

THE SERVICES ISSUE FINAL RULE AMENDING SECTION 7 CONSULTATION REGULATIONS

The U.S. Fish and Wildlife Service and the National Marine Fisheries Service issued their final rule amending certain regulations that govern Section 7 consultations under the Endangered Species Act. These amendments are intended to clarify several definitions, to clarify when the Section 7 regulations are applicable and the correct standards for effects analyses, and to establish time frames for the informal consultation process.

Section 7(a)(2) of the Endangered Species Act requires federal agencies, or “action agencies” in the parlance of the Section 7 regulations, to consult with the Fish and Wildlife Service or the National Marine Fisheries Service (depending upon the listed species at issue) to insure that any action authorized, funded, or carried out by the action agency is not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of critical habitat of any such species based on the best scientific and commercial data available. The Services implement this mandate pursuant to their Section 7 regulations found in the Code of Federal Regulations.

On December 11, 2008, the Services issued their final rule amending certain aspects of these regulations. According to the Services, these amendments are designed to improve the effectiveness and efficiency of the Section 7 consultation process, and to respond to a perceived need to clarify certain existing regulatory provisions where the Services have found that there is confusion and inconsistent application in Section 7 consultations. Most notably, the proposed rule would, under certain circumstances, allow federal agencies to independently determine, without concurrence by the Services, whether the actions that they take, fund, or authorize would adversely affect listed species or critical habitat, thus triggering formal consultation requirements.

Under the Services’ prior regulations, if the action agency determined that an action did not require Section 7 consultation because it was “not likely to adversely affect” protected species or critical habitat, the appropriate Service was required to concur with the action agency’s determination. Pursuant to the new rule, concurrence is not required if the action agency determines that the proposed action is not anticipated to result in take of listed species *and* one of three circumstances are met: (1) either the action has no effect on a listed species or critical habitat; (2) the effects of such action are manifested through global processes that cannot be reliably predicted or measured at the scale of a listed species’ current range, would result at most in an extremely small and insignificant impact on a listed species or critical habitat, or are such that the potential risk of harm to a listed species or critical habitat is remote; or (3) the effects of the action are wholly beneficial or are not capable of being measured or detected in a manner that permits meaningful evaluation.

Notably, the rule also clarifies the requirements for analysis of the indirect effects of a proposed action on protected species and their critical habitats. Apparently eschewing traditional concepts of “but for” and proximate causation, the rule imports the notion of an “essential cause” and defines indirect effects as “those effects for which the proposed action is an essential cause, and that are later in time, but still are reasonably certain to occur.” The rule offers some – but not much – guidance on what is meant by an essential cause: “If an effect will occur whether or not the action takes place, the action is not an essential cause of the indirect effect.” The preamble to the rule is somewhat more helpful, as it explains that the essential cause concept “focuses on both the nature and degree of the connection between the agency action and the effect to the species.” With respect to the “reasonably certain to occur” prong of the indirect effects definition, the rule establishes that “reasonably certain to occur” is the

(continued on back)

Los Angeles

2049 Century Park East, 28th Floor
Los Angeles, CA 90067
P (310) 277-4222
F (310) 277-7889

Orange County

19800 MacArthur Blvd., Suite 500
Irvine, CA 92612
P (949) 476-2111
F (949) 476-0256

San Francisco

555 California Street, 10th Floor
San Francisco, CA 94104
P (415) 392-4200
F (415) 392-4250

“standard used to determine the requisite confidence that an effect will happen,” and that a “conclusion that an effect is reasonably certain to occur must be based on clear and substantial information.”

In addition, the final rule provides timing deadlines for the informal consultation process that allow action agencies to terminate consultation if the appropriate Service has not acted on its request for concurrence within 60 days. The Service may extend the time for informal consultation for a period no greater than an additional 60 days from the end of the 60-day period. Adding these time frames to this process should help streamline consultations when an action agency does not need an incidental take statement and the effects of the action are not expected to be adverse.

Although minor in scope, these regulatory changes could have major implications. For example, the new standards governing the applicability of Section 7 could significantly reduce the number of projects that are required to undergo consultation with the Services. Moreover, the rule’s carve out for actions with effects that are “manifested through global processes” – i.e., actions that may result in climate change effects – is sure to draw the ire of environmental organizations. The Secretary of the Interior’s statement announcing the final rule makes the current administration’s intent clear: “If science can not draw a direct causal link between an action and an effect on a listed species, as is currently the case for global processes like climate change, then consultation under the ESA is not necessary.”

If you have any questions regarding this alert, please contact:

R. Clark Morrison at 415.262.5113 or cmorrison@coxcastle.com

Scott Birkey at 415.262.5162 or sbirkey@coxcastle.com