehensive plan."[53] The language was intended to parallel a similar provision governing formal consultation over grouped actions.[54] Unlike formal consultation, however, Director approval is not required for informal consultation on these grouped actions. [55]

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 project proponents and the Services, while maintaining the same level of species conservation and protection.

B. Timelines for Informal Consultation

1. Response Deadline for Concurrence with NLAA Determinations

INGAA recommends setting a 30-day deadline for the Services to respond to a request for concurrence with an NLAA determination, with concurrence presumed if the Service does not respond within the deadline.

Informal consultation can be useful, but on occasion its usefulness is negated by the very informality of the process. Parties should never be in a position of preferring formal consultation simply to be sure they will receive action from the Service within a fixed period of time.

In 2008, the Services proposed to add deadlines to help limit the duration of informal consultation and lend greater certainty to the process. Upon giving written notice, an action agency could terminate informal consultation if the consulting Service had not acted on the agency's request for concurrence within 60 days.[56]

INGAA supports the establishment of timeframes for informal consultation but recommends that the time for the Services to act on a request for concurrence be limited to 30 days. The consultation regulations currently provide that once an action agency submits a completed biological assessment the Services have 30 days to state whether it concurs with the assessment's findings.[57] The Services should have the same length of time to respond to a request for concurrence with an NLAA determination.

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53 2008 Proposed Rule, 73 Fed. Reg. at 47872.

54 50 C.F.R. § 402.14(c).

55 2008 Proposed Rule, 73 Fed. Reg. at 47872.

56 *Id*., 73 Fed. Reg. at 47874 (proposed 50 C.F.R. § 402.13(b)).

57 50 C.F.R. § 402.12(j).

2. Deadline Extensions

INGAA recommends limiting deadline extensions to a maximum of 30 days.

Under the 2008 proposal, the Services could act within the 60-day response deadline to extend the deadline by an additional 60 days.[58] INGAA disagrees.

As the Services have recognized, the analysis for informal consultation is less complex than for formal consultation.[59] If anything, an NLAA determination should take less time, not more. For these reasons, the Service's extension of the informal consultation concurrence period should be limited to 30 days.

INGAA recommends requiring deadline extensions to be accompanied by an explanation of why the extension is necessary.

Under the 2008 Proposed Rule, the Services could extend the 60-day deadline simply through written notice to the action agency.[60] No justification would have been required, and one readily can foresee extension notices being issued as a matter of routine.

The notification requirements for the informal consultation process should parallel the formal consultation process. For formal consultations where 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.[61] Similarly, when the Service seeks an extension of an informal consultation the Service should be required, at a minimum, to give the applicant a written explanation detailing why an extension is necessary.

3. Concurrence Requests by Non-Federal Representatives

INGAA recommends that the deadlines for informal consultation equally apply to concurrence requests by action agencies and their non-federal representatives.

Action agencies often designate a non-federal representative to undertake informal consultation.[62] The timeframe for the Services to respond to NLAA concurrence requests should be the same whether that request comes from the action agency or its 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.

4. Effect of Failure to Issue Timely Concurrence

INGAA recommends that a failure to issue an NLAA concurrence within the required time should be deemed to constitute the Service's concurrence.

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58 2008 Proposed Rule, 73 Fed. Reg. at 47874 (proposed 50 C.F.R. § 402.13(b)).

59 *Id*., 73 Fed. Reg. at 47872.

60 *Id*, 73 Fed. Reg. at 47874 (proposed 50 C.F.R. § 402.13(b)).

61 50 C.F.R. § 402.14(e).

62 For interstate natural gas pipeline construction, FERC regulations designate the project sponsor as FERC's non-federal representative. 18 C.F.R. § 380.13(b)(1).

Under the 2008 proposed regulations, if a concurrence was not issued within the specified time the consequence would be wholly procedural: the action agency could terminate the informal consultation.[63] There also needs to be substantive consequences, both to spur timely action and to give action agencies, non-federal representatives and project sponsors meaningful repose. Accordingly, the regulations should provide that a failure to issue a concurrence within the specified time constitutes concurrence.

IV. Formal Consultation (50 C.F.R. § 402.14)

A. Triggering Event for Initiating Formal Consultation

INGAA recommends amending 50 C.F.R. § 402.14(c), so that formal consultation begins on receipt of an initiation request, rather than receipt of a completed biological assessment.

Given the statutory deadlines for completing consultations[64] it is imperative that the initiating event is objective and transparent. Under current regulations, formal consultation is initiated upon the Services' receipt of a completed biological assessment.[65] This standard has proven neither objective nor transparent.

The initiation point for a formal consultation should be when the Service receives a consultation request, including the biological assessment, and initiation should not be subject to disputes over the biological assessment's completeness. Should additional information be required during the course of consultation, it could be submitted at that time by the action agency, as is currently contemplated by the consultation regulations. [66]

B. Consideration of Draft Biological Opinions

INGAA recommends expanding the Service's responsibilities during formal consultation, 50 C.F.R. § 402.14(g), to include consideration of draft biological opinions.

As noted above, INGAA urges the use of draft biological opinions, prepared by action agencies, non-federal representatives, applicants, and their agents, for Service review and approval. In addition to adding "draft biological opinion" to the list of defined terms,[67] this concept should be incorporated into the procedural regulations themselves. The list of Service responsibilities during formal consultation is the appropriate place for inserting Service review of draft biological opinions.[68]

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63 2008 Proposed Rule, 73 Fed. Reg. at 47874 (proposed 50 C.F.R. § 402.13(b)).

64 16 U.S.C. § 1536(b); *see also* 50 C.F.R. § 402.14(e).

65 ESA section 7(c)(1) provides that the biological assessment is to be conducted "for the purpose of identifying any endangered species or threatened species likely to be affected by such action." 16 U.S.C. § 1536(c)(1). In practice, biological assessments typically cover far more than identifying potentially affected listed species. They also contain an analysis of the effects of the proposed project on the species and its critical habitat, a discussion of available alternatives and mitigating measures, a collection of views from recognized experts on the identified species, a review of the literature and other information, and the results of any relevant studies.

66 50 C.F.R. § 402.14(d).

67 50 C.F.R. § 402.02.

68 Since the procedures and responsibilities governing early consultation incorporate the procedures and responsibilities governing formal consultations, 50 C.F.R. § 402.11(d), amending 50 C.F.R. § 402.14(g)

The purpose of allowing draft biological opinions is to speed the formal consultation process. Therefore, the Services' review of draft biological opinions, and any revisions, if necessary, must occur within existing time requirements. Establishing separate time limits for draft biological opinions would defeat the purpose for having them.[69]

C. Technical Amendment

INGAA recommends amending 50 C.F.R. § 402.14(g)(5) by substituting "proposed biological opinion" for "draft biological opinion," to avoid confusion with the draft biological opinions discussed elsewhere in these comments.

Earlier in these comments INGAA introduced the concept of draft biological opinions and urged the Services to amend the regulations to promote their use. The words "draft biological opinion" appear in the current regulations to refer to a proposed opinion the Service sends to an action agency "for the purpose of analyzing the reasonable and prudent alternatives" which are being suggested by the Service to avoid jeopardy or adverse modification of habitat.[70] To avoid confusion, INGAA recommends amending this regulation by substituting "proposed biological opinion" for "draft biological opinion."

V. General Remarks

A. Transparency and Consistency

INGAA recommends establishing an electronic bulletin board or other publicly accessible database that would include, at a minimum, each listing decision, biological opinion, unforeseen circumstance determination and incidental take statement.

In the context of formal consultations, transparency breeds consistency and consistency breeds efficiency. Placing listing decisions, biological opinions, unforeseen circumstance determinations and incidental take statements on-line would mark a great step forward. The more parties know about the Services' expectations and past decisions, the better they can prepare for consultations and anticipate their likely outcomes.[71] Transparency will also breed consistency between and within field offices.[72]

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would also establish the Services' responsibility to receive and review draft preliminary biological opinions submitted during early consultation..

69 For the same reason, separate time limits should not be established for using draft preliminary biological opinions in early consultation.

70 50 C.F.R. § 402.14(g)(5).

71 Implementation of the "minor change" provision of the incidental take regulations provides a useful example of the benefits of transparency and consistency. The incidental take regulations provide that "Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes." 50 C.F.R. § 402.14(*i*)(2). Over the years there has been considerable controversy where fundamentally similar projects have been subjected to widely different minimization measures. Allowing all parties to see what measures were imposed on various projects, and how those measures were tied to economic feasibility and species preservation, would improve the consistency, efficiency and predictability of the entire permitting process.

72 As a matter of sound administrative practice, it may become necessary for consistency to be imposed. The Services should consider establishing an administrative appeals process or other form of internal review and oversight to ensure consistency in Section 7 determinations and how consultations are conducted.

B. Reimbursable Agreements

INGAA recommends expressly embracing reimbursable agreements to underwrite and facilitate FWS administration of section 7.

As described above, reimbursable agreements allow non-agency parties to reimburse an agency for the costs incurred to process an application. With section 7 processing so often delayed or constrained due to a lack of resources, FWS has every reason to embrace these agreements and use them to the maximum extent possible.

CONCLUSION

INGAA embraces the Services' willingness to receive suggestions to improve the ESA consultation process. The suggestions presented are grounded in experience, and they increase administrative efficiency without compromising the objectives of the ESA. We appreciate the Services will be assembling the suggestions into proposed rules, and we look forward to participating in that phase of the improvement process.

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