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BUSH ADMINISTRATION ENVIRONMENTAL RECORD AT DEPARTMENT OF INTERIOR AND ENVIRONMENTAL PROTECTION AGENCY

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

SEPTEMBER 24, 2008

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ONE HUNDRED TENTH CONGRESS
SECOND SESSION

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C O N T E N T S

BUSH ADMINISTRATION ENVIRONMENTAL RECORD AT DEPARTMENT OF INTERIOR AND ENVIRONMENTAL PROTECTION AGENCY

WEDNESDAY, SEPTEMBER 24, 2008

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The full committee met, pursuant to notice, at 2:34 p.m. in room 406, Dirksen Senate Office Building, Hon. Barbara Boxer (chairman of the full committee) presiding.

Present: Senators Boxer, Baucus, Cardin, Klobuchar, and Whitehouse.

OPENING STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. The hearing will come to order.

I want to welcome everybody here to this beautiful room where so many wonderful laws have been written, and we want to write some more good ones. We do our oversight as best we can in this room.

Today's hearing is the Bush administration's Environmental Record at the Department of Interior and at the EPA. Our first panel is set to be Robert Meyers, Principal Deputy Assistant Administrator, Office of Air and Radiation, U.S. EPA, and Lyle Laverty, the Assistant Secretary for Fish and Wildlife, Department of the Interior.

And then we have panel two, who I will introduce after that.

So the purpose of this hearing is to examine the Bush administration's record on important public health and environmental matters. Unfortunately, instead of reviewing accomplishments, we look back on years filled with environmental rollbacks that serve the special interests and not the American people.

Today, this Committee will shine a light on the Bush administration's efforts to undermine EPA's and the Department of Interior's mission to protect public health and the environment. A clear picture of the Bush administration's environmental record can provide a road map for the next Administration and the Congress which will be useful in the effort to reverse these dangerous decisions.

This Committee is going to work up until the last minute of this session. Time and time again, the White House has interfered in EPA decisions that should be based on science and the law. Time

and time again, EPA has ignored the law and the advice of its own scientific experts.

Let's take a look at a few examples of this disturbing record. One, in one of its first official acts, the Bush EPA announced it was suspending the newly strengthened standard for arsenic—I am sorry, we have to get ourselves in gear. To we have a chart for arsenic? OK.

In one of its first official acts, the Bush EPA announced it was suspending the newly strengthened standard for arsenic in tap water. It was a public outcry, and we blocked them. I remember, just to catch their attention, I sent the movie Arsenic and Old Lace over to the White House to make a point that this was in fact a dangerous substance.

Then EPA proposed to do what it called the CHEERS study jointly with the chemical industry in which low-income families were offered gifts and other incentives if they agreed to enroll their newborn children in pesticide studies in their homes over a 2-year period. There would be videos taken of these children crawling around in pesticides. There was a great outcry and EPA canceled the study.

Senator, would you join me up here? I would really appreciate it. Senator Baucus is probably coming, but if you could just sit in Senator Carper's chair. Senator Carper's chair, you think? Is Senator Carper coming? Senator Carper's chair.

Senator WHITEHOUSE. I will upgrade and become Senator Carper.

[Laughter.]

Senator BOXER. I was just going through the EPA record, starting off with before you were here, one of the first things they did is try to weaken the arsenic standard in drinking water. And then the CHEERS study, where, as you may remember reading about at this time, we had a great outcry because this was low-income families. They were getting paid off to put their kids in a dangerous study.

And now we recently saw they tried to revive this idea, but after meeting with my staff, they couldn't answer any of the ethical questions, and they retreated from that study.

EPA set a weaker clean air standard for toxic soot than its independent scientific advisers, children's health advisers, and its own scientists recommended. Soot kills thousands of Americans every year. I think we have to keep reminding people of this. Soot kills thousands of Americans every year, especially children and the elderly.

Next, EPA rejected the advice of its own scientists, scientific advisers, and children's health experts and set a weaker health standard for smog than the scientists recommended. Smog poses a serious health risk to millions of people, killing thousands of people each and every year.

Next, EPA set a weaker standard for lead pollution in air, and for lead paint cleanup than its independent scientific advisers recommended. As we all know, lead is highly toxic to kids and can reduce IQ and can cause learning and behavioral problems and can damage children's developing brains.

The courts, including Bush-appointed judges, have repeatedly struck down EPA's rules that weaken public health protections. Judges have used strong language to express their frustration with EPA's failure to comply, saying for example, "only in a Humpty-Dumpty world would EPA's explanations make sense" or that, quote, "EPA employs the logic of the Queen of Hearts in Lewis Carroll's classic Alice in Wonderland." These are the words of the courts, the words of the courts.

According to a recent GAO report prepared at my request, EPA political officials worked with the White House and the Pentagon to undermine the process for evaluating toxic chemical risks. The Bush administration's system puts polluting agencies like DOD in the diver's seat, with an ability to secretly stop or weaken EPA actions to control toxic chemicals like perchlorate, TCE, and other pollutants.

Ben, could you sit in Senator Lieberman's seat?

Next—and I want to just talk about perchlorate for a minute. Perchlorate is this dangerous toxin that interferes with the thyroid. It means that it interferes with our ability to produce hormones. It damages the brain and it damages the nervous system. Now, perchlorate is in 35 States in many, many sites—35 States. It is everywhere. We have some leaks that show us that in fact the EPA is going to walk away from setting a standard for perchlorate, which the scientists tell us must be set at between one and six parts-per billion.

It is shocking, and there was actually a big story in The Washington Post about this, but they are not doing anything about these chemicals.

EPA has severely weakened its office of Children's Health Protection and ignored its Children's Health Advisory Committee, as we learned from GAO last week. GAO did a study and they said EPA is not paying attention.

EPA's record on global warming could not be worse. Despite the President's campaign to regulate carbon, the White House reversed course and rejected actions to control global warming pollution. It literally took an order from the court, the U.S. Supreme Court in Massachusetts v. EPA to force EPA to begin to address the problem. Even then, the White House blocked EPA from issuing its proposed "endangerment finding" under the Clean Air Act, which would have given the green light to action on global warming.

The Bush administration denied the California waiver, and I want to publicly thank Senator Whitehouse for his intense and unrelenting questions yesterday of an EPA witness. Mr. Johnson has not been here for 6 months. Yesterday, he sent someone else, and that individual actually contradicted Mr. Johnson's testimony that he had given about the waiver. We know that waiver is crucial to our State so that they can move forward. We also know that it is the first time a waiver has been denied in 40 times. Forty times we have gotten these waivers.

EPA has slowed its Superfund program—this is another issue—to a crawl. Over the last 7 years, the pace of cleanups has dropped by 50 percent compared to the last 7 years of the prior administration. The cleanups have fallen from 80 to 40.

And getting back to perchlorate, they are not going to set a standard. I wanted to say that because I know Carl Pope just came in, and he has worked so hard on this. EPA data shows that 16.6 million people are exposed to unsafe levels of perchlorate. And we know how risky it is to kids. It disrupts their normal development.

Now, on occasion, EPA has taken a positive step, including the issuance of cleanup orders to the DOD, although the DOD is not complying in many of these cases, which we found out. Senator Cardin, I want to thank him for his intensive questions about Fort Meade.

Now, on the Department of the Interior side, we don't get to interact with them that much, but where we do interact with them is on the Endangered Species Act, and they have proposed a terrible proposal to dramatically weaken the rules under the EPA—another 11th hour attempt to undermine environmental protections.

The Endangered Species Act is one of America's most successful environmental laws. Indeed, just last year the Fish and Wildlife Service removed the bald eagle, the very symbol of our Country, that was saved because of this Act. The Bush administration has proposed to rewrite the rules so that most expert agencies will not be involved anymore.

So here is where we stand, colleagues. We had been told that Robert Meyers, Principal Deputy Assistant Administrator of the Office of Air and Radiation at EPA would be here for our first panel, along with Lyle Laverty, Assistant Secretary for Fish and Wildlife, Department of the Interior. They are not showing up for this hearing. They are not showing up.

We will leave their cards there in case they do show up, but I have never seen anything like what we are getting from this Administration. Johnson has been in hiding since March, and now they won't even send people because they don't want to face up to the tough questions we have for them. And you know what? They are cowardly and they have been a danger to the people of this Country. That is it.

Now, if those words don't get them here, I don't know what else will.

And so I turn to Senator Whitehouse first, and then Senator Cardin.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. Thank you, Chairman. Thank you very much for your relentlessness in this pursuit and your passion to make sure that this is an agency that accomplishes its mission of protecting the people of this Country.

I think what I will do is ask unanimous consent that the documents that I assembled, with your assistance and with the assistance of your staff, that supported my call for Administrator Johnson's resignation, and that I put into the Senate record in the speech to that effect on the Senate floor, be made a part of the record of this proceeding.

Senator BOXER. Is there objection? Hearing none, so ordered.

[The referenced documents were not received at time of print.]

Senator WHITEHOUSE. I would also point out we had an interesting hearing in the Judiciary Committee not long ago, and the Director of the FBI, Bob Mueller, came. I spoke at some length to compliment him on the way he handled the pressure that was put on him by the White House with regard to the President's program to wiretap Americans without a warrant, and how he stood by his guns through all of that. I don't think he wanted to cross the President. I don't think that was his intention.

But what he did recognize and what Deputy Attorney General Comie recognized and what I think Principal Assistant Deputy Attorney General Patrick Philbin recognized is that even in the executive branch, when you take on certain public offices, you also take on certain public duties. The oath you take and the dignity and honor of the office that you assume binds you, honor bound, to the accomplishment of those duties.

If the President wants you to do something different, you simply cannot do it. You have to stand up to him and say, I can't do that; if you insist on that being done, you will have to find somebody else to do it. It is not consistent with the responsibilities of this office.

And it strikes at the heart of this phony I think largely corrupt unitary executive theory that has been the intellectual cover by which the White House has made an effort to essentially cow all executive agencies and bend them to their political will.

Setting aside the immediate health issues, as important as they are today, something very bad happens in America when the entire executive branch turns its eyes away from the duties and responsibilities that people are sworn to uphold based on their office, and instead look only for political direction from the White House, and are willing to do anything, say anything that obliges them, even if the repayment for being a toady is nothing more than rides on Air Force One or having your wife have tea with the First Lady at the White House, or whatever it is that causes you to—whatever your price is for having sold out the duties of your office.

Unfortunately, I think we will look back for many, many years at this episode, what happened at EPA and what happened at Interior. It is not just wrong substantively in terms of the protection of our people's health and our Country's natural resources. It is wrong at the very heart of the checks and balances that make America the Country that we are.

I think frankly it is disgraceful. I can understand why they are not here. I would be ashamed to come and defend myself here if I were in their shoes, but there has been a lot at stake. And your persistence and your relentlessness in keeping the focus on it I think is something that people will look back 20, 40, 60, 100 years from now and note as they look at bright spots in these dark days of misrule.

Senator BOXER. Thank you so much.

Senator Cardin.

OPENING STATEMENT OF HON. BENJAMIN L. CARDIN, U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. Thank you, Madam Chair. This is a sad day for the Environmental Protection Agency. It is a sad day for our Nation in that the representatives would not appear before the Con-

gress in order to review with us the status of environmental efforts to protect public health. It is a tragic day.

Let me, Madam Chair, compliment you. You know, we can have as many hearings and we can pass as many laws as we want, and you can't change the attitude of this government as it relates to the importance of protecting public health through our environment and leaving our planet in better condition than we found it. You just can't do that. You are not going to change their record, unfortunately.

But you have put a spotlight on this. You have put sunshine onto what they have done, and the American people now understand exactly what has happened over these last 8 years. I thank you for doing that because I think this record needs to be told.

We shouldn't be, I guess, surprised the witnesses aren't here. We know that this Administration has prevented the release of scientific information that should have been released. They have failed to follow the expert advice of their own career people. They have done that over and over again. So it is not a surprise that they would not want to be confronted by questioning by this Committee.

I asked my staff in preparation for today's hearing to outline for me the areas of concern and accomplishment by the Bush administration as it relates to protecting our environment. And Madam Chairman, I got a long list of concerns. I will just mention a few. It is a little bit too long. But I said, look, go back and find me something positive, and they did. They found one, so let me say there was one good thing that we found, and that is the national monument designation of the Northwest Owyhee owls. Congratulations on that.

But it is overshadowed by this long list, long list. We know how many hearings we have had on greenhouse gases, and we know just recently, the hearing this past week. The people of Maryland understand how much more we are at risk because of sea level changes. And this Administration is not even following the order of the Supreme Court in moving promptly to determine the regulations of greenhouse gases.

The California waiver is outrageous, Madam Chair. That is just outrageous. My own State of Maryland wanted to follow the California model. There have been two models in the Country: the minimum model established by the Federal Government and the California waiver. That is how we have done things in the past. Against the advice of their own department, against the law, they said no, the lead in the air which is affecting people in my own State, they refused to take the appropriate actions. The Endangered Species Act, you mentioned several times they have been forced to move forward because of court litigation. The quality of our drinking water, they have ignored.

You mentioned the cleanup. Well, let me tell you, you are right. EPA issued orders. DOD didn't follow it. The bottom line is, we don't have action, and the people that live around Fort Meade are suffering as a result of contamination of the water supply because of the failure of the Department of Defense to clean up the hazardous waste sites. And we have the same risk now at Fort Detrick in my State of Maryland. The shore infrastructure funds. Look at

what they have been doing trying to prevent the water quality there.

And then, let me just mention budgets, and I will be parochial. I will talk about the Chesapeake Bay. It is not the first and not the last time I will be talking about the Chesapeake Bay in this Committee. But this Administration has failed to adequately fund the programs that are essential to the Chesapeake Bay. The EPA program office, the Clean Water Revolving Fund, the NOAA Chesapeake Program Office, the Army Corps of Oyster Recovery, the USGS budget for analysis of pharmaceuticals in the Potomac River, the Forest Service's Chesapeake Forest Program, and then most recently, Madam Chairman, the Chesapeake Bay Watershed Program authorized in the farm bill they wanted to zero out.

I just want to thank not just the work of this Committee, which has been critical, but the work of the Congress in restoring much of those funds. Thank goodness we have done that here because Senator Whitehouse is correct. The challenges for the next Administration are going to be so much more difficult because of the record of this Administration.

This Congress has tried to be constructive. It is difficult in working with this Administration. I do look forward to the next Administration in forging the type of environmental programs that will make us proud. Our work will be more difficult, but I do look forward to restoring and correcting a lot of the damage that has been caused by the policies of this Administration.

[The prepared statement of Senator Cardin follows:]

STATEMENT OF HON. BENJAMIN L. CARDIN, U.S. SENATOR
FROM THE STATE OF MARYLAND

Madame Chairman, thank you for holding this hearing today.

President Bush's 2006 decision to establish a vast portion of the Northwestern Hawaiian Islands as a National Monument covering 1,200 nautical miles, an area larger than 46 of the 50 states, is an extraordinary accomplishment. I applaud the Administration's action. It is a legacy he can be proud of.

Unfortunately, the remaining record of the Bush administration is abysmal.

On Climate Change, the Administration has consistently tried to limit the amount of scientific data released, inserted political opinions for scientific findings, and ignored requirements to deal with the climate change issue

On its bedrock statutes regarding clean air and clean water, EPA has issued a number of controversial rules and regulations, often at odds with the recommendations of its own scientists. A number of the actions have been challenged successfully in the courts.

- EPA rejected the recommendations of its scientific advisors by setting a new Smog Standard which is less protective of health than the level recommended by its advisors.
- Earlier this year the U.S. Circuit Court of Appeals for the District of Columbia ruled unanimously that the EPA's rules for air emissions from power plants failed to comply with protective safeguards in the Clean Air Act that require strong and timely protection of public health from mercury emissions.
- The Bush administration announced a proposal to establish new limits on the amount of lead allowed to be in the air which ignored the recommendations of EPA scientists.

It is not just regulatory programs that have gone astray. The Administration's budget requests for environmental programs are also taking us in the wrong direction.

Sewer Infrastructure. A 2004 report from the EPA estimated that the lack of adequate sewer infrastructure was partly responsible for the estimated 850 billions of gallons of storm water that contaminated sewage that enters U.S. waters each year. This year's Bush administration's budget request for wastewater (the Clean Water State Revolving Fund) is more than 50 percent lower than when he took office.

Drinking Water. The Bush administration has not required any testing or set safety limits for drugs in water despite the fact that the Safe Drinking Water Act and the Food Quality Protection Act direct the EPA to address the problem of chemicals and their impact on the body. This year the Administration proposed cutting the water quality programs at the United States Geological Survey, which provided the key monitoring data showing the drug contamination.

Refusing to collect scientific data is the opposite of safeguarding our drinking water, and it is unacceptable.

NATURAL RESOURCES AND PUBLIC LANDS

The Bush Record on natural resource lands has generally been one of neglect. The greater harm, however, has come from an effort to limit the reach of the Endangered Species Act.

Mr. Laverty's predecessor was forced to step down in disgrace because of the way she inserted political ideology into the Fish and Wildlife Service's work, overruling staff scientists and ignoring the law. The Bush administration's Endangered Species Act proposal attempts to take the scientists out of the equation.

THE RECORD IN MARYLAND IS NO BETTER THAN IT IS NATIONALLY.

Climate Change: With sea level rise well documented and rising water temperature killing off key underwater grass species, the Chesapeake Bay is already experiencing serious affects from global warming. The Administration's failure to address the problem has exacerbated the problem.

And because greenhouse gases persist in the atmosphere for decades, failure to act over the last seven-plus years means significantly deeper and swifter reductions will be needed to address the threats in the future.

California Waiver: Maryland is one of 18 states seeking to join California in its ability to regulate mobile sources of greenhouse gas emissions.

Chesapeake Bay: In addition to the failure to act on climate change issues, the Administration has failed to adequately fund a variety of well-established programs ranging from the

- EPA Program Office,
- the Clean Water SRF,
- NOAA's Chesapeake Bay Program Office,
- the Army Corps of oyster recovery program,
- USGS's budget for analysis of pharmaceuticals in the Potomac River,
- the Forest Service's Chesapeake Forests program, and most recently,
- the Chesapeake Bay Watershed Program authorized in the Farm Bill.

We don't have the time to detail all the ways this Administration has

- undercut public health safety,
- ignored threats to our health and our environment, and
- undermined scientific integrity.

I hope we will focus on a few of the major problems and point out areas where the next Administration needs to right some fundamental missteps.

Senator BOXER. I want to thank both my colleagues.

So just to clear up the record, I want to place a couple of documents in the record. I don't know if my colleagues are aware, you probably are, but I will remind you because it was in the back of my mind. I remember when Stephen Johnson, his nomination was pending, and he came up here, and it was Chairman Inhofe at the time. And Chairman Inhofe said, before we have opening statements, I would like to have you respond to a required question of this Committee, if you would please; would you please stand: Are you willing to appear at the request of any duly constituted Committee of Congress as a witness? And each nominee nodded in the affirmative, including Mr. Johnson.

Now, he hasn't been here in 6 months, so he did not tell the truth to this Committee when he said he would.

And then also Mr. Laverty, nameplate over there, and I said to him, Robert—because his name is Robert Lyle, I called him Rob-

ert—Robert, I will ask you the same; are you willing to appear at the request of any duly constituted Committee of Congress as a witness? Yes, ma'am, I am.

He didn't tell the truth either. He is not here.

This is serious stuff. When you don't show up at a hearing that is duly constituted, you are not fulfilling your constitutional responsibility. And when you don't show up for 6 months, it seems to me, you committed perjury when you answered this question in the affirmative. And then you don't even send anyone?

I think after Senator Whitehouse did his questioning yesterday, maybe that is why. They didn't want to send anybody else, Senator.

Let me tell you what they told us. This is what they told us. EPA's senior staff told my senior staff that they are not here because they didn't want to be questioned on the issues raised in yesterday's hearing about the waiver and other things we questioned them about. Interior said they couldn't get their testimony cleared.

What Country are we in? So this is a sad moment. It is unbelievable, but it is not new for us. We haven't been able to get the head of the EPA here in 6 months. He has a lot of time on his hands. He is traveling around the world, I read, and going to—what did he do last week? He went on a river boat trip and we hear he is going to Israel and Jordan, Australia.

OK. We do have a panel that did show up, and I dare say it was a lot harder for some of you to get her than for Mr. Johnson to come a few blocks.

So if you would come and join us: Carl Pope, the Executive Director of the Sierra Club; Jamie Rappaport Clark, Executive Vice President, Defenders of Wildlife; Reverend Jim Ball, Ph.D., President and CEO, Evangelical Environmental Network; Alan Schaffer, Executive Director, Diesel Technology Forum; and Norman James, Director, Fennemore and Craig.

OK. Well, Mr. Schaffer, you are the only minority witness who showed up, and we want to welcome you. We are glad you are here and we are interested to hear what you have to say. And Mr. Jones hasn't come either. So.

So we are going to just go down the row here. We are taking a look-back. The reason we are taking a look-back is we need to know how much work we have to do in the next Congress and the next Administration. So I think there is so much we have to undo that we thought we would get started early and start our list.

You know how at home we have a to-do list? We put it up on the refrigerator. My to-do list looks a little different than a lot of others because we have so much that we have to do.

So let's start off with Carl Pope, Executive Director, Sierra Club. Let's say 7 minutes each, and make sure you put your mic on.

STATEMENT OF CARL POPE, EXECUTIVE DIRECTOR, SIERRA CLUB

Mr. POPE. Sorry, thank you.

Madam Chair, Senator Inhofe, members of the Committee, I am Carl Pope and I am the Executive Director of the Sierra Club.

Looking back, I think the fundamental lesson of the last 8 years is that James Madison wrought well. In the environmental arena, the executive dictatorship which the Vice President attempted to

erect on the foundation of a hyper-partisan parliamentary Congress was, I am happy to report, repeatedly and consistently thwarted by the checks and balances built into our system.

Let's begin with EPA, which I think can best be described at this moment as a pile of judicial smithereens.

Senator BOXER. Go ahead. You can all look at your BlackBerrys when you are done.

Mr. POPE. Over at EPA, if you were to pick up the Code of Federal Regulations in 2 years and examine it, you would be hard-pressed to know that this Administration ever existed. Virtually the entire regulatory edifice of clean air policy, which this Administration attempted to erect, has been dismissed by a combination of the courts, the Congress and vigorous State action. In its place, for the first time in American history, a vigorous State-based policy of clean air protection has been put in place.

The courts threw out the Bush administration's mercury rules, its interState transportation policy. They blocked its efforts to repeal the new source review requirements. And during the period when the mercury rule was on the books, more than 20 States rejected its permissive emission limits and adopted much more effective rules of their own.

When EPA said that carbon dioxide was not a pollutant, the Supreme Court disagreed and said it must be regulated under the Clean Air Act. When this Administration refused to comply, States all over the Country began moving on their own, first REGI, then the Western Governors Initiative, now the Midwestern Clean Air Alliance.

California after this Administration for years sat by while oil imports increased and global warming got worse and the price of gas rose and American motorists suffered, refused to set tougher fuel economy standards. California acted, 14 States have now followed it; when EPA and the auto industry tried to prevent this, once again, the courts refused to go along, and while the needed waiver has not indeed been issued, it is in the courts where I am certain when the issue is adjudicated it will be issued. And perhaps more important, both candidates for President of the United States have pledged that if elected, they will immediately grant the waiver.

In fact, and this has not been commented on, but it is a remarkable fact that in the last 3 years, in the face of an Administration which we all know has done everything it could to slow action on global warming, the United States and its States have put in place regulatory changes which will reduce the long-term carbon dioxide emission rate of this economy by 9 percent. More than 900 million metric tons of CO2, which were projected 3 years ago to be part of our business-as-usual inventory, will not happen. This estimate is very conservative. It does not, for example, include a very important decision made this weekend by the body which sets emission standards for all of the Nation, to raise the fuel efficiency requirement for all new homes and offices by between 15 percent and 20 percent.

So EPA may not have acted. America has acted.

Let's look at the public health. Consistently, repeatedly, time and time again, EPA has ignored the recommendations of its own scientific advisers. At one point on the particulate rule, EPA even pro-

mulgated the interesting scientific notion that the lungs of rural Americans were better able to handle the abuses of pollution than the lungs of urban Americans. The Bush administration was nothing if not fair. They were very willing to savage their own supporters.

But if you look actually at what has happened in terms of State regulation of clean air, the States have been moving forward. We have actually made tremendous progress in the last 5 years in spite of the lack of executive leadership.

On clean water, a similar story. The Administration wanted to permit raw sewage to be dumped into drinking water. Congress sent them packing. The Administration wanted to issue regulations that would have permanently exempted 60 percent of the Nation's waterways from Clean Water Act protection. Republican hunting and fishing groups scared them off in 2004. When Florida ignored the requirement that it regulate toxic pollution, the courts required it to act.

So the good news is that little of the Bush administration's affirmative environmental agenda survived. But the bad news is that checks and balances don't work very well to get routine maintenance done. They don't work very well to get the Nation to pay its bills. They don't work very well to maintain the integrity of governmental processes of the science of the Federal Government, of the measuring of the Federal Government, or the bookkeeping of the Federal Government.

And where we have an enormous problem inherited from this Administration is in the loss of governmental capacity, scientific integrity, the fact that we have a huge amount of undone routine maintenance, whether it is the national parks, our Nation's sewage system, clean water, clean air monitoring. The fact is the next Administration will inherit a Federal Government information process which has been fundamentally broken and which James Madison's checks and balances were inadequate to resolve.

At the end of the day, there are tasks, Madam Chair, for which executive leadership is important. I was asked recently whether I thought we needed new leadership on the environment in the White House. I was forced to respond, that question suggests that we have leadership today.

Thank you very much.

[The prepared statement of Mr. Pope follows:]

TESTIMONY OF CARL POPE
EXECUTIVE DIRECTOR
THE SIERRA CLUB
SENATE COMMITTEE ON ENVIRONMENT
SEPTEMBER 24, 2008

Madame Chair, Senator Inhofe, members of the Committee,

My name is Carl Pope, and I am the Executive Director of the Sierra Club. Sierra Club is a national non-profit organization, founded by John Muir in 1892, whose 1.1 million members and supporters are dedicated to exploring, enjoying, and protecting the planet.

CHECKS AND BALANCES HAVE PREVAILED

The best news from almost eight years of Bush Administration stewardship of our air, our waters and our lands is that James Madison wrought well. In the environmental arena, the Executive dictatorship which the Vice-President attempted to erect on the foundation of a hyper-partisan, parliamentary Congress was repeatedly and consistently thwarted by the checks and balances built into our system.

EPA:
A PILE OF JUDICIAL SMITHEREENS

Over at EPA, it will be hard to know from the Code of Federal Regulations that this Administration ever existed.

The entire edifice of Administration policy on clean air lies shattered in judicial smithereens –and in its place a vigorous, state based air quality protection structure is being put in place in much, but sadly not all, of the country.

The Courts have thrown out the Bush EPA's mercury rules and interstate transport policy and blocked its efforts to repeal the requirements that power plants be cleaned up when they are expanded or modernized. During the period when the Administration's mercury rule was on the books, more than 20 states rejected its permissive emission limits and adopted much more effective rules of their own.

The Supreme Court ruled that carbon dioxide was a pollutant and must be regulated under the Clean Air Act. While this Administration has refused to comply, the states are moving on their own. First the Northeastern states with REGI, then California with AB

32, then the Western and Midwestern Governors and state after state are moving to put comprehensive CO2 emission limits in place.

For six years the Administration sat by while oil imports increased, gas prices rose and global warming became more and more threatening. It refused to set higher fuel efficiency standards for vehicles even when the data showed that the current trajectory was actually hurting the US auto industry, desiccating its market share. But California acted on its own, and other states virtually stampeded to follow it. When the auto industry challenged the right of California and other states to regulate tailpipe emissions of CO2 the Courts again sided with our federal systems. While EPA has yet to issue the needed waiver for those standards to take effect, that matter is before the Courts, and perhaps more important, both candidates for President have pledged that they will allow California and the 13 other states which have joined it to act on their own.

It is a little noted fact, but in the last three years, because of state action, recent Congressional initiatives, and citizen intervention, the United States put in place regulatory changes which will reduce our economy's long term emissions of carbon dioxide by more than 9%. More than 900 million metric tons a year of CO2 emissions which were projected three years ago to be part of our emissions inventory in business as usual projections will not occur. This is a conservative estimate which does not quantify state initiatives in the utility and building sector arena.

EPA for years had dragged its feet on setting emission standards for dozens of toxic air pollutants; it took a lawsuit to get a federal court order to put the Agency on a five years schedule to get the long overdue job done. Efforts to ignore toxic pollution from brick kilns and plywood plants were overturned by federal judges.

With regard to bringing public health standards for criteria air pollutants into line with modern science, the EPA has ignored the recommendations of its own scientific advisors.

In September 2006, EPA made modest revisions in its standard for particulate air pollution, but by far less than scientific advisors had recommended. Contrary to recommendations of the EPA's Clean Air Scientific Advisory Committee, the EPA chose not to tighten the annual PM 2.5 standard, 15 $\mu g/m^3$. In a September 29, 2006 letter following the release of the standard, the scientific advisors wrote to Administrator Johnson: "*It is the CASAC's consensus scientific opinion that the decision to retain without change the annual PM2.5 standard does not provide an "adequate margin of safety ... requisite to protect the public health" (as required by the Clean Air Act), leaving parts of the population of this country at significant risk of adverse health effects from exposure to fine PM.* (Italics in original.)

In March of this year, the EPA announced a revision in the health-based National Ambient Air Quality Standard for ozone pollution. Unfortunately, the new standard falls far short of the requirements of the Clean Air Act—and of what EPA's own scientific advisors had recommended. The expert science advisors recommended a range of 60 to 70 parts per billion of ozone in the air; the EPA's new standard is 75 parts per billion.

The lower standard recommended by the scientists would have protected many more people from an early death from their exposure to ozone.

On October 15, the EPA is expected to announce a new National Ambient Air Quality Standard for lead pollution. In July, the Clean Air Scientific Advisory Committee raised a number of concerns about the Agency's Notice of Proposed Rulemaking. Some observers suspect that EPA will finalize the standard at (or above) 0.3 ug/m^3, 50 percent higher than the high end of the range recommended by EPA's science advisors. The science advisors recommended protecting against a 1 to 2 IQ point loss, calling such a loss significant from a public health perspective. A standard at 0.3 ug/m^3 would allow, not protect against, such a loss.

Similarly Administration efforts to weaken arsenic standards for drinking water had to be abandoned in a firestorm of public protest. FEMA's infamous toxic trailers were finally shut down by media investigations and testing conducted by the Sierra Club, and EPA has been forced to begin the process of regulating formaldehyde exposures. Lead in our children's Christmas toys is also, finally, being dealt with – because the Sierra Club petitioned EPA and the Consumer Product Safety Commission to act, and private enforcement under state consumer protection laws like California's Prop 65 finally got the attention of big retailers and importers.

On water quality, the story is similar. The Administration wanted to permit raw sewage to be dumped into drinking water without treatment simply by diluting it with fresh water; Congress and a public outcry put that bad idea to bed. The Administration wanted to issue a regulation that could have exempted almost 60% of the nation's waterways and some 20 million acres of wetlands from protection under the Clean Water Act – sportsmen's groups and the pendancy of the 2004 election scared the White House off.

When EPA let Florida ignore toxic contamination of its waterways with mercury, the courts intervened and made the state act; the Courts intervened to prevent the Kensington Mine in Alaska from dumping tailings into waterways, even though EPA and the Corps of Engineers refused to act.

So the good news is that little of the Bush Administration's affirmative environmental agenda has survived the challenges our system of checks and balances makes possible – Congress, the Courts, the states, and direct intervention by the public has undone most of the legal damage which the Administration sought to do.

THE FOREST SERVICE: SEVEN YEARS, SEVEN MILES OF ROADS

Begin outside your jurisdiction, with the National Forests. The Clinton Administration's signature Wild Forest Protection policy has been suspended by a federal court, replaced by a hurried and poorly crafted new rule, reinstated and then suspended again. But on the ground, among the groves, after seven years only seven miles of road have been built in previously pristine National Forest. And Deputy Undersecretary of Agriculture Mark

Rey's assaults on public participation in forest planning, on biological diversity in the Southeastern forests, his salvage policy, his efforts to clear cut the Tongass, to gut the Sierra Nevada framework – all rebuffed by the federal courts.

A cynical effort to begin disposing of the public lands by using National Forest sales as a temporary funding mechanism for rural schools was rejected by the President's own party in the Congress.

THE DEPARTMENT OF THE INTERIOR:
THE WORST JUDICIAL BATTING AVERAGE IN HISTORY?

Now let us look at the Interior Department.

We face a new, and hasty, assault on the Endangered Species Act from the Secretary. It simply eviscerates the common sense notion that biologists, not highway builders and civil engineers, should decide whether or not a project threatens wildlife. The proposed regulations would gut section 7 of the Endangered Species Act, eliminating the key scientific consultation that has served as the act's backbone for over 30 years. Why must the Administration attempt to undo the protection of the ESA by regulation? Because its efforts to undo them by inaction have been thwarted with embarrassing consistency; at last count the Administration had lost 85% of its Endangered Species cases, and lost them most often to judges appointed by Republican Presidents, including President Bush himself. So while the proposed rules make a mockery of the intent of the Act, they are a virtual invitation to federal judges to once again say to the Administration, "The Founding Fathers made it very clear that Congress, not the Executive, makes the laws. What part of Separation of Powers don't you understand?"

It is clear that mineral leasing program of this Administration has been carried out with a stunning lack of respect for the law and phenomenal corruption. We know this because another one of our system's checks and balances – this one the internal system of Inspectors General – has repeatedly blown the whistle on the Minerals Management Service and its conducting of the oil and gas leasing program on public lands, most recently in the infamous escapades at the Denver office of MMS.

The response from the appointed leaders of the Department is revealing. When the Inspector General several years ago brought 27 instances of corruption and ethical wrongdoing on the part of the highest ranking offices in the Department, including then Secretary Gale Norton, to the attention of the Administration, the allegations were quashed and no action was taken. Similarly the most that Interior Secretary Kempthorne can bring himself to say about the Denver situation is that he "may" fire some of the officials involved – the Justice Department has resolutely refused to take criminal action even when criminal behavior has been amply documented.

A similar tragedy has not yet played itself out on America's coastlines, because until this summer both an Executive Order and a Congressional moratorium prevented leasing in some of the most critical areas. But it required a Sierra Club lawsuit to force the

Administration to conduct a proper environmental review of additional leasing activities in the Santa Barbara channel, and the Courts have yet to decide whether they will permit the oil industry to threaten the vital wildlife habitat of the Chukchi Sea without any review that took into account the threat leasing poses to the polar bear.

But while the Bush Administration has done everything in its power – and attempted a good deal as it turned out beyond its power – to make life easy for the oil and gas industry, it has thrown up road block after road block against renewable energy. Even the Department of Defense was pressed into service during 2006 to put in place a moratorium on the permitting of new wind farms, deliberately delaying the study which would have allowed wind farms to go ahead again for months and months until, once again, the Sierra Club sued and the Courts intervened.

THE COLLAPSE OF CAPACITY:
NOT EVEN THE ROUTINE MAINTENANCE

But the bad news is that for eight years we have failed to pay attention to, or carry out, the routine maintenance that our common inheritance of air, water and public lands requires. The structure of checks and balances works better to stop bad initiatives than to facilitate such routine activities as paying our bills. The capacity of the federal government to monitor and measure the health of the American landscape has been seriously eroded. The integrity of federal science has been badly compromised. Congress has by and large not been able to act when changing circumstances on the ground indicated that new regulatory initiatives were desperately needed.

Begin with the money. The federal budget account which contains funding for investment in environmental protection has shrunk faster than any other line item, with the possible exception of certain forms of foreign assistance. As a result of this financial starvation of basic public health and natural resource functions, we face serious risk of ecological collapse. The accumulated deficit on maintaining sewers and sewage treatment facilities is now in the hundreds of billions of dollars, and as a result the progress we made from 1972-2002 in cleaning up the nation's waterways has gradually begun to reverse and may shortly go into dramatic backsliding. The National Park Service and the Fish and Wildlife Service have had to shut down routine public service functions, forgo badly needed infrastructure maintenance, and now, in the case of FWS, are actually shuttering units of the system. The Administration's routine plea when it is taken to Court for failing to carry out the ESA is, "we don't have the resources." Enforcement activities, whether of the Clean Air Act or the Surface Mining Reclamation Act, are a fraction of the level needed to deter violators.

And even where resources exist, scientists and other public servants have been censored, intimidated, muzzled, and driven from agency after agency. The most spectacular example, perhaps, was the shuttering of EPA's regional library system, even when Congress had appropriated funds for the system, and even after Congress specifically ordered the libraries reopened. Political interference with the wildlife biology at the Department of the Interior reached such heights under departed Assistant Secretary Julie

McDonald that the Department was forced to reopen and redo many of its most fundamental biological assessments under the ESA.

And the legal framework of environmental standards and citizen empowerment which existed and blocked most of the Bush agenda in areas like clean air and water was not complete when the Administration took office – it is in those areas, where Madison's concepts of distributed power were least fully fledged – that the real, on the ground environmental damage has been done.

One arena where Congress supinely has refused to play its role is in the regulation of oil and gas drilling on public lands, or private lands underlain by public mineral rights. In 2005 Congress exempted many of these operations from the protections of the Safe Drinking Water Act. As a result all over the West, irresponsible oil and gas operators using such potentially deadly technologies as coal bed methane extraction are destroying wildlife habitat and putting private landowners and ranchers at risk.

And the Administration's similar refusal to protect communities, private property and waterways from the ravages of mountain mining in Appalachia has left behind a similar legacy – here again, Congress has refused to play its role, and the Courts have not made up the difference – in part because the underlying legal framework inherited from previous administrations was inadequate.

Clearly in the area of hard rock minerals the virtually unregulated state of the industry continues as under previous Administrations – the Mining Law of 1872 in all its antique glory still reigns – but here, too, the fault is largely that of Congress.

Congress must act to ensure that the mining of coal, oil and natural gas – and hard rock minerals – can only occur with proper environmental safeguards. It must give affected private property owners and communities the right to ensure enforcement of these regulations even in the absence of an Executive branch committed enforcement of these safeguards. In particular, those affected by these mining activities need a guarantee that a proper environmental assessment is done, and publicly released, before mining can begin, and that citizens have access to the Courts to ensure that mining companies do not ignore the rules when they find a complaisant federal or state executive.

Some in industry will lament that such regulation will reduce our supply of needed oil, gas and other minerals. But proper regulation will actually enable us more rapidly to exploit appropriate resources, such as many of the deep shale natural gas plays now adding so spectacularly to our supply. New York State just imposed a temporary moratorium on permitting such drilling – because it lacks an appropriate environmental assessment. If strong, effective regulations are put in place, then drilling companies can know what the rules are, where drilling is welcomed and where it is not, and bring new supplies to market more rapidly. Similarly, we have lots of coal we can mine safely – but in the absence of regulation, mining companies simply go after that which they can get most cheaply and easily, even if the cheapness is an artifact of the costs they impose on their neighbors.

THE BROADENING CONSENSUS

Another positive legacy of the last eight years is a far broader, deeper public consensus on most of these issues. Whether it is the need to complete the clean up of currently grandfathered, polluting power plants or the importance of places like Otero Mesa and the Road Plateau for wildlife, not hydrocarbons, the Bush Administration's stunning overreaching has engaged new, grass-roots, bipartisan forces to battle for the future of America's air, water and landscape. The churches – evangelical and liberal – have committed themselves on issues from sprawl to global warming in a much more fundamental way. Hunters and anglers, mostly conservative and Republican, are battling the BLM, not just the Sierra Club. A new generation of student activists are making climate change their generation's challenge. Major sectors of the business community are pouring billions of dollars into clean technologies. When Phillip Anschutz and Boone Pickens pour billions into wind power, it's no longer "alternative energy" – it's the future. Labor unions no longer see pollution as the smell of money, as they once did – they see clean, green jobs as the key to a revitalized manufacturing sector. It was the Teamsters who took the lead in cleaning up air pollution by modernizing the ways goods are shipped from crane to warehouse in the Ports of Los Angeles and Long Beach.

Which are the two states who have taken the strongest stand against coal fired power plants? California, yes, but rock-ribbed, red state Idaho second. Which Western Governor has most articulately called for us to abandon our dependence on oil? Utah's John Huntsman, the son of an oilman. What is America's wind capital? Sweet Water, Texas.

The forces of the past, the forces the Bush Administration tried to enthrone in power by creating a secretive, anti-scientific and unaccountable executive cabal, have indeed enjoyed preferential access to what seemed to be the corridors of power for the last eight years. The tale of the Vice-President's secret energy task force and Enron's influence over it have been told too many times. But while they were wining, dining, and, yes, bedding Interior Department executives, America was changing, and big oil, coal, and the mining companies were becoming isolated from those changes – they are on the wrong side of the future.

MADISON'S LESSON

Why have the checks and balances of our Constitution worked so well in the environmental arena? Why is the Bush legacy here – except for the loss of capacity – so relatively easy for the next Administration to undo? Why do we not have an environmental meltdown comparable to what has happened in health care of the economy?

I am going to suggest that the key reason is that most environmental regulations rests on statutes passed in the 1970's, not the 1930's, and these laws were imbued with a healthy

and Madisonian distrust of the Executive Branch of government. Far more than the economic regulatory framework which has failed us so spectacularly in the last few months, the environmental safety net has redundancy built in. Congress sets affirmative standards and objective outcomes, rather than trusting broadly to agency discretion. The word "Shall" and specific deadlines riddle the Clean Air, Clean Water and Endangered Species Acts, giving federal courts clear standards for when federal agencies have abused their discretion. States were clearly protected from unwarranted federal preemption by specific language establishing their right to go beyond the federal standards.

And most important, citizens were empowered, empowered by requiring public environmental reviews, and then empowered by being given access to the courts. Where that citizen access has been lacking – for example in the mineral leasing and mining areas – the system has failed.

It is not accidental that Vice-President Cheney has built his efforts to weaken environmental law on the framework of a unitary and unchecked executive and a parliamentary politics that Madison and the Founders would have abhorred.

The last eight years are a hopeful, but cautionary tale. Madison beats Cheney – but only when Congress turns Madison's vision into detailed legislative architecture. That is the challenge for the next Congress.

Senator BOXER. Well, that sure says it.

Senator Baucus, I want to take a minute here before we go to our next witness to fill you in what has been happening.

We had planned this a very long time ago, and we had received word that we were going to have two witnesses, Robert Meyers, Principal Deputy Assistant Administrator from the EPA, and Lyle Laverty, Assistant Secretary for Fish and Wildlife. Neither of them have shown up. They told us, one said they didn't want to—where is my quote. They called and said they are not here, the EPA, because they didn't want to be questioned on the issues raised at yesterday's hearing, in which Senator Whitehouse pretty well asked a lot of hard questions on the waiver, and we had other questions. And Interior said they couldn't get their testimony cleared.

Now, I have never seen anything like this. I went back to essentially the oath they took. They were asked would they—you know how we always ask nominees will you always come when you are asked. This makes 6 months since Mr. Johnson has been here. I know you have a very important hearing on Libby here. So I wanted to give you the sense of what is going on.

We will go to your opening statement at this time, and then we will resume the hearing with Ms. Clark. So please go ahead.

OPENING STATEMENT OF HON. MAX BAUCUS,
U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Well, thank you, Madam Chair. I am very disappointed that the Administration has taken that course of action.

Clearly, when agencies cooperate and attend, there is a much better result for the public good.

Senator BOXER. Of course.

Senator BAUCUS. Because at the very least, it enables the relevant agency to come up with ways to make, to improve upon something they perhaps not have done or should have done in the past. To stonewall causes the public to have even less confidence in government. All of us are public servants. The American public are our employers, who we work for. We are just the hired hands. We are just employees, whether it is us in the Senate or whether it is the people who work at EPA, OMB, the Administration or what not, because people have entrusted us with making decisions that affect their lives. I am just very disappointed, to say the least, the EPA has chosen that course of action.

I thank you, though, for holding this hearing because it is important. Accountability is one of the hallmarks of good government, and oversight hearings I think are extremely important in the interests of good government. I have been increasingly disappointed over the last 8 years that sound science and public health are waning at the EPA.

Protecting people and the environment is the mission of the EPA. It should be the most important consideration in whatever EPA does, whether it is writing regulations or cleaning up a Superfund site. When EPA strays from its mission in order to promote special interests or to cut costs, people get hurt.

There is no better example of this than the situation at Libby, Montana. You have heard me talk many times about the tragic circumstances of Libby. Libby, Montana is a town plagued by decades

of asbestos contamination. Hundreds have died, died of asbestos-related disease, and many hundreds more are sick and dying.

Tomorrow, this Committee will hold an important hearing on the failure of EPA to keep public health as the most important goal during the cleanup of Libby. Madam Chairman, I thank you for holding the hearing tomorrow and for allowing me to chair that hearing. This hearing highlights the concerns about the Bush administration's environmental record and EPA's conduct with respect to Libby. The hearing tomorrow is another example of the topic discussed here today.

My staff and the Committee staff have conducted an extensive investigation of EPA's handling of Libby, Montana and its failure to declare it a public health emergency. This is a relevant topic for today's hearing. I would like to ask consent to enter some of the documents uncovered during the investigation in the record today. I have them with me. Madam Chairman, these are some of the documents we have uncovered, and believe me, they are alarming. Let me read them.

Senator BOXER. Without objection, they will go into the record.

Senator BAUCUS. I thank you, and I thank the Chair again for allowing me to speak today, and also for chairing the hearing tomorrow, having the hearing tomorrow. It is not only tragic, it is stunning in its scope of what EPA has not done, particularly in conjunction with OMB.

In fact, in many respects the EPA was for a while on the right track. This was a few years ago, around 2001 and 2002. And then something happened, and the something that happened is that the White House just put the kibosh on EPA's actions to not only cleanup Libby, but to declare a public health emergency. And then the staff all recommended strongly that EPA declare a public health emergency. And even Christine Todd Whitman, when she was then Administrator, so agreed. But then the White House intervened and said no, and they said no because they did not want to pay the cost of cleaning up asbestos in Libby and also paying the cost of cleaning up asbestos products in other parts of the Country, products that were manufactured with asbestos in Libby, Montana. The company is W.R. Grace. W.R. Grace is worse than reprehensible in its conduct here.

But anyway, the point is tomorrow to get this out on the record so the public knows what happened. Hopefully, it will lead to a result where we do get this problem addressed, with a public health emergency declared so that asbestos products are addressed in attic insulation, other installations with asbestos products can be removed, not just in homes in Libby, Montana, but also in other parts of the Country.

So thank you very much.

Senator BOXER. Senator, I just want to say I know you have such a burden on your shoulders with your work here, but you have carried this Libby, Montana issue. I have watched you, you know, seriously fight and fight and fight for justice. I just want you to know, as Chair of this Committee, that I am so proud to have you on this Committee and to have your voice because, you know, there are certain things in life where there is right and there is wrong. It is just so obvious.

And people sometimes say, well, why would the Administration not do the right thing? Well, I think you pointed it out. Either they don't want to spend the money or the special interests are behind it, and they don't want any action. We just found out that in perchlorate—you know, that terrible toxic chemical that interrupts the thyroid and harms kids and damages their brain—we just found out that EPA is not going to set a standard.

Now, their own scientists have told them you must set a stand between one and six parts per billion. There are 35 States that suffer from this toxin. And kids are suffering brain damage. This is extraordinary, and they are walking away from it.

So there is a pattern here, and that is the purpose of this hearing is, and your continuing it tomorrow, is to step back and look at all the work we have to do just to repair the damage that was done these past 8 years.

Senator BAUCUS. Thank you very much.

Senator BOXER. Thank you.

All right, Ms. Clark.

STATEMENT OF JAMIE RAPPAPORT CLARK, EXECUTIVE VICE PRESIDENT, DEFENDERS OF WILDLIFE

Ms. CLARK. Thank you, Madam Chair. I am happy to be here today. Members of the Committee, I am Jamie Rappaport Clark. I am the Executive Vice President of Defenders of Wildlife. I do appreciate the opportunity to testify today.

I have to say when I was first told, as soon as I got here, about the Administration not coming to testify, I was dumbfounded, to say the least. I am glad I was given a heads up, because having a long career in the Federal Government as a wildlife biologist before accepting a Presidential appointment as Director of the Fish and Wildlife Service in the last Administration, it never dawned on me that you could actually say no, that you wouldn't come. Or it never dawned on me that I wouldn't come when asked to explain decisions made by our agency or by the executive branch. So that is quite surprising. I can assure you that coming up here to explain ourselves wasn't always comfortable.

I would, however, like to draw a fairly bright line between those who have refused to testify and those former career colleagues that have worked incredibly hard and quite doggedly over these last 8 years to protect wildlife and special places. I think they have done us all proud.

Over the past 25-plus years, I have seen the Endangered Species Act and how it works from a variety of different perspectives, both inside and outside of government. Based on this experience, I can say that during these last 8 years, the Administration has largely abandoned our longstanding bipartisan commitment to protect endangered and threatened species and their habitat.

It has slowly starved ESA programs of critical resources. It has slow-walked the protection of endangered and threatened species by listing fewer than in any previous 8-year period. The Administration, as the Interior Department's Inspector General and Government Accountability Office has found, has repeatedly politically interfered with the science supporting endangered species decisions.

You will recall 18 months ago after documents were leaked to the press, the Administration denied outright, they denied that it was considering a massive rewrite of ESA through regulation changes. But the proposals published last month certainly demonstrate that it never really did abandon efforts to undermine and weaken the ESA.

The section seven consultation requirements are the heart of protections of the Endangered Species Act, but the Administration is now proposing to allow any Federal agency to avoid consultation if the agency unilaterally—unilaterally—decides that an action it sponsors is not anticipated to result in take of an enlisted species, and its other effects are insignificant or unlikely.

Now, that might sound reasonable—in fact, it does on its face. It sounds reasonable. Why have consultation if there are no effects? But figuring out whether an action will cause take or other effects often is the key issue and it can be a difficult one to solve. On many occasions, the questions of whether take will occur is not readily apparent. To know that requires expertise and in-depth knowledge of a species' biology and behavior.

Current rules allow Federal agencies to decide whether there will be adverse effects in their actions, but the agencies must obtain the concurrence of the Fish and Wildlife Service or the National Marine Fisheries Service. Under this Administration's proposal, however, independent species experts at one of the services would no longer review Federal agency judgments about the effects of actions that it sponsors. This framework lets the fox guard the chicken coop.

Shifting the responsibility for determining the effects Federal actions will have on listed species to the agency proposing those same actions, when those agencies have potentially conflicting missions and priorities, will clearly undermine progress toward species recovery. It would be much more effective, and I submit efficient, to appropriately fund and staff our existing wildlife agencies and programs to ensure that they can carry out section seven consultations in a timely and responsible manner.

The Administration is also proposing to drastically narrow the consideration of Federal agency impacts even when consultation does occur. Using some novel concept of essential causation, the Administration would eliminate consultation for Federal actions that contribute to effects on a species, perhaps even substantially if that effect would still occur to some extent without the actions.

Even though the scientific evidence builds every day that greenhouse gas pollution is a significant cause of adverse effects on wildlife, this Administration would eliminate by fiat by statement, any meaningful consideration of the cumulative impacts of this pollution or allow for possible solutions.

But the changes they propose go well beyond global warming. They would make it far more difficult to address all types of cumulative impacts on wildlife so that all listed species today, almost 1,400 of them, and their habitat could be quietly destroyed a little bit at a time, even if the destruction eventually adds up to losing the species altogether.

Perhaps even more harmful are the supposed clarifications proposed by the Administration to the official list of endangered and

threatened species, which put into place a radical new interpretation of the law. The practical effect of the revisions would be to write into law an opinion of the Interior Solicitors Office, the Interior Department's Solicitor, which reverses more than three decades—the entire implementation of law since it was passed—but more than three decades of understanding, by concluding that a species eligible for listing may be given protection only in some of the places it occurs and not in other places.

For nearly 35 years before the Solicitor came along with this new novel argument, any species that met the Act's definition of an endangered species or a threatened species received the Act's protection wherever it occurred. With the stroke of a pen, a political appointee reverses long-settled understanding and did it just with the stroke of a pen—no opportunity for public engagement or public comment.

Two years ago, the Senate wisely refused to consider legislation that included some of the same concepts that are now found in the Administration's proposals today. Congress should stop these proposals once again.

Thank you, Madam Chair. I am happy to answer any questions.

[The prepared statement of Ms. Clark follows:]

TESTIMONY OF JAMIE RAPPAPORT CLARK
EXECUTIVE VICE PRESIDENT
DEFENDERS OF WILDLIFE
BEFORE THE
UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
HEARING ON
BUSH ADMINISTRATION ENVIRONMENTAL RECORD AT
DEPARTMENT OF THE INTERIOR AND ENVIRONMENTAL PROTECTION AGENCY
SEPTEMBER 24, 2008

Madam Chairwoman and members of the Committee, I am Jamie Rappaport Clark, Executive Vice President of Defenders of Wildlife. Founded in 1947, Defenders of Wildlife has over 1.1 million members and supporters across the nation and is dedicated to the protection and restoration of wild animals and plants in their natural communities.

Prior to coming to Defenders of Wildlife, I worked for the federal government for almost 20 years, both at the Department of Defense and the Department of the Interior. I served as Director of the U.S. Fish and Wildlife Service from 1997 to 2001. Thus, I have seen the Endangered Species Act from different perspectives: that of a federal agency employee working to comply with the law; that of a federal agency head charged with key responsibilities in overseeing and implementing the law; and now that of a conservation organization leader working to ensure that the law meets its promise of conserving threatened and endangered plants and wildlife.

The common lesson I have drawn from all of these experiences with the Endangered Species Act is that 35 years ago Congress and this nation put in place the world's most farsighted and important protection for imperiled wildlife and plant species and the ecosystems on which they depend. For more than three decades, the Endangered Species Act has helped rescue hundreds of species from the catastrophic permanence of extinction. But the even greater achievement of the Endangered Species Act has been the efforts it has prompted to recover species to the point at which they no longer need its protections.

It is because of the act that we have wolves in Yellowstone, manatees in Florida and sea otters in California. We can marvel at the sight of bald eagles in the lower 48 states and other magnificent creatures like the whooping crane, the American alligator and California condors largely because of the Endangered Species Act. Beyond rescuing these and other treasures, this landmark law protects many less well-known and seemingly insignificant plants and animals that have everyday value for humans because they play crucial roles in their ecosystems that help sustain all life on Earth.

A 35-Year Bipartisan Legacy of Protection -- Abandoned and Undermined

Unfortunately, during the last eight years the Bush administration has largely abandoned, and in many cases has actively undermined, our longstanding bipartisan commitment to protect imperiled species.

The Bush administration has slowly starved Endangered Species Act programs of critical funding. For example, the administration's fiscal year 2009 request for the Fish and Wildlife Service's core endangered species program was at least 33 percent ($71.5 million) below the minimum level needed. The consistent and continuing failure by the administration over the last eight years to request adequate resources in the budgets it presented to Congress has meant that the number of Fish and Wildlife Service endangered species program biologists has dropped by at least 30 percent since the end of Fiscal Year 2001.

Similarly, the administration has done its best to erase the "Thin Green Line" of defense held by the Fish and Wildlife Service Office of Law Enforcement that is responsible for enforcing federal wildlife laws and international treaties, including, importantly, upholding the Endangered Species Act and investigating crimes involving threatened and endangered animals and plants. Numbers of all-important special agents have plummeted to a 30 year low, down from a high of 238 in 2002 to 184 in 2008, a 23 percent loss and nearly 30 percent below the authorized number of 261.

The record of the Bush administration amply demonstrates that it decided to slow-walk the listing of species under the Endangered Species Act. Fewer listings of endangered and threatened species have occurred under this administration than in any previous eight-year period, and there are more than 280 species that are currently candidates for protection. These species are ones that the Fish and Wildlife Service already has determined warrant initiation of the listing process. The net result of the administration's policies has been to thwart protection for hundreds of species deserving protection under the act. Species such as jaguars, wolverines and pygmy owls have had Endangered Species Act protections denied or removed by the Bush administration on the dubious and illegal grounds that those species are found in Canada or Mexico and, consequently, protecting them in our own country is not necessary.

The Bush administration also has hamstrung recovery of many species by making decisions based on political agendas rather than scientific data. The Interior Department's Office of Inspector General found that former Deputy Assistant Secretary of the Interior for Fish and Wildlife and Parks Julie MacDonald was " heavily involved with editing, commenting on, and reshaping the Endangered Species Program's scientific reports from the field." Three months later, the Fish and Wildlife Service ended up identifying eight decisions in which it found Deputy Assistant Secretary MacDonald's involvement might have been inappropriate.

In addition, the Government Accountability Office (GAO) testified on May 21, 2008, before the House Natural Resources Committee that administration officials other than Deputy Assistant Secretary MacDonald may have inappropriately influenced endangered species decisions. According to the GAO, if the Fish and Wildlife Service had used broader criteria to investigate the extent of political interference in endangered species programs, then they would have likely found additional decisions that warranted review and possible revision. Perhaps more troubling even than these findings is that the GAO found the continual questioning of biologists by political appointees about

their scientific reasoning eventually taught the biologists to anticipate what might be approved and to write their decisions accordingly.

The scope and magnitude of political interference revealed by the Interior Department's Office of Inspector General and the GAO interviews is unprecedented in my experience, but no longer surprising given the unrelenting hostility the Bush administration has shown to the conservation of endangered species. Last year, documents leaked to the press revealed that the administration was considering sweeping changes to the rules that implement the Endangered Species Act. Many of these changes bore striking resemblance to provisions in the failed legislative attempt by former Representative Richard Pombo to dismantle the Endangered Species Act.

While Interior Department officials back peddled as a result of the uproar by Congress and the American people that accompanied the discovery that the administration might be contemplating a massive re-write of the Endangered Species Act by administrative means, the regulatory proposals published last month demonstrate that the administration never abandoned its efforts to weaken the act.

The Bush administration regulatory revisions exposed last year and its August 15, 2008, proposed rule changes have much in common. Both sets of proposals would reduce the scope of Section 7 consultation under the Endangered Species Act, reduce the role of the Fish and Wildlife Service and National Marine Fisheries Service in the act's implementation, and weaken the substantive standards that apply to federal agency actions under the law.

The Section 7 consultation requirements are the heart of the protections of the Endangered Species Act. By requiring federal agencies to work with the Fish and Wildlife Service or National Marine Fisheries Service to insure that an agency's actions do not jeopardize the existence of a species or adversely change or destroy habitat critical to a species, the Act's consultation requirement provides an essential safety net for imperiled plants and animals.

Consultation under Section 7 may be either "informal" or "formal." For actions that "may affect" listed species or designated critical habitat, informal consultation allows federal agencies sponsoring the actions to assess, in conjunction with one of the Services, whether formal consultation is required. Formal consultation is required unless the action agency finds, with the written concurrence of one of the Services, that the proposed action "is not likely to adversely affect" the species or habitat. This finding can be made only if all of the reasonably expected effects of the proposed action will be beneficial, insignificant, or discountable. In those cases in which one of the Services is unable to agree with a federal agency that an activity is not likely to adversely affect listed species, the Service and the action agency may use the informal consultation process to work together to gather further information or to identify modifications to the activity that will avoid adverse effects.

Informal consultation provides more than just expert review and an opportunity for information sharing. It also can aid in recovery. Informal consultations can lead to recommendations for project modifications, providing crucial safeguards for listed species. Experts in the Services familiar with recovery plans may identify actions benefiting listed species that can be carried out on or near the project site, including habitat protection, modification or improvement.

Over the years, the Section 7 process of informal consultation between the Fish and Wildlife Service or National Marine Fisheries Service and other federal agencies has been one of the act's most successful provisions in reconciling species conservation needs with other objectives. For example, progress towards the conservation of species such as the grizzly bear and piping plover would have been virtually inconceivable without the beneficial influence of Section 7. Yet, the net effect of last month's proposed changes will almost certainly be to make species recovery less likely rather than more likely.

Removes Crucial Safeguards for Imperiled Wildlife and Habitat

The Bush administration's August 15th proposal allows a federal agency to avoid Section 7 consultation if the agency unilaterally decides that an action it sponsors is not anticipated to result in death, harm or other "take" of a threatened or endangered species, and that the action has inconsequential, uncertain, unlikely or beneficial effects. The determination of whether take or other effects will occur often is not readily apparent, and requires in-depth knowledge of the affected species' "essential behavioral patterns, including breeding, feeding or sheltering."

Current rules allow federal agencies to make such determinations, but the agencies must obtain the concurrence of the Fish and Wildlife Service or National Marine Fisheries Service. Frequently, this requirement for concurrence by one of the Services has led to a better understanding of an activity's effects, through the collection and analysis of additional information to assess whether take is likely. Under the administration's proposal, however, independent species experts at one of the Services would no longer review federal agency judgments about the effects of actions that it sponsors.

The administration's proposed framework lets the fox guard the chicken coop. Action agencies often have their own institutional biases and priorities that may not be consistent with conservation of threatened and endangered species. Indeed, many federal agencies lack expertise in species conservation and may not even have biologists or botanists on staff. There is no evidence provided in the proposed rule to support the claim that other federal agencies are willing and able to effectively review species impacts without input from the Fish and Wildlife Service or National Marine Fisheries Service.

These changes will almost certainly result in more species being put in jeopardy. Unfortunately, the proposed changes follow an all too familiar pattern by the administration. The so-called "joint counterpart regulations," which were published in 2003 to streamline the Section 7 consultation process for logging and thinning projects on public lands under the National Fire Plan, provide an instructive example. They allow the Forest Service and Bureau of Land Management to self-consult on impacts to listed species rather than obtain concurrence from Fish and Wildlife Service or National Marine Fisheries Service. Unlike the Bush administration's latest proposed rule, however, the National Fire Plan counterpart regulations required a training program for Forest Service and BLM staff who make determinations on species impacts and established a program by which the Services would periodically monitor action agency performance. These minimal safeguards clearly have been insufficient. A recent Fish and Wildlife Service and National Marine Fisheries Service review of self-consultation under the Fire Plan counterpart regulations found that the Forest Service and BLM failed to properly account for species impacts in their unilateral consultations 62 percent of the time.

The dismal results of the National Fire Plan experiment hardly warrant abandonment of training and monitoring requirements or expansion of the approach to all federal agencies. Yet the latest proposal by the Bush administration would do just that by providing no safeguards whatsoever. The proposal contains no requirements for federal agencies to make determinations based on the judgment of qualified biologists, to provide documentation to support the determinations, or to provide any notice or opportunity to the Fish and Wildlife Service or National Marine Fisheries Service to review the documentation and determination.

While the federal action agency would theoretically still be liable if take occurs, under the August 15th proposed rule, it would take a citizen suit against the agency to impose that liability. Citizens and courts would be forced to provide the independent checks and balances now provided by Fish and Wildlife Service and National Marine Fisheries Service experts. This could spur an increase in litigation, which in turn would raise costs and delay many valuable federal projects. Moreover, the threat of liability does not necessarily guarantee sound decision making in itself. Absent review by the Fish and Wildlife Service or National Marine Fisheries Service, agencies may act in good faith in evaluating species impacts and still make an erroneous decision that could cause irreversible harm to wildlife. The possibility of liability will do little in such circumstances to ensure adequate species protections, unless the agency decides affirmatively to request independent expert review by one of the Services.

Under the Bush administration's August 15th proposed rule, a federal action agency may voluntarily request informal consultation with, and concurrence by, the Fish and Wildlife Service or National Marine Fisheries Service on its determination that an activity is not likely to adversely affect a threatened or endangered species. The proposal, however, ties the hands of the Services in the process by imposing an arbitrary 60-day limit (subject to a possible extension of 60 days) on completion of the informal consultation; otherwise, the project can move forward regardless of the impacts on listed species. This proposal will increase the likelihood that harmful agency actions could slip through unchecked by Endangered Species Act consultation safeguards.

Allowing federal agencies to decide for themselves, without checking with wildlife biologists at the U.S. Fish and Wildlife Service or National Marine Fisheries Service, whether their projects will harm endangered species represents a step backwards not only for endangered wildlife conservation, but also for federal agencies trying to move their projects forward.
The proposed regulations are an open invitation for agencies to cut corners and take advantage of the changes to push through damaging projects. Without any reporting requirement or ability to know what is happening across the range of a species, it will be almost impossible to monitor the condition of a species over time.

Shifting the full responsibility for determining the effects federal actions will have on threatened or endangered species to the federal agencies proposing those actions, when those agencies have potentially conflicting missions and priorities, will clearly undermine progress towards species recovery. It would be much more effective and efficient to appropriately fund and staff the existing wildlife agencies and programs to ensure they can carry out Section 7 consultations in a timely and responsible manner.

Narrows Consideration of Impacts Due to Federal Actions

The Bush administration also is proposing to drastically narrow the consideration of impacts of federal actions even when consultation occurs. In announcing the August 15th proposal to change implementation of Section 7, Interior Secretary Kempthorne made clear that the revisions were intended to put off limits any consideration of the impacts of greenhouse gas emissions on polar bears or other wildlife affected by global warming. In the words of the proposal: "This regulation would enforce the Services' current view that there is no requirement to consult on greenhouse gas (GHG) emissions' contribution to global warming and its associated impacts on listed species (e.g., polar bears)."

The administration purports to address what it views as the "problem" of consultation dealing with global warming impacts on species. In fact, the proposed changes would illegally sweep under the rug any consideration of the very real threat global warming poses to polar bears and other wildlife by barring evaluation of impacts and possible solutions across the board. Moreover, these changes go well beyond global warming. The proposed changes are sweeping and potentially harmful to all listed species and their habitats... They would make it far more difficult to address all types of cumulative impacts on wildlife. They would allow endangered species and their habitat to be quietly destroyed a little bit at a time, even if the destruction eventually adds up to losing the species altogether.

The administration's proposal narrowly defines what effects of an action are subject to review under the Endangered Species Act. Specifically, the definitions of "effects of the action" and "cumulative impacts" in the proposed rule limit application of Section 7 consultation to those federal agency actions that are an "essential cause" of the effects and for which there is "clear and substantial information" that they "are reasonably certain to occur." The proposal's new concept of essential causation would eliminate consultation for federal actions that contribute to an effect on a species, perhaps even substantially, if the effect would otherwise occur to some extent without the federal action. Consideration of global warming impacts on species is thus simplified to the point of absurdity: Actions that contribute to the extent, duration or severity of global warming would escape review entirely under the Endangered Species Act as long as global warming would otherwise occur to some extent.

Indeed, the preamble to the rule singles out greenhouse gas emissions as an example of an effect that would not be evaluated under Section 7 because, in the Bush administration's view, (1) there is not clear and substantial information that the effects of the emissions are an essential cause of effects to polar bears by polar ice cap melting, and (2) even if it is an effect covered by Section 7, the proposal states that the Section 7 consultation requirements do not apply if the "effects are not capable of being meaningfully identified or detected in a manner that permits evaluation." The preamble asserts that this is the case with greenhouse gas pollution.

Mounting scientific evidence confirms that greenhouse gas emissions are a significant cause of adverse effects on wildlife, including the recently listed polar bear. Although the precise impact of a particular project's emissions may be presently unknowable, the administration's proposal essentially eliminates any meaningful consideration of the cumulative impacts of this pollution. Global warming clearly poses new challenges for regulatory efforts to protect threatened and endangered species, but the administration's response to these challenges—ignoring the potential impact of greenhouse gases on wildlife altogether—is myopic and misguided. The proposal signals that the Bush

administration not only refuses to take action to address the impacts of global warming on polar bears and other listed wildlife, it also wants to prevent future administrations from doing so.

Disguises a Radical New Interpretation of the Law as Clerical Edits

On August 5, 2008, the Bush administration unleashed an attack on the Endangered Species Act that is more subtle, but no less harmful, than the changes proposed to Section 7 just ten days later. By very quietly proposing changes to column headings and descriptions in the official "Lists of Endangered and Threatened Wildlife and Plants" found in the regulations implementing the Endangered Species Act, the administration is trying to disguise a radical new interpretation of the law as minor clerical edits.

In its rulemaking, the administration inaccurately claims that none of the proposed changes are regulatory in nature, and that the changes are simply intended to rename and reorganize the columns in the lists to clarify the types of information being presented, update the regulations to include current practices and standards, and ensure that the regulations and lists are easy for the public to understand.

The practical effect of the proposed format revisions, however, would be to codify the legal conclusions of a Solicitor's Opinion dated March 16, 2007, and put into force significant and substantive changes to the long-settled understanding of how the Endangered Species Act applies to species that have been designated as "endangered" or "threatened." The Solicitor's opinion reversed more than three decades of administrative practice and understanding, without any opportunity for public input.

The 2007 opinion concluded that any entity eligible for listing under the Endangered Species Act (i.e., a species, subspecies, or vertebrate "distinct population segment") may be given the protection of the Act only in some places and not in others. Prior to the Solicitor's opinion, the consistent and unvarying administrative practice for nearly 35 years was that any taxon that met the act's definition of an "endangered species" or a "threatened species" received the act's protection wherever it occurred. The opinion reversed this settled understanding.

The Bush administration's proposed revisions effectuate the Solicitor's novel interpretation of the law by making subtle, but important changes in two sentences explaining the "historic range" column in the official species lists. Significantly, neither of the changes is explained, or even acknowledged, in the preamble to the proposed rule. Instead, they are buried in the text of the actual revised regulations, where they are easily overlooked.

In the past, the first sentence explaining the "historic range" column (and its precursor) has always stated that the column "does not imply any limitation on the application of the prohibitions of the Act." The administration now, however, proposes for the first time to revise this sentence to make clear that it should not be inferred from the "historic range" column that the act's prohibitions actually apply to any species listed.

The second sentence explaining the "historic range" column (and its precursor) has always made it clear that the act applies to every individual organism of a species wherever it may occur by stating, "Such prohibitions apply to all individuals of the species wherever found." The administration's

August 5th proposed regulations would change this sentence by inserting without explanation the word "listed" so that the act would apply "to all individuals of the listed species wherever found."

The unrevealed significance of this seemingly innocuous change is that the term "listed species" has a meaning in the proposed rule that is very different from the meaning of "species" in the current regulations. Under current regulations and longstanding practice, Endangered Species Act prohibitions apply to every individual organism of any taxon on the endangered or threatened species list wherever it occurs. In contrast, the only individual organisms of any taxon that would be protected by the act under the Bush administration's proposal would be those that occur in the geographic area designated in a new "where listed" column. This substantive and significant revision to the official lists of what is protected under the Endangered Species Act seems calculated to reinforce the Solicitor's radical new interpretation of the law. The practical effect for protection of any species designated as threatened or endangered in the future will be to exclude individual organisms, populations, and entire portions of a species range from protection under the Endangered Species Act.

Eleventh-hour Proposals That Should Be Stopped by Congress

The Bush administration's eleventh-hour proposals with less than 120 days left in office are clearly an effort to secure dramatic changes to the Endangered Species Act that the administration and its allies have been unable to achieve through legislation. The proposed re-write of Section 7 consultation attempts to eviscerate one of the most important provisions of the Endangered Species Act, while the proposed changes to the lists of threatened and endangered species tries to lay a foundation for vastly reducing the amount of habitat protected for threatened and endangered species.

Taken together, the two proposals dramatically alter the way the Endangered Species Act works without adequate public debate or consideration by Congress. They are anything but narrow or minor in scope. Instead, they are a dangerous assault on America's living heritage that could affect us for generations to come.

Two years ago, former Representative Richard Pombo authored legislation that included some of the same concepts that now can be found in the Bush administration's proposals, such as federal agency self-consultation and deadlines that place the burden of delay on listed species protection.

The Senate wisely refused to consider those radical changes to the Endangered Species Act. Congress should stop these proposals once again.

Thank you for considering my testimony. I'll be happy to answer questions.

Senator BOXER. Thank you very much.

Reverend Jim Ball, President and CEO, Evangelical Environmental Network. Welcome.

STATEMENT OF REVEREND JIM BALL, PRESIDENT AND CEO, EVANGELICAL ENVIRONMENTAL NETWORK

Reverend Ball. Chairman Boxer, Ranking Member Inhofe—oh, he is not here—distinguished members of the Committee, my name is Reverend Jim Ball, and I am President and CEO of the Evangelical Environmental Network. It is an honor to testify before you today.

I just want to highlight that we had passed out issues of our latest magazine, and there is a photographic essay on endangered species in the issue. I would love to have it included in the record.

Senator BOXER. Without objection.

Reverend Ball. My purpose here is to offer moral guidance on protecting the environment, which can be found in reflecting upon the belief that we are made in the image of God. In Genesis 1:26, it states: "Then God said, let us make humanity in our image, in our likeness, and let them rule over the fish of the sea and the birds of the air, over the livestock, over all the earth, and over all the creatures that move along the ground."

This text helps us understand the tremendous power God has given us as human beings, power to rule, power that can easily be misused. It is clear, however, that God intends us to use this power in a certain way. With our God-given freedom, we are to image or reflect how God would rule on earth, always understanding that any authority or power we have does not come from us.

How we treat both who and what is within our control, within our power, is a true test of our moral character as individuals and as a society. How we treat who we have the power to help or harm is governed by some basic moral principles. We are to: love our neighbors; do unto others as we would have them do unto us; and protect whom Jesus has called "the least of these," described elsewhere in scripture as orphans, widows, and aliens or foreigners—precisely those who don't have power and are therefore vulnerable to those who do.

As Jesus helped us see when asked what was the greatest commandment, all of these moral principles ultimately flow out of our chief aim as human beings: to love God with all of our heart, soul, mind and strength. The major way we love God is by doing God's will, which is another way of saying that we are to freely be whom God created us to be: images or reflections of how He would do things on earth. Morally, this is how we are to exercise power, as a loving and just God would.

In the United States, how citizens and the government can legally exercise power is determined by you, the legislators, in keeping with the Constitution. When it comes to environmental concerns, how can you or members of the executive branch exercise power on behalf of the citizenry in keeping with the basic moral principles of loving our neighbors and protecting the most vulnerable?

Take lead as an example. As the best scientific evidence demonstrates, it clearly causes harm to children. The current standard

in 1978 is clearly outdated and should be strengthened or improved. My hope is that when the EPA issues their final ruling in mid-October, the EPA Administrator will abide by the unanimous recommendations of the EPA's own scientific panel, as well as his scientific staff. The same pattern should be followed with ozone and particulate matter. Other pollutants to highlight that are not currently regulated, but should be, are mercury and greenhouse gases.

Thus far, I have briefly discussed how we are to treat who we have the power to help or harm. How we treat what we have under our control, including God's other creatures and the natural resources of God's earth is also very much wrapped up in being made in the image of God, of doing God's will.

In keeping with our moral obligations as image-bearers, the Endangered Species Act provides for the legal protection of God's other creatures within our power, helping to ensure that the blessing of life and sustenance God has given to his other creatures is not turned into a curse by us. Any diminishment of legal protection that ensures the survivability of the multitude of species created, blessed, and provided for by God runs counter to our calling to rule as God would rule.

On the other hand, the improvement or enhancement of such protection is in keeping with our being made in the image of God. But don't be fooled and don't fool yourselves. As the Apostle Paul says, "Be not deceived; God is not mocked." God knows the difference between real improvements and those designed for other purposes that do not enhance protection.

But just a few verses later, the Apostle Paul offers words of encouragement that are especially important for Members of Congress and your staff to hear: "So let us not grow weary in doing what is right, for we will reap at harvest-time, if we do not give up."

Thus, to be true images of God in our love and service of others, especially those within our power, as well as in our dominion or care of the rest of creation, is at the core of what it means to be a moral being. Will the use of our power be characterized by service, generosity, compassion, and mercy? Or will it degenerate into selfishness, greed, and tyranny?

And so as finite creatures and members of the Senate, your exercise of legal power is tinged with eternity. You can weak or strengthen our country's efforts to protect people, especially the most vulnerable, from air pollution and climate change. You can stand by and let others weaken them, even though you have the power to stop them. You have the same moral choices concerning the protection of God's other creatures.

So what type of images of God will you be in relation to environmental concerns as you exercise your freedom and power as members of the Senate? True images? True reflections of God's will, God's love? I pray that God grant you, as well as members of the executive branch with authority over the environment, the spiritual strength and wisdom to be His true images on earth in your protection of your fellow citizens and God's other creatures.

Thank you for your attention, and I look forward to any questions.

[The prepared statement of Reverend Ball follows:]

TESTIMONY OF
THE REVEREND JIM BALL, PH.D
President and CEO of the
Evangelical Environmental Network

"MADE IN THE IMAGE OF GOD"

Before the
COMMITTEE ON THE ENVIRONMENT AND PUBLIC WORKS
U.S. SENATE
SEPTEMBER 24, 2008

Chairman Boxer, Ranking Member Inhofe, distinguished Members of the Committee, my name is the Rev. Jim Ball and I am President and CEO of the Evangelical Environmental Network (EEN).[1] It is an honor to testify before you today at this hearing to review serious environmental policy concerns that have arisen in 2008.

Other panelists will offer testimony on the specifics.

My purpose here is to offer moral guidance from a religious perspective on one of the chief responsibilities of the Senate Environment and Public Works Committee, to protect the environment. (Colleagues from other religious communities have also submitted written documents that provide similar guidance, which I draw to your attention.)

Such moral guidance can be found in reflecting upon a belief we discover in the very first chapter of Genesis, that we are made in the image of God.

As Gen. 1:26 (NIV) states:

> "Then God said, 'Let us make man (humanity) in our image, in our likeness, and let them rule over the fish of the sea and the birds of the air, over the livestock, over all the earth, and over all the creatures that move along the ground.'"

This text helps us understand the tremendous power God has given us as human beings, power to rule, power that can easily be misused. It is clear, however, that God intends us to use this power in a certain way.

With our God-given freedom we are to image or reflect how God would rule on earth, always understanding that any authority or power we have does not come from us. All authority still rests with the LORD. Our authority is derived, not intrinsic, lest anyone should boast (to paraphrase the Apostle Paul).

How we treat both **who** or **what** is within our control, within our power, is a true test of our moral character as individuals and as a society.

How we treat **who** we have the power to help or harm is to be governed by some basic moral principles recognized by most if not all faith traditions in one form or another. These principles are that we are to:

- love our neighbors;
- do unto others as we would have them do unto us (also known as the Golden Rule), and;
- protect whom Jesus calls "the least of these" (Mt. 25), described elsewhere in Scripture as orphans, widows, and aliens or foreigners – precisely those who don't have power and are therefore vulnerable to those who do.

As Jesus helped us see when asked what was the greatest commandment, all of these moral principles ultimately flow out of **our chief aim as human beings**: to love God with all of our heart, soul, mind, and strength.

The major way we love God is by doing God's will, which is another way of saying that we are to freely be who God created us to be: images or reflections of how He would do things on Earth.

Thus, with the freedom God has given us we are to do as He would do. With any power we may currently posses we are to rule as God would rule. *Morally* this is how we are to exercise power – as a loving and just God would.

In the United States, how citizens and the government can *legally* exercise power is determined by you, the legislators, in keeping with our Constitution. Although it may at times seem like a game to those outside the process, it is an awesome responsibility that I know you take with upmost seriousness.

When it comes to environmental concerns, how can you, as legislators, or members of the Executive Branch, as administrators, exercise power on behalf of the citizenry in keeping with the basic moral principles of loving our neighbors and protecting the most vulnerable?

You must be able to discern, first, whether something actually poses a problem, and second what is required to solve the problem.

To determine whether something poses a problem, you should rely on the best scientific evidence and analysis available. Such evidence and analysis should in turn guide you in determining what is required to solve the problem.

Take lead as an example. As the best scientific evidence demonstrates, it clearly causes harm to children, a vulnerable group within our society over whom we have power. As the most current evidence and analysis by both the EPA's Clean Air Scientific Advisory Committee (CASAC) and the EPA's staff scientists suggests, the current standard set in 1978 is clearly outdated and should be strengthened or improved. My hope is that when the EPA issues their final ruling in mid-October the EPA Administrator will abide by the unanimous recommendations of the EPA's own scientific panel as well as his scientific staff.[2]

This same pattern should be followed with ozone and particulate matter.

Another air pollutant that has been clearly demonstrated to cause harm, especially to the unborn and infants and young children, is mercury. A recent estimate suggests that up to one in six babies are born with harmful levels of mercury in their blood. Yet there are still no federal protections for the vulnerable against mercury. This clearly needs to be remedied and I urge the next Congress and Administration to work together to see that this is done.

A final group of air pollutants causing serious harm to the vulnerable that is currently not regulated are greenhouse gases, particularly CO^2. (Please see attached EEN fact sheet.) On June 7, 2007, I and other religious community colleagues testified before you on the dangers climate changes poses, especially to the poor, and the ethical reasons for action. The situation is even more urgent now than it was then. Given the current state of our efforts at the federal level, this represents a tremendous opportunity for the next Congress and Administration to do better.

Thus far I have briefly discussed how we treat **who** we have the power to help or harm.

How we treat **what** we have under our control, including God's other creatures and the natural resources of God's Earth, is also very much wrapped up in being made in the image of God, of doing God's will.

It is clear from Scripture that God created His other creatures to glorify Him by living the lives He intends for them. In the first chapter of Genesis God blesses them and tells them to fill the earth and the seas (vv. 20-25). Jesus reminds us that God provides even for the birds of the air and knows when a sparrow falls (Mt 6:26; Lk. 12:24; Lk. 12:6). The book of Job teaches us that simply because we have the capacity to control God's other creatures doesn't mean that we should. Some are simply made for God's pleasure, not ours (chapters 38-41[3]).

Having made us in His image, God has given us the capacity to rule over His other creatures and His Earth and the charge to rule as He would. In keeping with our moral obligations as image bearers, the Endangered Species Act (ESA) provides for the legal protection of God's other creatures within our power, helping to ensure that the blessing of life and sustenance God has given to his other creatures is not turned into a curse by us. Any diminishment of legal protection that ensures the survivability of the multitude of species created, blessed, and provided for by God runs counter to our calling to rule as God would rule. On the other hand, the improvement or enhancement of such protection is in keeping with our being made in the image of God.

Human laws such as the ESA (or the Clean Air Act, for that matter) are not written in stone like the Ten Commandments. Certainly this law and the regulations promulgated to implement it can be improved.

For example, we must strive to do all things as efficiently as we can, in keeping with our call to be good stewards of our time and financial resources. Efficiency is good when it complements other moral goals.

But an increase in efficiency can never justify the weakening of such goals. As we have seen, another part of stewardship is the care and protection of God's other creatures to ensure that they can live the lives He intends for them. Thus, we must work to protect God's other creatures in the most efficient manner we can.

Given the sinfulness of human nature, however, we must be mindful of rhetorical sleights of hand whereby the goal of efficiency, or changes dressed up in the language of "making improvements," are, in reality, changes designed to weaken the legal protections of God's other creatures. Such rhetorical wolves in sheep's clothing must be recognized by policymakers for what they are. Don't be fooled. Don't fool yourselves. As the Apostle Paul says, "Be not deceived; God is not mocked" (Gal. 6:7, KJV). God knows the difference between real improvements and those designed for other purposes that do not enhance protection.

But just a few verses later the Apostle Paul offers words of encouragement that are especially important for Members of Congress and your staff to hear: "So let us not grow weary in doing what is right, for we will reap at harvest-time, if we do not give up." (Gal. 6:9, NRSV). Indeed, to switch metaphors, doing what is right can reap dividends for the rest of our lives in its capacity to enhance us as moral beings, as beings made in the image of God who have been called upon to rule as God would rule in terms of the rest of creation, and to do towards our fellow human beings as God would do. As Jesus taught his disciples to pray, "Thy will be done on Earth as it is in Heaven." That's the divine charge for each of us: to do God's will, to image or reflect Him on Earth.

Thus, to be true images of God in our love and service of others, especially those within our power, as well as in our dominion or care of the rest of creation, is at the core of what it means to be a moral being. Will the use of our power be characterized by service, generosity, compassion, and mercy? Or will it degenerate into selfishness, greed, and tyranny.

And so as finite creatures and Members of the Senate your exercise of legal power is tinged with eternity. You can weaken or strengthen our country's efforts to protect people, especially the most vulnerable, from air pollution and climate change. You can stand by and let others weaken them even though you have the power to stop them. You have the same moral choices concerning the protection of God's other creatures.

So what type of images of God will you be in relation to environmental concerns as you exercise your freedom and power as Members of the Senate? True images? True reflections of God's will, God's love? What will your actions say about our moral character as a nation?

I pray that God grant you, as well as members of the Executive Branch with authority over the environment, the spiritual strength and wisdom to be His true images on Earth in your protection of your fellow citizens and God's other creatures.

Thank you for your attention. I look forward to any questions you may have.

Global Warming and the Poor

A Fact Sheet by the Evangelical Environmental Network

A consensus of the world's leading scientists as represented by the Intergovernmental Panel on Climate change has concluded that human-induced climate change is real and that we need to take action now.

Impacts are already starting to occur. Global warming is projected to hit the poor the hardest

- Agricultural output in many poorer countries could be significantly reduced. 40-170 million additional poor people could be at risk of hunger and malnutrition in this century.[4]
- Worldwide, roughly 1-2 billion people already in a water stressed situation could see a further reduction in water availability.[5]
- In Africa 75-250 million will face water scarcity by 2020, and crop yields could be reduced by 50% in some areas.[6]
- Climate change could increase the number of people impacted by coastal flooding by 100 million.[7]
- Hundreds of millions of people will be at increased risk of malaria, dengue fever, yellow fever, encephalitis, and other infectious diseases because of global warming.[8]
- In addition to impacts on human beings, approximately 20- 30% of God's creatures could be committed to extinction by 2050, making global warming the largest single threat to biodiversity.[9]

Because Jesus is our Lord, the evangelical community has worked in poor countries for many years and spent billions of dollars to help people meet their basic needs and to share the Good News about Jesus Christ. In the future global warming will be an insidious reversal of our long-standing efforts to help the poor.

We care about what happens to the poor because God loves them. We care about these projected impacts of global warming because they are a profound challenge to Christian justice and Jesus' call to care for "the least of these" (Mt. 25:40, 45). Pollution that causes the threat of global warming violates Jesus' Great Commandments to "Love the Lord your God with all your heart and with all your soul and with all your mind and with all your strength" and "Love your neighbor as yourself" (Mk. 12:30-31), and the Golden Rule to "Do to others as you would have them do to you" (Lk. 6:31). And global warming is a breach of our responsibility to care for God's other creatures (Gen. 2:15). Failure to act to reduce the impacts of global warming denies Christ's Lordship.

As Christians we are called to love and protect those with less power, such as the poor, children, the unborn, those yet to be born, and our fellow creatures. Global warming has profound implications for their welfare. Reducing this threat is part of what it must mean today to love God and our neighbor, as Jesus taught us to do.

For further information, go to www.christiansandclimate.org and to solve the problem go to www.coolingcreation.org. To view the IPCC reports, go to www.ipcc.ch.

Contact EEN: een@creationcare.org • 678-541-0747 • 4485 Tench Rd, Suite 850, Suanee, GA 30024

Revised 9-19-08

EDEN

September 20, 2008

Dear Member of Congress,

The Bush administration has proposed a regulatory change that would cripple the Endangered Species Act. This overhaul would cut scientists with the most expertise out of the review process, allowing federal agencies to decide on their own whether federal projects — including construction of highways and dams — poses a threat to imperiled wildlife. The Bush administration is trying to fast track this proposal with as little public input as possible. The public was given only 60 days to comment on the change, and the administration is refusing to accept comments by email or hold public hearings on the proposed rules.

Restoring Eden formally opposes these proposed changes to the Endangered Species Act. These changes treat the extinction of species with an unacceptable and cavalier attitude. History and our children will judge harshly these choices. Restoring Eden is a Christian environmental ministry that networks thousands of evangelicals, including many younger evangelical and emergent churches as well as the majority of evangelical colleges. For us, protecting the viability of species is seen as a sacred trust. The Bible states that God created, blessed, protected, and made a covenant with species. It is a core responsibility of all Christians to protect them. In doing so, we also protect ourselves, our children, and our future.

In Matthew 24:45, Jesus asks, "Who then is the faithful and wise servant that the Master has put in charge of his household to make sure they have food at the proper time?" This scripture teaches that the biological needs of the rest of the household of God are a primary task of Christians. We believe it is a holy responsibility – the fact that it may be complicated or even costly at times does not get to trump our moral duty. Extinction isn't stewardship. The Endangered Species Act has been an enormous success. It is because of the Act that our children and grandchildren will be able to see bald eagles, grizzly bears, and manatees.

Under the regulations now in place, federal agencies must consult with one of two wildlife agencies — the U.S. Fish and Wildlife Service or the National Marine Fisheries Service if the federal agencies permit, fund, or otherwise carry out actions that "may affect" endangered species. Through this consultation process, the wildlife agencies can approve, reject, or modify proposed projects. Consultation begins with an initial review called an "informal consultation," in which the wildlife agencies decide whether the project is likely to harm an endangered species — and if it is, the agency must go through formal consultation to make sure the species isn't put in danger and that impacts are minimized and counteracted.

Under the new, proposed regulations federal agencies will get to decide for themselves whether their actions are likely to harm endangered species — and thus whether they need to consult with the wildlife agencies at all. This is the very same proposal industry has tried for years to push

through Congress – without success. Now they are trying to get the Bush administration to grant them one last wish before leaving office. Agencies not only lack the expertise to determine whether their projects would harm wildlife, they have a built-in conflict of interest. In the past, decisions under the Endangered Species Act have been made by experienced wildlife biologists using the best available data. More than agency insiders, scientists are the best source of information about the state of wildlife in America.

In conclusion, we believe that these changes will be viewed as foolish, short-sighted, and immoral. We ask Congress to do whatever is possible to stop these changes and to protect the fruitfulness of all creation we all depend upon.

For the Creator and the creation,
Peter Illyn
Executive Director
Restoring Eden

"But ask the animals, and they will teach you; the birds of the air, and they will tell you; ask the plants of the earth, and they will teach you; and the fish of the sea will declare to you. Who among all these does not know that the hand of the LORD has done this? In his hand is the life of every living thing and the breath of every human being." Job 12:7-10

www.noahalliance.org

September 24, 2008

U.S. Senate Environment and
Public Works Committee
410 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators:

Like this beautiful and instructive quote from Job 12, the Bible has many words and images that remind us of the wonder in creation, our connection with the natural world, and our responsibility to protect God's earth.

The Noah Alliance is comprised of groups and individuals that feel this responsibility, clarified by Scripture and experience, to care about imperiled plants and animals. We are fortunate to have been presented with ways to carry out this call, most recently through collaboration with the public education effort *Irreplaceable: Wildlife in a Warming World.*

Plants and animals, as well as people, are struggling with climate change. Scientists predict that 20-30 percent of wildlife, 60 percent in some places, could be driven to extinction by climate change, or climate change combined with other stresses. And right now species are stressed with the impacts of changing climate.

These are the plants and animals that God declared good and provided an ark, and with which God established a covenant. These are the species that often serve people's needs, through agriculture, medicine, ecosystem services, inspiration, comfort, and joy. This is the wildlife that gazes at us with eyes that seem to ask if we are going to care.

As policy makers we hope you will reflect such caring via public policy. We urge you to oppose efforts to weaken laws that protect species, including the recently proposed change to Endangered Species Act regulations. This proposal seeks to undermine our nation's protection of endangered species in a number of ways, including the following:
U.S. Senate Environment and
Public Works Committee

1. Substitute self consultation of action agencies for what many have called the most effective part of the ESA: section 7 action agency consultation with federal wildlife agencies that are the experts. Getting around such consultation with the wildlife agencies when federal projects may hurt endangered species makes no sense. When we have important, complex decisions to make, we go to experts.
2. Put unreasonable parameters around the kind of science that can be considered when deciding if an action will be too detrimental. This would be bad for endangered species and also set an unwise precedent for other policy.
3. Place difficult deadlines on the federal wildlife agencies (FWS and NMFS) and allow certain projects to go forward if these deadlines are not met.

Please make compassion for plants and animals struggling with climate change and other stresses a hallmark of your work as the Senate Environment and Public Works Committee. Please ensure that our existing protective laws remain in place and are implemented fully, while also making care for species part of future climate change and other legislation.

Thank you for considering our concerns.

Sincerely,

Suellen Lowry
Director
The Noah Alliance

COEJL

Coalition on the Environment and Jewish Life
Protecting Creation, Generation to Generation

September 24, 2008
U.S. Senate Environment and
Public Works Committee
410 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators:

The Coalition on the Environment and Jewish Life was created in 1993 with the aim of catalyzing a distinctively Jewish programmatic and policy response to the environmental crisis. Since that time, COEJL has deepened Jewish community's commitment to the stewardship of creation and mobilizes the resources of Jewish life and learning to protect the Earth and all its inhabitants.

To advance our mission, COEJL:

- Partners with the full spectrum of national Jewish organizations to integrate Jewish values of environmental stewardship into Jewish life;
- Works with synagogues and other local Jewish organizations to bring Jewish environmental education, ecologically-conscious Jewish observance, and opportunities for environmental action to Jewish families and individuals;
- Supports rabbis, educators, and Jewish scholars to develop and distribute materials that express diverse Jewish perspectives on environmental issues;
- Brings a Jewish vision and voice to issues of environmental justice and sustainability, and advocates on behalf of the Jewish community;
- Activates Jewish institutions, local COEJL programs, and individuals (both affiliated with organized Judaism and unaffiliated) in support of environmental protection efforts; and
- Participates in inter-religious and civic coalitions to protect the environment, public health, and our common future.

I am attaching several documents that articulate COEJL's specific policy priorities and positions. Please do not hesitate to contact me if you have any questions about our work.
Sincerely,

Jennifer Kefer

Ball - Senate EPW Testimony 9-24-08

Climate and Energy Program Coordinator, COEJL

Sincerely,

Hadar Susskind
Washington Director
Jewish Council for Public Affairs

Jennifer Kefer
Climate and Energy Program Coordinator
Coalition on the Environment and Jewish Life

Resolution on Strengthening Protections for Endangered Species and Habitats

Adopted by the 1997 NJCRAC Plenum
February 17, 1997

Torah does not permit a killing that would uproot a species, even if it permitted the killing [of individuals] in that species.

-Nachmanides, Commentary on Deuteronomy 22:6.

Background: In 1996, the National Jewish Community Relations Advisory Council (NJCRAC) took action in response to the rapid destruction of habitats and species around the world, advocating that federal, state, and local governments develop, strengthen, and fully implement laws, policies, and programs that will protect and restore the biological inheritance of the human community both in the United States and abroad. In October of 1996, the World Conservation Union released the most comprehensive survey of threatened species around the world, estimating that 25 percent of mammals, 20 percent of reptiles, 25 percent of amphibians, and 34 percent of fish are threatened with extinction.

NJCRAC's advocacy to protect biological diversity has focused on strengthening the Endangered Species Act, the nation's most important vehicle for the protection of biological diversity. The Act encodes into law a moral principle shared by the Jewish tradition and the vast majority of Americans alike: It is wrong for human beings to knowingly cause the extinction of a unique form of life. The Act sets a mandate for the federal government to take actions necessary to prevent extinction, including the protection of habitat that is critical to the survival and recovery of an endangered species.

While the Endangered Species Act has succeeded in preventing the extinction of numerous animals, such as the bald eagle, american alligator, and peregrine falcon, the majority of listed species are far from recovering to stable and viable populations. Less than two percent of species fisted as endangered have improved sufficiently to be downlisted to threatened status and less than one half of one percent have recovered sufficiently to be fully delisted.

Sharp disagreements over the Endangered Species Act in the last two sessions of Congress prevented its reauthorization, which has been due since 1992. Unfortunately, the 104th Congress took action to hamper the implementation of the law, including a yearlong moratorium on new listings of endangered species, temporary suspension of the Endangered Species Act in national forests, and reduced funding for government agencies responsible for implementing the Act.

Therefore, the NJCRAC affirms the protection of species and their habitats as a basic goal of public policy and advocates the following improvements and amendments to the Endangered Species Act to ensure our nation's success in achieving this goal:

1) **Species protection should be based on sound science:** The Act should require that the federal government conduct a national biological survey, including marine species, and

conservation biology research sufficient to make timely decisions on the listing of species as threatened and endangered. Furthermore, Congress should amend the Endangered Species Act to prohibit the federal government from granting permits ("incidental take permits") to destroy habitat that is scientifically demonstrated by peer review to be essential to the recovery of endangered species.

2) The government should work proactively to prevent dangerous declines in species populations rather than waiting until species are endangered: The Act should work proactively by requiring the timely creation and implementation of recovery plans for all endangered and threatened species that would protect and restore sufficient habitat to secure viable populations of declining species throughout their ranges. Furthermore, the Act should require that the federal government develop a national plan for the establishment of a system of natural preserves on land, in fresh water, and in the sea, to protect endangered ecosystems and the species which depend upon them.

3) The Act should strengthen protections for habitat on private lands through positive incentives: Critical to the protection and restoration of many endangered populations is the protection of their habitat on private lands. The NJCRAC calls on individual and corporate owners of endangered species habitat to cooperate with state and federal agencies to effectively protect and recover endangered species. Furthermore, the NJCRAC calls on the Administration and Congress to devise, fully fund, and aggressively publicize positive incentives to encourage private property owners to protect and recover endangered and threatened species and the habitat upon which they depend.

The NJCRAC urges the Congress and Administration to work diligently to reauthorize an amended Endangered Species Act and create secure funding mechanisms sufficient to fulfill, our mandate as a nation to protect and preserve our biological inheritance for its own sake and for the sake of generations to come.

JCPA
JEWISH COUNCIL
FOR PUBLIC AFFAIRS

TASK FORCE CONCERN ON CLIMATE CHANGE AND POVERTY
Adopted by the 2008 JCPA Plenum

In 2007, The Intergovernmental Panel on Climate Change (IPCC) concluded that warming of the climate system is "unequivocal." Climate change has already led to observable increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising sea levels. Eleven of the last twelve years (1995-2006) rank among the twelve warmest years in the instrumental record of global surface temperature (since 1850). Our response to this crisis must take into consideration the predicament that those who have contributed the least to the problem stand to suffer the most from it.

Although the local effect of climate change is determined by geography, topography and other physical characteristics, the poorest nations, communities and individuals, who have the least capacity to respond, are likely to be hardest hit. Less developed countries will have the least capacity to cope with the devastating impacts of extreme weather events, rise in sea level, drought, disruption of water and food supplies, impacts on health, and the destruction of natural resources. As a result, the poor will not only be put at greatest risk by the physical impacts of natural disasters and climate change, they could also bear a disproportionately greater economic burden from any program to address it.

In the United States, climate related events and even modest emissions reductions could place a significant burden on the poor. For example, reducing greenhouse gas emissions by only 15 percent from 2005 levels will impose an estimated $750-$950 a year in added costs on the poorest fifth of the population.[1] Scientists have called for reductions of 80% in greenhouse gas emissions by 2050 to avoid the most severe effects of climate change. The financial burden of these reductions will undoubtedly increase with a more aggressive program.

Both here in the United States and abroad, the poor will suffer the most from climate change. For example, yields from rain-fed agriculture in sub-Saharan Africa could be reduced by up to 50% by 2020. Elsewhere, increased flooding will cause outbreaks of diseases such as malaria and cholera. Changes in precipitation patterns, subterranean aquifers, and the disappearance of glaciers will impact the entire biosphere, affecting water availability for human consumption, agriculture and energy generation globally and in the United States. Development NGOs estimate that it will cost upwards of $50 billion annually to adapt to these conditions.

[1] Center for Budget and Policy Priorities

The community relations field should at both the state and federal level:

- Support measures to protect vulnerable populations (at home and abroad) from environmental damage related to climate change and that limit the economic burdens of new policies on those populations (including efforts to direct revenue generated by climate change legislation toward such programs).
- Support increased funding for programs that help vulnerable populations pay for their immediate home energy needs and reduce their energy demands;
- Support efforts to create new jobs and job-training programs to help those who lose their jobs as a result of new environmental regulations and policies;
- Support studies that examine the effects of climate change on vulnerable populations and facilitate implementation of emergency plans to respond to these effects.
- Promote multilateral international cooperation to deal with this issue.

[1] The Evangelical Environmental Network (EEN) is a non-profit network of organizations that seeks to educate, inspire, and mobilize Christians in their effort to care for God's creation, to be faithful stewards of God's provision, and to advocate for actions and policies that honor God and protect His creation. EEN's work is grounded in the Bible's teaching on the responsibility of God's people to tend the garden and in a desire to be faithful to Jesus Christ and to follow Him. For more information about EEN, go to: www.creationcare.org. EEN is also the evangelical Partner of the National Religious Partnership for the Environment (NRPE).

While my testimony is in keeping with the basic viewpoint of EEN, the testimony itself and any opinions expressed therein are my own.

[2] In its January 22, 2008 letter to EPA Administrator Johnson, the EPA Clean Air Scientific Advisory Committee (CASAC) stated the following:

> "The Committee unanimously and fully supports Agency staff's scientific analysis in recommending the need to substantially lower the level of the primary (public-health based) Lead NAAQS to an upper bound of no higher than 0.2 $\mu g/m^3$ with a monthly averaging time. The CASAC is also unanimous in its recommendation that the secondary (public-welfare based) standard for lead needs to be substantially lowered to a level at least as low as the recommended primary NAAQS for lead."

In May 2008 the EPA issued an initial proposal suggesting a range between 0.1 and 0.3 $\mu g/m^3$. In its July 18, 2008 letter to Administrator Johnson CASAC reiterated "setting it at 0.2 $\mu g/m^3$ or less." It is currently at 1.5 $\mu g/m^3$.

[3] Here are selected verses from chapters 38 and 39 of Job where God is speaking to Job:

Chapter 38:
2"Who is this that darkens my counsel
with words without knowledge?
3 Brace yourself like a man;
I will question you,
and you shall answer me.
4 "Where were you when I laid the earth's foundation?
Tell me, if you understand ...
39 "Do you hunt the prey for the lioness
and satisfy the hunger of the lions
40 when they crouch in their dens
or lie in wait in a thicket?
41 Who provides food for the raven
when its young cry out to God
and wander about for lack of food?
Chapter 39:
5 "Who let the wild donkey go free?
Who untied his ropes?
6 I gave him the wasteland as his home,
the salt flats as his habitat.
7 He laughs at the commotion in the town;
he does not hear a driver's shout.
8 He ranges the hills for his pasture
and searches for any green thing."

[4] IPCC, 4th Assessment Report (AR4), Working Group Two (WG2), pp. 298-300.
[5] Nigel Arnell, "Climate Change and Water Resources: a Global Perspective," Ch. 17 in *Avoiding Dangerous Climate Change*, H.J. Schellnhuber, et al. eds., p. 167. Arnell's projections are utilized heavily by the IPCC.
[6] IPCC, AR4, WG2, p. 435.
[7] IPCC, AR4, WG2, p. 334.
[8] IPCC, AR4, WG2, Summary for Policymakers (SPM), p. 7.
[9] IPCC, AR4, WG2 p. 213.

Senator BOXER. Thank you, Reverend. I really liked that quote about never give up because we don't.

[Laughter.]

Senator BOXER. Believe me, the three of us don't and many others on this Committee and our staff. So we thank you for those words. They are very comforting to us.

Mr. Schaeffer, we are happy to have you, Executive Director, Diesel Technology Forum. Welcome, sir.

STATEMENT OF ALLEN SCHAEFFER, EXECUTIVE DIRECTOR, DIESEL TECHNOLOGY FORUM

Mr. SCHAFFER. Good afternoon. Madam Chairwoman and members of the Committee, my name is Allen Schaeffer and I serve as Executive Director of the Diesel Technology Forum. We are a not-for-profit educational group representing the Nation's leading diesel engine, vehicle and equipment manufacturers, fuel refiners and suppliers, including those that make emissions control technology.

We are delighted to be here today to discuss the actions at the Environmental Protection Agency relative to the Clean Air Act over the last 8 years. Specifically, our focus will be on diesel engines, equipment and fuels.

The last 8 years have seen actions that compel the fundamental transformation to a new generation of diesel engines, fuels, and emission control technologies. We refer to this as clean diesel. By definition, this is the combination of advanced engines, cleaner fuels, and new emissions control devices all working together.

Clean diesel is the future. It is a system that will soon be standard equipment on every diesel engine and piece of equipment in America, including a whole new generation of clean diesel cars now coming to market. Moving to this clean diesel technology has involved both conventional and non-conventional approaches by industry, the EPA and other stakeholders. In a practical sense, it means stringent new engine emissions standards, a switch to a cleaner diesel fuel, but also a voluntary collaborative approach to reduce emissions from existing engines and equipment.

For engine manufacturers, it has required substantial innovation and breakthroughs in emissions control technology. For fuel refiners, it has required substantial and unprecedented investments to clean up diesel fuel.

With regard to new engines, over the last 8 years the EPA has enacted the most stringent emissions standards on the diesel industry in history, requiring more than a 90 percent reduction in emissions of particulate matter and nitrogen oxides from their previous levels. This effort began in 2000 with rules adopted by the Clinton administration, which were subsequently defended, implemented and expanded to other equipment sectors by President Bush and the current Administration.

As a result of the EPA's numerous regulatory actions, the pathway to cleaner diesel engines and fuels to achieve much lower emissions is now in place from everything from small construction equipment, farm machinery, highway commercial trucks, freight locomotives, marine vessels, work boats, and very large off-road machines and mining equipment, and most recently to a new genera-

tion of clean diesel passenger cars that now meet the emissions standards of all 50 States.

A graphical representation of the continuous improvement in diesel engines is provided as an appendix to this testimony.

The foundation of this success story was the switch to cleaner diesel fuel, which we refer to as ultra-low sulfur diesel. This is a critical aspect of the clean diesel system because it enables the use of advanced emissions control devices. The last time a major change in diesel fuel formulation took place was in 1993, and resulted in spot supply shortages and vehicle performance problems for the first 6 months of the fuel transition. Older truck engines were particularly affected in California. Enforcement waivers had to be granted, and the switch was viewed as problematic on a number of fronts.

This time around, EPA took a number of steps to assure a smoother transition, including convening a panel of stakeholders to monitor implementation of the fuel refining requirements, as well as providing information to those that had to comply with the rule through the Clean Diesel Fuel Alliance with the Department of Energy and industry and other stakeholders.

While not perfect, the October 15, 2006 roll-out of clean diesel fuel was a marked improvement over 1993. EPA mostly succeeded in meeting the goal of a smoother transition to the new fuel that was transparent, had widespread fuel availability for 2007 and later-year model trucks and diesel cars which required the use of this new clean fuel. Work continues today toward assuring consistent nationwide supply and meeting the final 100 percent availability requirement by December 31, 2010.

As a result of this progress, many stakeholders have come together to applaud the contribution of ultra-low sulfur diesel fuel and clean diesel technology to the Nation's clean air progress. Our group partnered with the Natural Resources Defense Council in a joint press conference heralding the switch to new clean diesel fuel in October 2006.

EPA has also closely collaborated with California on the adoption of many diesel engine emissions and fuel quality standards, and has been helpful in raising awareness about the fuel savings potential for a new generation of clean diesel cars that get 20 percent to 40 percent better fuel economy than a gasoline vehicle.

I would like to turn now to non-conventional approaches. While the Administration has implemented a substantial number of regulations that impact new engines, it also has worked to reduce diesel emissions and improve air quality by pursuing some non-conventional and non-regulatory approaches for existing engines and fuels.

Because diesel engines are renowned for their durability and long lives, in 2000 EPA announced the creation of a new voluntary program called the Diesel Retrofit Initiative. Through this program, EPA hopes State and local governments, fleet operators, and industry could complement the reductions coming from regulatory actions by using newly available technology on existing heavy-duty trucks, buses and equipment. A goal at that time was set to reduce emissions from more than 11 million diesel engines.

Subsequent efforts followed, known as Clean School Bus USA and other diesel retrofit initiatives through the construction sector.

One of the key reasons for EPA's success in promoting this program was the creation of regional diesel collaboratives, where they invited industry and environmental groups, as well as State and local governments, to focus on projects and concerns of regional interest. EPA brought an important energy and attention to this critical issue and offered Federal support, while letting local stakeholders have flexibility to set their own priorities.

The key to the success of the national clean diesel retrofit effort is funding for end-users like school districts, refuse haulers, contractors, trucking fleets and others so that they can implement these new technologies.

Here, Congress and this Committee in particular, continue to play a vital role. Senators Carper and Voinovich in 2005, along with Senator Clinton and others on the Committee, undertook a bipartisan effort to help advance clean diesel retrofit through the Diesel Emissions Reduction Act, otherwise known as DERA, a portion of the 2005 energy bill. DERA provides funding for the voluntary retrofit initiative authorized at up to $200 million a year for each of 5 years.

This year, we have our first appropriation and the success is really substantial. State grant programs have generated interest now from all 50 States. Every single State has expressed interest in this program, with 35 providing their own matching funds. It is a real testament to the success of the initiative. The only criticism we have heard about the program, besides the desire for full funding, has been around the coordination of EPA and California's efforts to verify new technology.

In conclusion, the transformation to clean diesel is well at hand, and by any measure is a success story with industry, environmental stakeholders and the EPA working together. Manufacturers are delivering on the challenge to the production and delivery of clean diesel commercial trucks since last year. Refiners have delivered cleaner diesel fuel and continue to expand its availability. End-users that have acquired the new technology are finding it to meet or exceed their expectations for performance.

Every category of stationary and mobile diesel engines, with the exception of ocean-going container vessels, is now on the path to clean diesel fuel and low-emissions technology. And finally, there is genuine excitement about the new generation of clean diesel cars which is coming here in the U.S. beginning this year. The voluntary incentive-based programs EPA has championed through its National Clean Diesel Campaign and the SmartWay Transport Partnership will play a greater role in reducing emissions and saving energy in the future.

Congress has placed an important role in authorizing and appropriating funds for these voluntary incentive programs, and consumer tax credits for light duty advanced lean-burn diesel vehicles. Your continued support in this area is needed.

Thank you for the opportunity to appear today.

[The prepared statement of Mr. Schaeffer follows:]

Before the
United States Senate
Environment and Public Works Committee
September 24, 2008

Statement of the
Diesel Technology Forum
Allen Schaeffer, Executive Director

INTRODUCTION

Good Afternoon. My name is Allen Schaeffer and I serve as Executive Director of the Diesel Technology Forum, a not for profit educational group representing the nation's leading diesel engine, vehicle and equipment manufacturers, fuel refiners and suppliers, including those that manufacture emissions control technology. We appreciate the opportunity to appear before you today to discuss actions at the Environmental Protection Agency relative to the Clean Air Act over the last 8 years. Specifically our focus will be on diesel engines, equipment and fuels.

ADVANCING CLEAN DIESEL TECHNOLOGY

As a matter of background, because of their unique combination of power, performance and energy efficiency, diesel engines are the workhorse of the US and global economy, powering over 90 percent of commercial trucks, 100 percent of freight locomotives and marine work boats and two-thirds of all farm and construction equipment. Diesel engines are also found in back up emergency electrical generators, stationary pumps and other industrial equipment. Diesel engines also make up about 3.0 percent of all passenger vehicles, a number that has grown more than 70 percent over the last 7 years.

The last 8 years have seen actions that compel the fundamental transformation to a new generation of diesel engines, fuels, and emissions control technologies in each of those previously noted 6 categories of equipment or vehicles. We refer to this as clean diesel. By definition this is the combination of advanced new engine technology, cleaner diesel fuel, and emissions control devices all working together as a system. Clean diesel is the future – it is a system that is now or will soon be "standard equipment" for all diesel engines and equipment, including a whole new generation of clean diesel cars now coming to market.

Moving to Clean Diesel Technology has involved both conventional and non-conventional approaches by industry, the EPA and other stakeholders. In a practical sense, it means stringent

new engine emission standards, the switch to a cleaner diesel fuel, but also a new voluntary collaborative approach to reduce emissions from existing engines and equipment. For engine manufacturers, it has required substantial innovation and breakthroughs in emissions control technology, engine performance and management to meet both customer requirements as well as environmental standards. Fuel refiners have also met unprecedented requirements to reduce sulfur levels in diesel fuel.

NEW CLEAN DIESEL ENGINE EMISSIONS STANDARDS IN PLACE FOR ALL VEHICLES AND EQUIPMENT

With regard to new engines, over the last 8 years, the EPA has enacted the most stringent emissions standards on the diesel industry in history, requiring more than a 90 percent reduction in emissions of particulate matter and nitrogen oxides from previous levels. This effort began in 2000 with rules adopted by the Clinton Administration, which were subsequently defended, implemented and expanded to other equipment sectors by President Bush and the current administration. As a result of the EPA's numerous regulatory actions, the pathway to cleaner diesel engines and fuels to achieve much lower emissions is now in place for everything from small construction equipment, farm machinery, highway commercial tractor trailer trucks, freight locomotives, marine vessels, work boats and very large off-road machines and mining equipment. And most recently, to a new generation of clean diesel passenger cars that meet the emissions standards of all 50 states. A graphical representation of the continuous improvement in diesel engines is provided as an Appendix to this testimony.

A foundation of this success story is the switch to ultra low sulfur diesel fuel (ULSD) (enacted as part of the 2007 and 2010 highway engine rule which was finalized in early 2001) which required most highway grade diesel fuel to have 97 percent lower levels of sulfur by mid-2006, and all highway fuel to be so by the end of 2010. Cleaner diesel fuel that is lower in sulfur is critical in that it enables the use of advanced emissions control systems to help reach very low emissions levels. Simply using cleaner diesel fuel in any existing engine can reduce particulate emissions by as much as 10 percent.

The last time a major change to diesel fuel formulation took place was in 1993 and resulted in spot supply shortages and vehicle performance problems for the first 6 months of the fuel transition. Older truck engines were particularly affected in California. Enforcement waivers had to be granted and the switch was viewed as problematic on a number of fronts.

This time around, the EPA took a number of steps to assure a smoother transition. In 2001, EPA convened an independent advisory panel of all stakeholders including fuel and engine experts and end users to provide input and a sounding board for issues regarding the transition and the ability to produce and distribute the new cleaner fuel, known as ultra-low sulfur diesel fuel. Beyond this group, the EPA played an active role in the Clean Diesel Fuel Alliance—(www.clean-diesel.org) involving DOE, oil and engine manufacturers and other stakeholders to provide compliance information to end users, fuel distributors and marketers.

While not perfect, the October 15, 2006 roll-out of clean diesel fuel was a marked improvement over 1993. EPA mostly succeeded in meeting the goal of a smoother transition to the new cleaner fuel that was transparent, had widespread fuel availability to match the new 2007 model year highway trucks and clean diesel cars which required the use of the ULSD. Work continues

today toward assuring consistent nationwide supply of ULSD and meeting the final 100 percent availability requirement by December 31, 2010.

The use of ultra low sulfur diesel fuel is now being phased in for most off-road machines and equipment by 2010, and ultimately to all off-road engines and equipment, including locomotives and marine boats by 2014.

As a result of this progress, many stakeholders have come together to applaud the contribution of ULSD and clean diesel technology to clean air progress around the country. Our group partnered with the Natural Resources Defense Council in a joint press conference heralding the switch to new clean diesel fuel in October 2006.

The EPA has also closely collaborated with California on the adoption of many diesel emissions and fuel quality standards, and has been helpful in raising awareness about the fuel savings, federal tax credits, and greenhouse gas emissions benefits from a new generation of clean diesel cars, highlighting their fuel savings of 20-40 percent over a gasoline vehicle with 10-20 percent lower emissions of CO2.

NON-CONVENTIONAL APPROACHES: CLEAN DIESEL RETROFIT and SMARTWAY TRANSPORT PARTNERSHIP

While the administration has implemented a substantial number of regulations that impact new engines and equipment, it has also worked to reduce diesel emissions and improve air quality by pursuing non-conventional, non-regulatory approaches outside the normal regulation of new engines and fuels.

Because diesel engines are renowned for their durability and long-lives, in 2000, the EPA announced the creation of a new voluntary program called the "Diesel Retrofit Initiative." Through this effort, EPA hoped state and local governments, fleet operators and industry could complement the reductions coming from regulatory actions by using newly available technology on their existing heavy-duty trucks, buses and construction equipment. A goal was set to reduce emissions from more than 11 million diesel engines.

In 2003, EPA created Clean School Bus USA to provide a targeted focus on this sector with $5 million in congressional appropriations that year. By May 2004, more than 160,000 diesel engines had been retrofitted through EPA's voluntary Diesel Retrofit Initiative, leading to several other sector specific initiatives focusing on ports, construction, agriculture and the freight industry.

One of the key reasons for EPA's success in promoting voluntary retrofit projects was the creation of regional diesel collaboratives. By inviting industry and environmental groups, as well as state and local governments to focus on projects and concerns of regional interest, EPA was able to bring energy and attention to this critical issue and offer federal support while letting local stakeholders have ownership and flexibility to set their own priorities.

Today, engine and equipment manufacturers, fuel providers and emissions control technology companies continue to work side by side to increase the number of clean diesel retrofitted vehicles across the country. However, key to the success of this national Clean Diesel effort is funding for end users like school districts, refuse haulers, contractors and trucking fleets to acquire and install these new emissions control technologies.

Here, Congress and this Committee in particular, continue to play a vital role.

Senators Carper and Voinovich in 2005 undertook a bipartisan effort to help advance clean diesel retrofit through the Diesel Emissions Reduction Act, a portion of the 2005 Energy Bill which was supported by members of this Committee. DERA provides funding for the voluntary diesel retrofits and is authorized up to $200 million annually for 5 years, with 30 percent going to the states directly, and 70 percent to EPA to allocate to national projects across the country.

The authorization of $1 billion over 5 years boosted the hope of program stakeholders around the country that their voluntary efforts could bring measurable air quality improvements. Moreover, the program's structure, by dedicating funds to support the creation of state programs and the development of emerging technologies further energized local stakeholders who had differing views and solutions for addressing this common national issue.

Thanks to the appropriation of $49.2 million for DERA in FY08, the fruits of these early efforts are now growing exponentially. Of the $49.2 million in FY08, $27.6 million was available for the national grant competition run through EPA's regional diesel collaboratives. This solicitation generated over 236 applications requesting approximately $144 million in retrofit funding support. In addition, the state grant program generated interest from all 50 states, with 35 providing their own matching funds, thereby fostering the creation of voluntary retrofit funding programs in every state, ranging in size from approximately $200 million to $500 million. Each state has chosen its own sector priorities and distribution methods which is likely to engender continued support in the years ahead.

Virtually the only criticism we've heard of the program, besides the desire for full funding, has been around the coordination between EPA and California's Air Resources Board on the verification of new retrofit technologies and the inordinate time required to receive new verifications. Hopefully DERA's funding for emerging technologies will help bring attention to this issue and more solutions to market.

Finally, EPA has an equally successful voluntary-based program in the SmartWay Transport Partnership, which has worked with the freight sector to reduce emissions and save energy through a voluntary public private initiative to accelerate the adoption of money-saving market based approaches such as idle reduction technologies, fuel saving aerodynamic devices, combined with the use of new emissions control technology. This program is well-regarded and growing with over 1000 partners and affiliates.

CONCLUSION

The transformation to clean diesel technology is well at hand, and by any measure, is a success story, with industry, environmental stakeholders and EPA working together.

- Manufacturers are delivering on the challenge through the production and delivery of clean diesel commercial trucks since 2007.
- Refiners have delivered cleaner diesel fuel and continue to expand its availability.
- End users that have acquired the new technology are finding it to meet or exceed their expectations with performance, fuel economy and low emissions.
- Every category of stationary and mobile diesel engines – with the exception of ocean going container vessels – is now on a path to cleaner diesel fuel and low emissions diesel engine technology.
- There is genuine excitement about the new generation of clean diesel cars and light trucks that are now 50-state emissions certified and provide consumers with another green choice that has 10-20 percent fewer CO2 emissions and 20-40 percent better fuel efficiency compared with gasoline. The ability to use renewable fuels only adds to the importance and opportunity of this new technology.

The voluntary, incentive- based programs that EPA has championed through its National Clean Diesel Campaign and SmartWay Transport partnership will play an even greater role in reducing emissions and saving energy in the future.

Congress has played an important role in authorizing and appropriating funds for these voluntary incentive based programs, and consumer tax credits for light duty advanced lean-burn diesel vehicles. Your continued support in this area is needed.

Thank you for the opportunity to appear today and I would be happy to answer any questions.

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Membership of the Diesel Technology Forum
As of September 1, 2008

Association of Diesel Specialists
BMW
Bosch
Chevron
Caterpillar
Daimler
Delphi
Detroit Diesel
Eaton
General Motors
Johnson Matthey
MTU Detroit Diesel
Neste Oil
Umicore Autocat USA Inc
Volvo Powertrain
BASF Catalysts
BorgWarner
BP
Corning
Cummins
Deere & Company
Denso
Donaldson
Ford
Honeywell
LE Jones
Navistar
Sturman Industries
Volkswagen
Western States Petroleum Association

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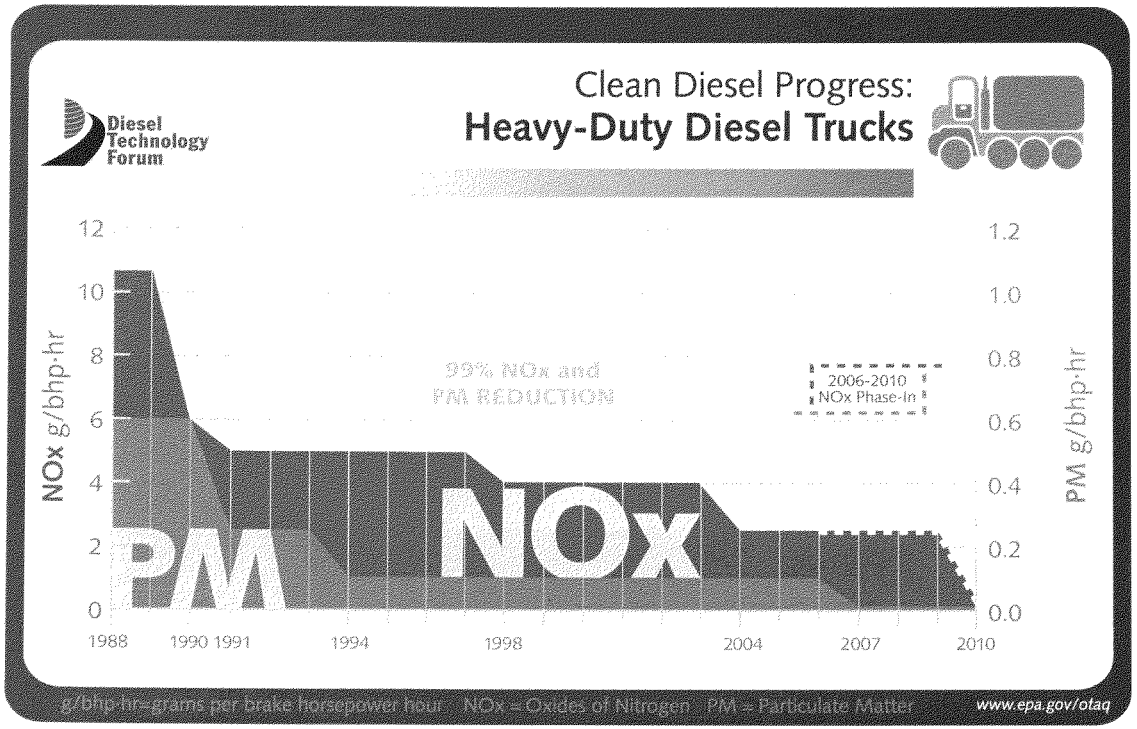
Appendix A
Continuous Improvement of Diesel Engines



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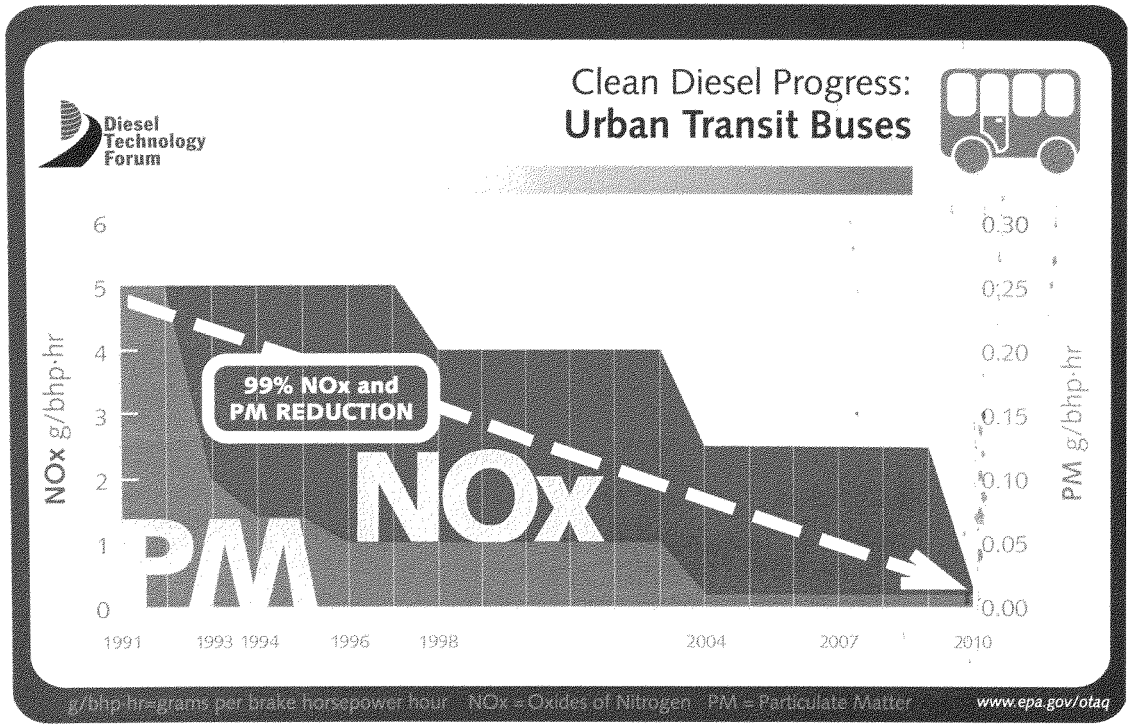
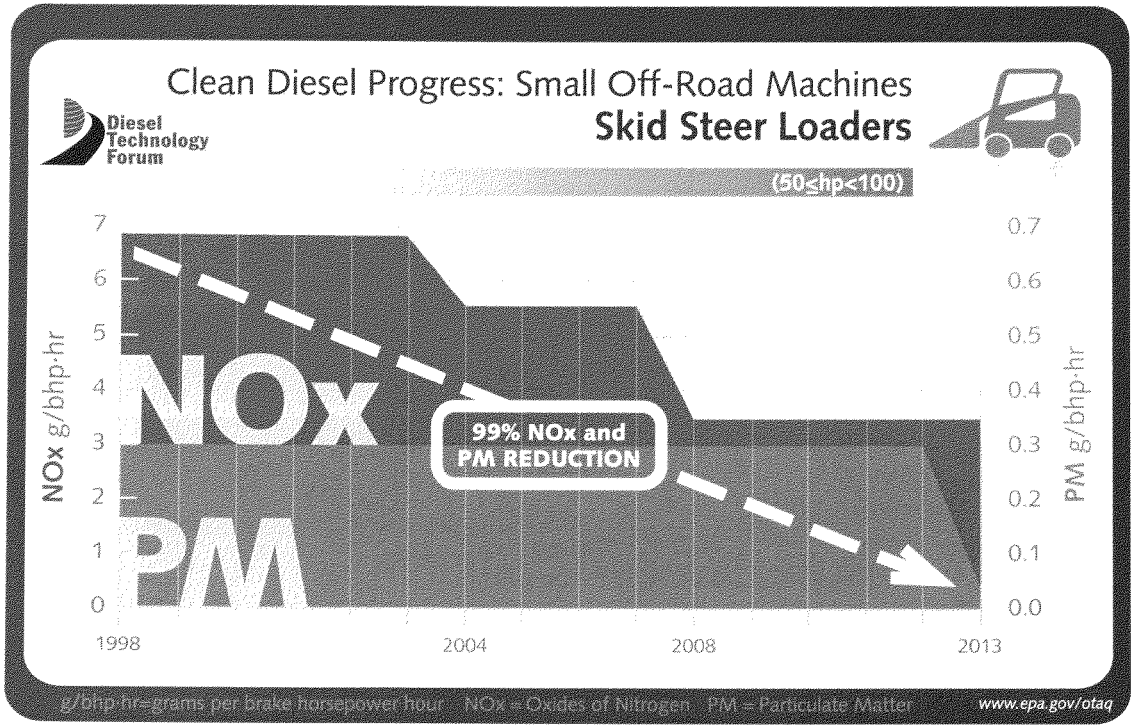
Continuous Improvement of Diesel Engines




Clean Diesel Progress: Small Off-Road Machines
Skid Steer Loaders
Diesel Technology Forum
(50≤hp<100)
NOx
PM
99% NOx and PM REDUCTION
NOx g/bhp·hr
PM g/bhp·hr
7
6
5
4
3
2
1
0
0.7
0.6
0.5
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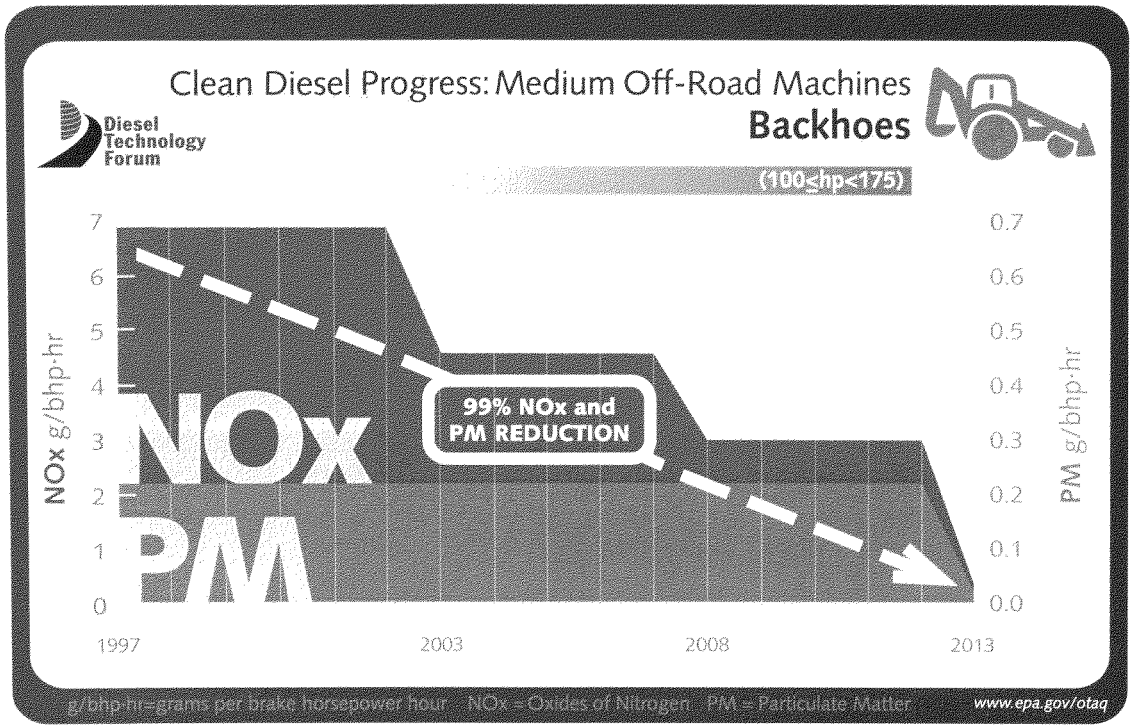
0.3
0.2
0.1
0.0
1998
2004
2008
2013
g/bhp·hr=grams per brake horsepower hour NOx = Oxides of Nitrogen PM = Particulate Matter
www.epa.gov/otaq


Clean Diesel Progress: Medium Off-Road Machines
Backhoes
Diesel Technology Forum
(100≤hp<175)
NOx g/bhp-hr
PM g/bhp-hr
7
6
5
4
3
2
1
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0.7
0.6
0.5
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NOx
PM
99% NOx and PM REDUCTION
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2003
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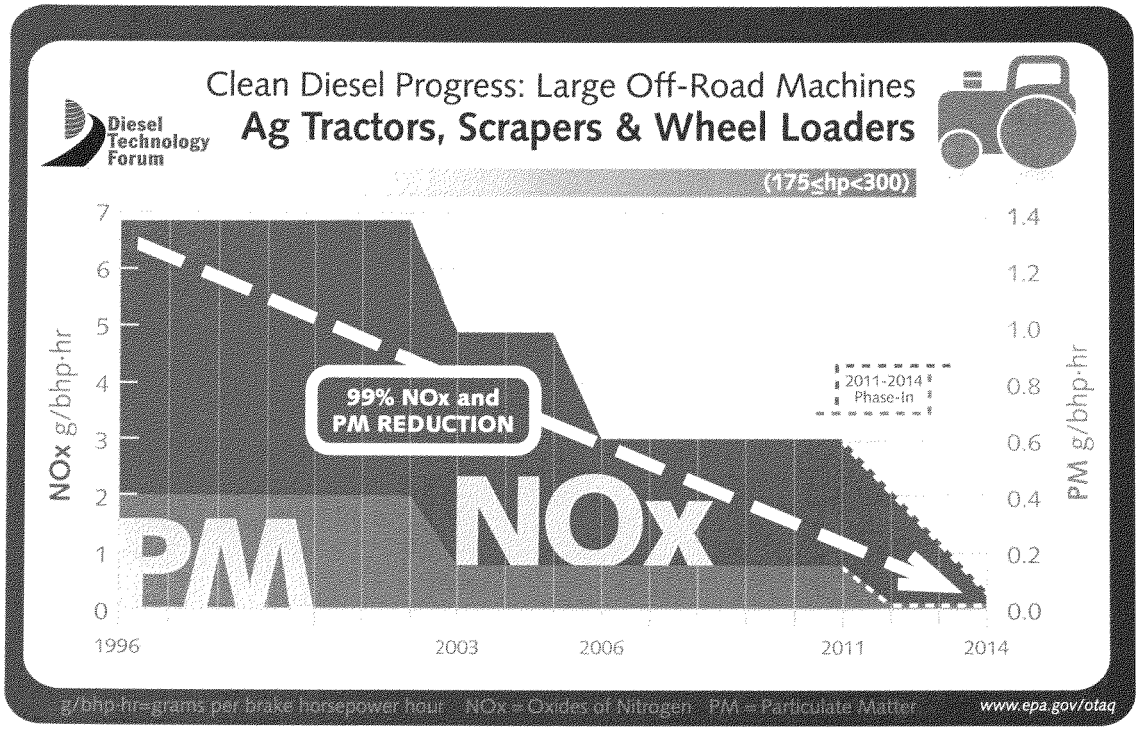
Diesel Technology Forum
Clean Diesel Progress: Large Off-Road Machines
Ag Tractors, Scrapers & Wheel Loaders
(175≤hp<300)
NOx g/bhp·hr
PM g/bhp·hr
99% NOx and PM REDUCTION
2011-2014 Phase-in
PM
NOx
1996
2003
2006
2011
2014
g/bhp-hr=grams per brake horsepower hour NOx = Oxides of Nitrogen PM = Particulate Matter
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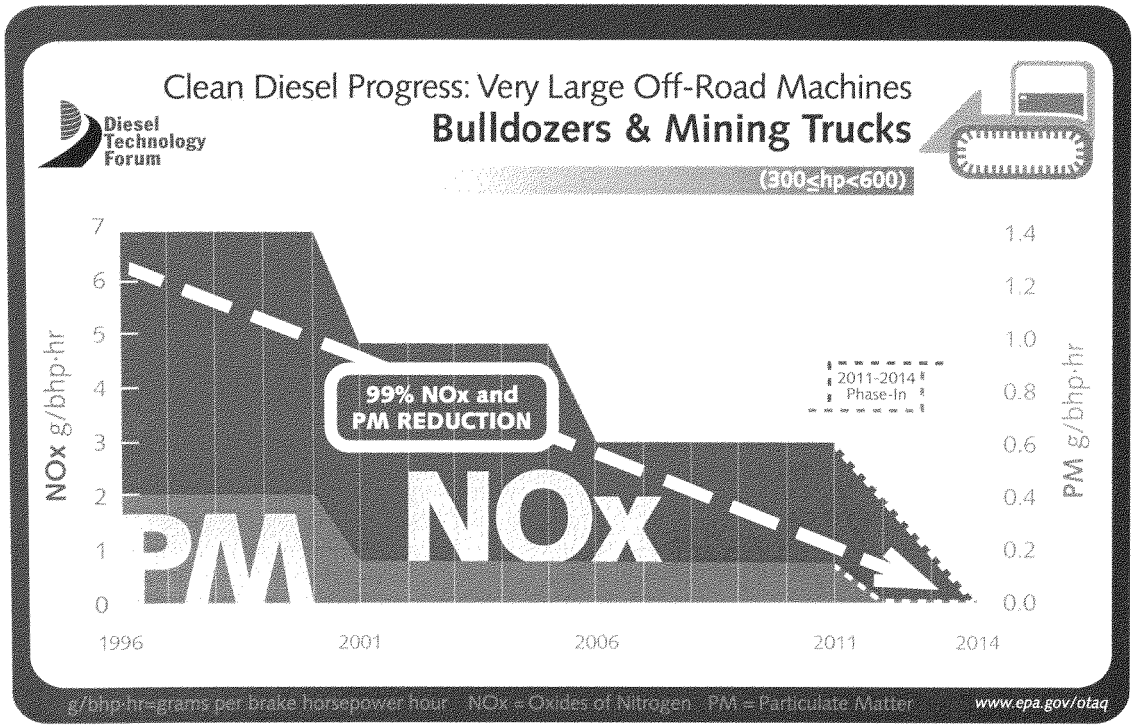
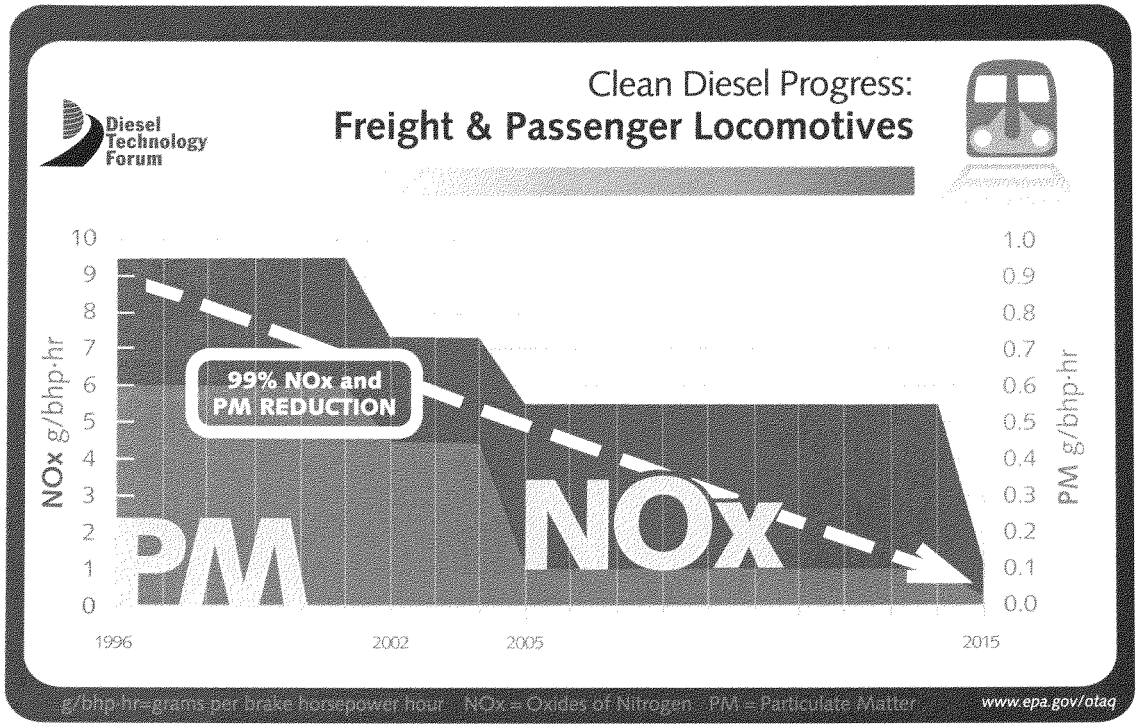
Continuous Improvement of Diesel Engines




Diesel Technology Forum
Clean Diesel Progress:
Freight & Passenger Locomotives
NOx g/bhp·hr
PM g/bhp·hr
10
9
8
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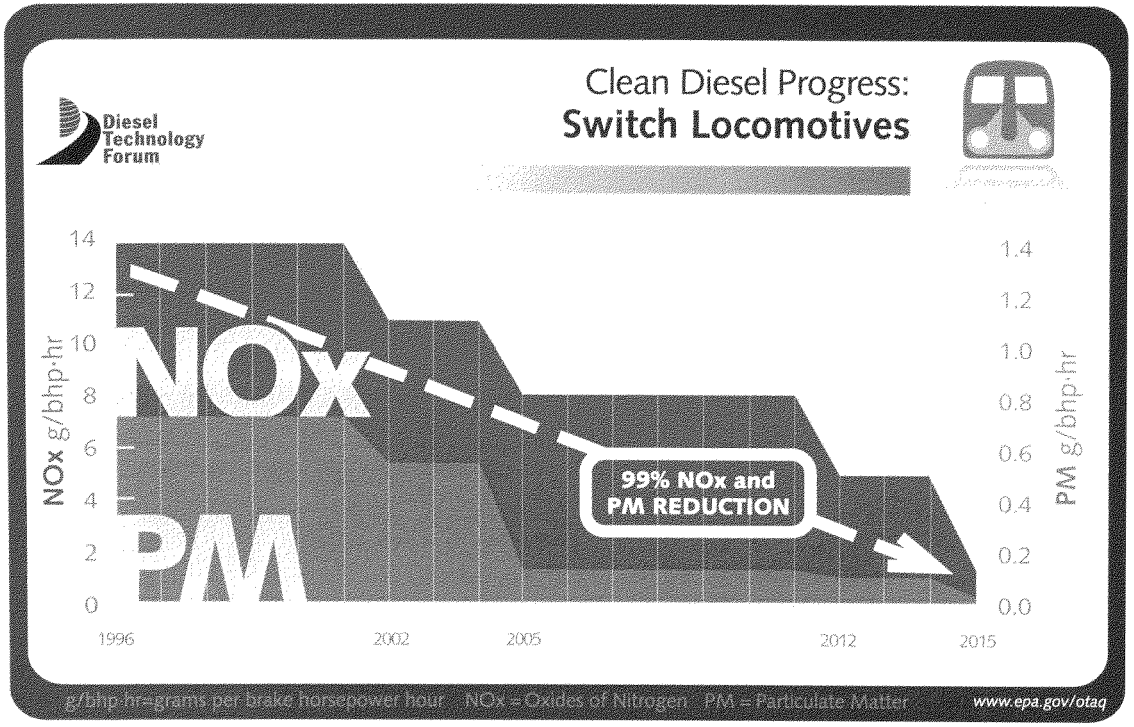
0.3
0.2
0.1
0.0
99% NOx and PM REDUCTION
PM
NOx
1996
2002
2005
2015
g/bhp·hr=grams per brake horsepower hour NOx = Oxides of Nitrogen PM = Particulate Matter
www.epa.gov/otaq


Diesel Technology Forum
Clean Diesel Progress:
Switch Locomotives
NOx g/bhp•hr
PM g/bhp•hr
14
12
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6
4
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1.4
1.2
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NOx
PM
99% NOx and PM REDUCTION
1996
2002
2005
2012
2015
g/bhp-hr=grams per brake horsepower hour NOx = Oxides of Nitrogen PM = Particulate Matter
www.epa.gov/otaq

Senator BOXER. Thank you very much, sir.

I know that Senator Klobuchar had a statement to make, so I will call on her.

OPENING STATEMENT OF HON. AMY KLOBUCHAR, U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator KLOBUCHAR. OK, thank you very much, Chairwoman Boxer. I want to thank you for holding this important hearing and for your diligence and perseverance in the face of many obstacles in trying to push these environmental issues.

I have to tell you, and I want to thank our witnesses for all being here. I wish, Mr. Schaeffer, that every environmental issue we dealt with was handled on a more bipartisan basis, but that just hasn't happened with many of the ones that the witnesses referred to here.

My State has operated that way in the environmental area. We have a Republican Governor, a Democratic legislature, and we have been able to enact one of the most aggressive renewable portfolio standards in the Country—25 percent by the year 2025 for renewables. Part of it is I think we see it, as I know most States in the Country do, is that the environment and the world around us part of our way of life.

I always like to ask people how much money you think we spend on worms and bait in Minnesota. Would you like to answer that, Mr. Pope? Every year, how much money do you think we spend on worms and bait?

Mr. POPE. I don't know, but I am sure the number is large, Senator. I am sure you do know.

Senator KLOBUCHAR. It is $50 million for fishing in Minnesota, and it is just a good example of how clean water and mercury-free water is part of our way of life in our State. I have been really emboldened by some of the groups that have come out to support work on climate change in our State. Snowmobile groups testified because they have seen the effect that the lack of snow and the warmer temperatures have had on recreation. Ski clubs have testified. It is not just the little kids with penguin buttons on anymore.

So despite all of the resistance—and that is putting it mildly—we have experienced with this Administration, I see hope in the way that groups have been able to come together. I think of the blue-green alliance between some of the environmental groups and the labor groups. I think, Reverend Ball, about the work that the religious community is doing and all the hearings that Chairwoman Boxer had that have brought together different groups that want to come together and get something done.

The second reason I believe it is so important in our State is our State believes in science. We brought the world everything from the post-it note to the pacemaker. We are the home of the Mayo Clinic. We believe that you shouldn't hide science. That is why I have been so shocked in my first year-and-a-half in the Senate to have this endangerment finding on the Clean Air Act and on climate change and greenhouse gases that we have to look at it in a back room with three Senators. I have been told we can't even make a copy of it.

I didn't really think it was some top security secret. I thought it was something that the public should be able to have. And so I am looking forward to next year with a fresh start that we will be able to bring this science into the realm of this Committee room from a new Administration.

And then finally, as you so eloquently talked about, Reverend Ball, I just see this as a moral issue. When I gave the prayer at the National Prayer Breakfast for world leaders, I talked about the prayer of the Ojibway Indians in our State, where they talk about how decisions have to be made not for today, but for those seven generations from now, and that we have that moral obligation as leaders. That is why I have so appreciated Chairwoman Boxer's attempt to work across the aisle and get things done. I know we are going to have success next year. I can feel it in my bones, but it has been a very difficult year for us.

So I just want to thank all the witnesses for being here and for participating. I will make you a promise. There is a reason I am in the gang of 20 on the energy issue. I don't agree with everything that the other side has, but I think we need to work together better. But it has made it nearly impossible in the environmental area with this Administration, and that just has to change next year.

Senator BOXER. Yes, it does, and it will.

I was thinking, if any of you could shed light, I particularly think perhaps Carl and Jamie might the ones on this particular question. I was struck by how many executive orders there have been, you know, where they have back-doored a lot of the rules and regs. Have either of you studied that? You know, in other words, if you don't want to obey the law, there are various ways. First, you can try to get it repealed. No one is going to repeal the Endangered Species Act. It is just not. The bald eagle symbolizes a lot of what was said, so we are not going to do that. So there are ways—you know, obviously they have put forward a plan to do that.

But just in terms of executive orders, Carl or Jamie, have you taken a look at how many have been issued and how many could be repealed on the first 100 days of the new President if he desired to?

Mr. POPE. Well, they have done almost everything with executive orders or things that are less. Executive orders at least are public documents. You have to tell people about them. An extraordinary amount of what they have done they have been unwilling to tell people what they are doing. We don't really know, for example, what the enforcement advisories to the Army Corps of Engineers and EPA are with regard to the jurisdiction of the Clean Water Act over intermittent headwater streams.

We do know that at least 500 cases that we have been able to ferret out, you know, basically by hiring detectives, that in at least 500 cases waterways were not protected by the Clean Water Act because some Federal bureaucrat or some political appointee decided the Clean Water Act didn't apply, and that although this was a waterway and it was within the United States, it was not in a legal sense a water of the United States.

So I think that in fact the amount of legally instantaneous improvement to be achieved is enormous. The challenge is that what is legally instantaneously achieved may not be achievable if you

don't have the staff, you don't have the science, you don't have the budget, you don't have the morale on the part of civil servants to do the job. There is a major leadership challenge to get this stuff undone because these agencies have been so badly damaged. But legally, the next President will have a relatively open field.

Senator BOXER. Do you want to add to that, Jamie?

Ms. CLARK. Well, I haven't counted, but it is clear that this Administration has been incredibly frustrated legislatively. What they have not been able to achieve legislatively, they have worked very hard to deal with administratively.

Worse than that, they are increasingly doing it under the radar. So there is not opportunity for public engagement, public input, as Carl was mentioning. And clearly as it relates to Interior and the issues that Defenders of Wildlife deals with on a daily basis, the Endangered Species Act is one of the best examples. They have been thwarted by you and others, thankfully, up here to in essence gut the ESA, which has served us so well.

One of the best examples—executive order notwithstanding—is what is happening in the Solicitor's office. By fiat of a Solicitor, they totally changed the way that the Endangered Species Act is implemented through the writing of creative opinion. It is tantamount to changing the law. It has undone 35 years of interpretation by the biologists.

Senator BOXER. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Ms. Clark, you have held significant executive office.

Mr. Pope, you have referenced the great James Madison, so I will direct a question to you about the point that I made in my opening statement.

I guess, simply put, the question is, does someone who undertakes the duties of an executive position undertake any duties other than the duty of obedience to the White House?

Mr. POPE. Well, I suppose that depends on whether you address that question to anybody prior to Vice President Cheney or to Vice President Cheney. It is clear that in this Administration, the view is that in fact the oath of office is an oath of office to the President. That is what their interpretation of the unitary executive means.

Now, if you asked me if I can find any shred of validation in American political, judicial, legislative or constitutional history, I can't, and the Vice President has never offered any. But if you really look at the way they behave, and you look at the way in which the founding fathers described the way the British cabinet and the British Parliament interacted with King George, the parallels are eerie.

Senator WHITEHOUSE. There was some—I will let you answer as well, Ms. Clark—but Mr. Pope has prompted my recollection of a telling moment in a Judiciary Committee hearing when one of the loyal Bushes who was testifying referenced having sworn her oath of office to the President. Of course, Chairman Leahy pounced on that in a moment, and interrupted and said, wait a minute, didn't you swear an oath to the Constitution?

And then rapid back-peddling began, but it was a telling moment and relates very much to the questions we have heard about of in theory nonpartisan positions at the Department of Justice, with the

candidates facing the inquiry of what is it about George W. Bush that makes you want to serve him, which again I think is a bit more consistent with the realm of King George than it is with the United States of America that I grew up in and was trained about as a lawyer.

Ms. Clark.

Ms. CLARK. Well, Senator, I can only speak from personal experience.

Senator WHITEHOUSE. What did you feel when you took your oath of office?

Ms. CLARK. Well, it was quite clear to me. I was also kind of brought along through the confirmation process as a career biologist within the agency first. It was absolutely clear to me that I was swearing to uphold the Constitution, and to steward the laws and regulations under the governance of the Fish and Wildlife Service, under the authority of the Fish and Wildlife Service.

That certainly didn't mean that I was going to "disobey the White House." And there was often great conversation with the Secretary of Interior and the White House. But there was not a question ethically or from a performance base that we were swearing to uphold the Constitution. That is how my Senate confirmation hearing went and that is how the swearing-in ceremony went. So that was paramount.

Senator WHITEHOUSE. Which of course, to confirm and State the obvious, includes the requirement that even the President of the United States faithfully execute the laws.

Thank you, Madam Chair.

Senator BOXER. I just want to thank this panel so much.

I want to thank Senator Whitehouse so much.

This has been a difficult time for us because it is hard to make progress when people don't show up. You know? At least you have a chance in discourse to try to persuade one another. And when they don't show up—and in Mr. Johnson's case for 6 months—it is really difficult.

I want to say, working on the global warming legislation was one of the greatest experiences in my life, and to shepherd it through this Committee was one of the best accomplishments that I could talk about.

And just having the faith community come to the table was really wonderful, Reverend Ball.

And I want to say to Carl here that I think you know how much Carl Pope of the Sierra Club was such an advocate in saying to me they need to be part of this and they need to be happy, and this has got to be done, all of us together.

So having all of you here is really great. I wanted to say, we got a beautiful letter from the National Council of Churches, and I thought, you know, it was very much, Reverend Ball, the same effect of yours, just making us sit back for a moment and understand that there is a whole spiritual component to what we do.

I thought just one very simple sentence in here I think is important: In a time of growing environmental concerns, it is important that the EPA and those agencies with the needed expertise and experience remain vigilant in protecting God's earth and God's people.

I mean, that is it in a very simple way. That is all we are asking from Mr. Johnson. We are not asking anything other than what he is supposed to do.

Mr. Schaeffer, having you here was wonderful. You told a good story and we started taking care of these diesel engines back in the Clinton era and we continued with the progress, crossed over party lines. This is an example of how it should be.

Unfortunately, there are so few examples of this, maybe a few, a scant few. And the rest of it has really been—and I am not going to overState it—it has just been a war against the environment, to be honest. I use those words carefully, but that is what it has been because every day, you know, we hear about another repeal, another executive order, another outrageous decision, another ducking of an obligation.

And it is just—you know, Bettina now, she calls me. I know when she calls me on Friday afternoon, late Friday, that something terrible has happened.

Senator WHITEHOUSE. For the Saturday papers.

Senator BOXER. What? Yes, for the Saturday papers. You know, they hope no one is going to notice it, but that is why we do this oversight, as Senator Whitehouse alluded to, because we need to set the record straight.

Well, all of you are our allies in this. We work for the people and that is it. So I just want to say that I hope better days are coming in so many ways. We have a financial crisis that needs to be dealt with in the right way, and we are trying to do that. We have an environmental crisis that is going to have to wait until the next Administration because this one won't come to the table—unheard of—but we will not stop what we have to do.

Senator Whitehouse, I know you have some closing remarks. Please proceed.

Senator WHITEHOUSE. I just wanted to, with respect to the boycott of this hearing by the Administration witnesses, State that I thought that the questions that I was asking Mr. Meyers yesterday were ones that merit answer. Clearly, he was having substantial difficulty. I don't know that the record of the hearing would reflect it because the record is not well-suited to long gaps of silence.

But there were extremely long gaps of silence—30 seconds, a minute—while he sat there trying to puzzle his way through to an answer that would neither commit perjury by him, nor reveal perjury by the by the Administrator. And I think that stumped him in those times, but as I said, I think these are questions that merit an answer. Although clearly, as this Administration winds down and slinks off-stage, there is no appetite for meeting further with us, I hope that those questions get answered anyway.

Frankly, I hope that with respect to our request, somebody from the Department of Justice interviews Robert Meyers and continues that examination and gets those answers, and doesn't get fobbed off by the short timeframe we have to work with in these hearings. I think he is a witness who would—it would be very interesting and I think useful to have half an hour or an hour to examine him under oath and be able to run down questions and get to the bottom of his answers.

I very much hope that somebody at the Department of Justice who is looking into the letter that the Chairman sent and that I sent, follow up on this, because I think that he does have only two choices. He can either perjure himself or reveal the perjury of his Administrator.

Thank you.

Senator BOXER. I think that is a very important statement that you made. Anyone who followed yesterday's hearing, it was one of the most—it was such a long silence, that I had forgotten what the question was, and the poor clerk here had to go back and find the question. It was just on and on.

I am going to put in the record, without objection, the statement of the National Council of Churches, which goes very well with Reverend Ball's.

[The referenced document was not received at time of print.]

Senator BOXER. I am really stunned today that they are not showing up. It speaks volumes to their disdain for the American people, because after all, we represent the American people. That is our job. We don't have any other power other than that which we derive from them. So when they don't come to Congress, they are not talking to us, they are not talking to the American people.

These are tough, tough days. We have a few more tough days ahead of us. But the American people have to know the truth. As we look at this investigation, perjury, on the whole issue of the waiver, we have sent over the fact that these witnesses, Mr. Johnson, these officials, Mr. Johnson and Mr. Laverty—right?—Mr. Johnson and Mr. Laverty told us that they would appear anytime we asked them. That was the condition upon which—if they had said no, that would have been the end of it, but they meant no, maybe.

We didn't say, will you appear when you are in the mood or if you feel good and have a good cup of coffee. We didn't say will you appear when you think it is good for you and not when you don't. We didn't say any caveat. We said what we have to say: Will you come to a duly constituted hearing?

I have to say, Senator Inhofe—this is a fact, this will come out—tried not to have a duly constituted hearing. I wanted to make sure you knew he was going to object to our meeting, and that is why we had a recess. We almost didn't have this hearing. We almost had a briefing because I think they knew for them not to show up here, they could have not shown up if it was a hearing. But if it is a hearing, they have to show up.

So it is an unpleasant sticky wicket. When Congress wants to do its job, and we know it is not pleasant. I wouldn't want to be Mr. Johnson facing me and Sheldon Whitehouse. But you know what? That is his job. He has to face us. And if he is such a coward, he ought to resign, which is what we asked him to do, instead of traveling around the world on taxpayer dollars going to Israel and Jordan and going on some fancy-dan ship. Somebody said he went on this ship where they had a show or something, but he missed the show? Did he miss it? I guess he was so busy.

He tried very hard to make the ventriloquist show, but he may not have made it because he is just so busy.

All right, enough said.

Thank you.
We stand adjourned.
[Whereupon, at 12:35 p.m., the committee was adjourned.]
[Additional material submitted for the record follows.]

TESTIMONY OF NORMAN D. JAMES

before the

UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

September 24, 2008

Current Problems Arising Under Section 7 of the Endangered Species Act and Comments Concerning the Joint Proposal of the United States Fish and Wildlife Service and the National Marine Fisheries Service to Amend the Regulations Governing Interagency Consultation

My name is Norman D. James. I am an attorney with the law firm of Fennemore Craig in Phoenix, Arizona. I am appearing before the Committee on my own behalf, as an attorney who specializes in environmental and natural resources law. I have represented various public and private clients on matters concerning the Endangered Species Act ("ESA") in the Southwest since the early 1990s.

In my view as an attorney who represents public and private land and resource users, the time has come for Congress to take a hard look at how the ESA is being used and, increasingly, misused by Federal agencies and public interest groups to prevent legitimate land uses. As one commentator stated:

> The ESA is not the single most important federal environmental statute, but – whether one applauds or deplores this turn of events – the law is now a primary obstacle to land development and related activities in America.

George Cameron Coggins, *A Premature Evaluation of American Endangered Species Law, in Endangered Species Act: Law, Policy, and Perspective*, 1 (Donald C. Baur and

Wm. Robert Irvin eds. 2002).

My testimony today will address, first, how Section 7 of the ESA is supposed to work and how that statute actually works in the field. Put bluntly, over the past decade, the Section 7 consultation process has evolved into a land use regulation program, under which FWS field employees dictate the manner in which private projects are allowed to proceed. Section 7, however, applies only to Federal actions, and is limited by the scope of the Federal agency's regulatory authority. As I will discuss in this testimony, these limitations are frequently ignored, at least in Arizona.

Second, I will address the joint proposal of the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NFMS")[1] to amend the regulations governing interagency consultation under Section 7 of the ESA. *See Interagency Cooperation Under the Endangered Species Act; Proposed Rule*, 73 Fed. Reg. 47868 (Aug. 15, 2008) ("Proposed Rule"). The Proposed Rule attempts to address the problems that I describe below, and is consistent with, and supported by, existing law. It certainly is not a radical change, as certain groups contend. Consequently, the Proposed Rule is appropriate and, in my view, should be adopted by the Services.

A. Overview of Section 7 and the Consultation Process

Perhaps the most complex and troublesome provision of the ESA is Section 7(a)(2), 16 U.S.C. § 1536(a)(2), which requires Federal agencies to ensure that "any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the

[1] FWS and NMFS are referred to collectively as the "Services" and individually as the "Service" unless otherwise appropriate in context.

continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species" that has been designated as critical. Thus, Federal actions may not proceed if they would either jeopardize the existence of a listed species or destroy or adversely modify a listed species' critical habitat, unless an exemption is granted by Endangered Species Committee. This was the basis for the Supreme Court's injunction halting construction of the Tellico Dam in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), which would have resulted in the extinction of a listed species of fish.

Nevertheless, the applicability of Section 7(a)(2) is limited in certain important respects. On its face, this provision applies only to *Federal* actions, and not to actions undertaken by a State or local government or by a private individual or business. Moreover, Section 7(a)(2) applies only to activities "in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Last year, in *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518 (2007), the Supreme Court, applying the existing version of 50 C.F.R. § 402.03, confirmed that Section 7(a)(2) does not apply to Federal actions when the agency lacks discretion to consider impacts on listed species in its decision-making process.

In addition, the requirements of Section 7(a)(2) apply only to habitat that has been formally designated as "critical" under Section 4 of the ESA, 16 U.S.C. § 1533. The ESA does not protect "suitable" or "potential" habitat for species:

> The ESA provides for the designation of critical habitat outside the geographic area currently occupied by the species when "such areas are essential for the conservation of the

> species." 16 U.S.C. § 1532(5)(A)(ii). Absent this procedure, however, *there is no evidence that Congress intended to allow the Fish and Wildlife Service to regulate any parcel of land that is merely capable of supporting a protected species.*

Arizona Cattle Growers Ass'n v. U. S. Fish and Wildlife Serv., 273 F.3d 1229, 1244 (9th Cir. 2001) (emphasis supplied).

Section 7(a)(2) also imposes an obligation to "consult" with FWS or NMFS (depending on whether the species at issue is a terrestrial or a marine species) to ensure that the Federal action does not violate the provision's substantive "no jeopardy" requirement. The procedural requirements for consultation are set forth in the joint regulations of FWS and NMFS, codified at 50 C.F.R. Part 402. A violation of these consultation procedures can lead to an injunction halting the Federal action until consultation has been completed. *See, e.g., National Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 481 F.3d 1224 (9th Cir. 2007) ("The ESA imposes a procedural consultation duty whenever a federal action may affect an ESA-listed species.")

In deciding whether to consult, a Federal agency must initially determine whether its action "may affect" listed species or critical habitat, which depends on whether any members of a listed species or critical habitat are present in the "action area," i.e., the area directly and indirectly affected by the proposed Federal action. 50 C.F.R. § 402.02 (definition of "action area"). If no listed species or critical habitat are present, consultation is not required, and the action may proceed without violating Section 7. Notably, this determination is made by the Federal agency, not by the Services, as the courts have held. *See, e.g., Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1070-71

(9th Cir. 2005) (upholding agency's "no effect" determination); *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998) ("A finding of no effect [by the Forest Service] obviates the need for consultation with [FWS]"); *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1445 (9th Cir. 1996) (the Forest Service's "no effect" determination "obviates the need for formal consultation").

If the Federal agency believes that its action, while having some effect on listed species or critical habitat, is not likely to adversely affect the listed species or critical habitat, the agency may request that the Service concur with its evaluation. If the Service concurs, no additional consultation is required. This process is known as informal consultation. *See* 50 C.F.R. §§ 402.13, 402.14(b)(1). The vast majority of consultations are conducted informally under 50 C.F.R. § 402.13.[2]

If the Federal agency believes instead that the action is likely to adversely affect listed species or critical habitat, or if the Service does not concur with the Federal agency's determination that the impacts on listed species or critical habitat will not be adverse, formal consultation is required. 50 C.F.R. §§ 402.12(k), 402.14(a). During formal consultation, a more thorough analysis of the proposed action is performed, and at the conclusion of consultation, the Service prepares a written biological opinion. 16 U.S.C. § 1536(a)(3); 50 C.F.R. §§ 402.14(g), (h). This opinion will state whether the Service believes the proposed action is likely to jeopardize the continued existence of any

[2] During fiscal year 1999, for example, FWS informally consulted on about 12,000 actions, while conducting 83 formal consultations and issuing one "jeopardy" opinion. Terry Rabot, The Federal Role in Habitat Protection, *Endangered Species Bulletin* 11 (U.S. Fish and Wildlife Service Nov./Dec. 1999).

listed species or adversely modify critical habitat, and may contain reasonable and prudent alternatives to avoid jeopardy and an incidental take statement if members of a listed species are likely to killed or injured. 50 C.F.R. §§ 402.14(h), (i).[3]

If a "jeopardy" biological opinion is issued, the federal agency technically may proceed with the proposed action. *Cf. Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193-94 (9th Cir. 1988) (the Interior Secretary's failure to adopt NMFS's reasonable and prudent alternative does not violate Section 7). The Supreme Court has recognized, however, that a biological opinion "alters the legal regime to which the action agency is subject," and exposes the agency (as well as any permit or license applicant) to potential liability. *Bennett v. Spear*, 520 U.S. 154, 169-70 (1997). When there are no viable reasonable and prudent alternatives to avoid jeopardy, the agency is faced with either terminating the proposed action or applying for an exemption from the Endangered Species Committee.

The statutory time limit for Section 7 consultation is 90 days or such time as is mutually agreed to between the Federal agency and FWS. 16 U.S.C. § 1536(b)(1)(A). Within 45 days from the completion of consultation, the biological opinion must be issued. 50 C.F.R. § 402.14(e). As a practical matter, the 135-day time limit is often exceeded, even in the case of relatively simple Federal actions.

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[3] An action that causes the death or injury of members of a listed species violates Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B) *See also, e.g., Arizona Cattle Growers*, 273 F.3d at 1237-38. Therefore, the prohibition against the taking of listed species found in Section 9 could prevent a proposed Federal action from going forward even though Section 7 consultation has been completed. In this situation, formal consultation would be necessary in order to obtain an incidental take statement. *See Arizona Cattle Growers*, 273 F.3d at 1239-42 (discussing the relationship between incidental take statements and Section 7 consultation).

B. Current Problems With Section 7 Consultation and Examples

As other Federal regulatory programs have expanded, an increasing number of private land uses require some sort of Federal permit or approval or have some other Federal nexus that triggers consultation. At the same time, FWS[4] has become increasingly aggressive in exploiting the Section 7 consultation process to extract concessions from landowners and control how private land is used.

For example, many private construction activities currently require one or more Federal permits under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* Two of the most common permits are permits regulating the discharge of pollutants in storm water from construction sites, which are issued by EPA under Section 402 of the Clean Water Act, and permits authorizing the discharge of dredged or fill material into the waters of the United States, which are issued by the Army Corps of Engineers under Section 404 of the Clean Water Act. *See* 33 U.S.C. §§ 1342, 1344. In both instances, however, the authority of the agency is limited to regulating discharges of pollutants into jurisdictional waters – not the activity from which the discharge results. *See, e.g., Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 505 (2d Cir. 2005) ("the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges – not potential discharges, and certainly not point sources themselves"); *United States v. Mango*, 199 F.3d 85, 93 & n. 7 (2d Cir. 1999) ("Because the [Corps'] jurisdiction is limited to the issuing of permits for such discharges, ... any conditions imposed in a permit must themselves be related to

[4] The discussion that follows relates solely to FWS's consultation practices. The witness does not have personal experience with NFMS, which, as previously stated, has jurisdiction over marine species.

the discharge."); *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988) ("EPA's jurisdiction ... is limited to regulating the discharge of pollutants.").

While it may seem obvious that the Federal action is the issuance of the Clean Water Act permit, FWS frequently (and usually without explanation) treats the *entire* project as the Federal action for consultation purposes, even if there is no discretionary Federal involvement in or control over the balance of the project. This error effectively "federalizes" the private project for the purposes of Section 7 consultation, and extends the scope of consultation to private land uses over which the agency lacks jurisdiction.

Moreover, FWS field employees do not appear to understand the causal relationship necessary for an impact to be considered an "effect" of a Federal action. "Effects of the action" include both the direct and indirect effects of the Federal action that is the subject of the consultation. 50 C.F.R. § 402.02. Under the definition, "direct effects" are the direct or immediate effects on listed species or critical habitat caused by the Federal action. "Indirect effects are those that are caused by the proposed action and are later in time, but are still reasonably certain to occur." *Id.* Cumulative effects, i.e., the effects of future state or private activities, are also considered. Those activities must be "reasonably certain to occur" in the area impacted by the proposed Federal action. *Id.*

For example, the immediate impacts caused by the construction of a street crossing or flood control structure within a watercourse subject to the Army Corps of Engineers' jurisdiction would constitute direct effects of the Corps' Section 404 permit, while future impacts caused by the placement of structures and fill material within the watercourse that are reasonably certain to occur (e.g., altered flood flows or increased

downstream sedimentation) would constitute indirect effects of the permit. In this example, the "action area" associated with the Corps' permit would include not only the portion of the watercourse directly impacted by the construction of the street crossing, but also any areas upstream or downstream of the crossing reasonably certain to be impacted in the future. Therefore, the proper scope of analysis would include the effects (including both indirect and cumulative effects) that are caused by the permitted activity and are reasonably certain to occur within that portion of the watercourse. *E.g.*, *Riverside Irr. Dist. v. Andrews,* 758 F.2d 508, 512 (10th Cir. 1985) (the relevant "action area" relating to a Clean Water Act permit for the construction of a dam included downstream aquatic habitat).

In many recent biological opinions, however, FWS has gone well beyond the limits imposed in the current consultation regulations and by the ESA itself, extending the scope of analysis to effects over which there is no Federal jurisdiction. For example, in consultations involving the impacts of issuing Clean Water Act permits on the cactus ferruginous pygmy-owl in southern Arizona, FWS has determined that the permit's "action area" includes all land within 19 miles of the project site. *E.g.*, *Final Biological Opinion on the Effects of the Thornydale Road Improvement Project in Pima County, Arizona*, 20 (Feb. 25, 2002).[5] These determinations were based on unpublished data suggesting that the dispersal distance of juvenile pygmy-owls may be as much as 19 miles – an area containing more than 725,000 acres! Thus, the "action area" was

[5] The FWS biological opinions that are discussed in this testimony are available at http://www.fws.gov/southwest/es/arizona/Biological.htm (visited September 19, 2008).

delimited by the maximum, potential movement of a member of the species, rather than the effects caused by the activities authorized under the Federal permit.

The specific Pima County project identified in the foregoing biological opinion involved the widening and improvement of 1.6 miles of a major arterial street, which would result in the permanent loss of approximately 1.4 acres of desert vegetation. The Federal action consisted of authorizing storm water discharges from construction activities under a general NPDES permit and a Section 404 permit authorizing the construction of certain minor flood control and drainage structures in a desert wash. The biological opinion contained no explanation of how the activities authorized by these Federal permits were reasonably certain to result in direct or indirect effects throughout the 725,000-acre "action area." FWS nevertheless required Pima County to acquire approximately 36 acres of suitable pygmy-owl habitat, to be set aside and managed in perpetuity for the benefit of the species, in addition to complying with numerous on-site conservation measures that had little to do with protecting aquatic resources under the Clean Water Act.

In a Section 7 consultation that addressed the effects of storm water discharges from the construction of 10 single-family homes on a 8.92-acre parcel in northwest Tucson, FWS required the landowner to maintain 76 percent of his property (6.7 acres) as natural open space, restore an additional 1.2 acres (including 0.69 acres on site) using specified vegetation, and record a conservation easement restricting various land use activities, including land uses on each lot outside a 6,300 square-foot building envelope, fence locations, pedestrian activities, artificial lighting, and outdoor cooking. *Biological*

Opinion on the Effects of the Proposed Pueblo Oasis Development in Pima County, Arizona (July 9, 2002). While this biological opinion contained a lengthy (and largely generic) discussion about the pygmy-owl, it contained virtually no site-specific information, included no discussion of current owl locations relative to the parcel and failed to identify the jurisdictional waters affected by the storm water discharge. The opinion simply noted that two juvenile owls used the parcel in 1998 and one juvenile owl used the parcel in 1999, and explained that the parcel contains suitable owl habitat. No incidental take statement was provided because the proposed action was not expected to "take" any owls.

The Pima County and Pueblo Oasis biological opinions are, unfortunately, typical of the biological opinions that have been issued by the FWS Arizona field office in connection with Clean Water Act permits during the past decade.[6] In these opinions, FWS largely ignored the effects on listed species and critical habitat resulting from the discharge of pollutants (the regulated activity). FWS instead focused on the impact of private real estate development activities (including off-site improvements) on habitat considered "suitable" for pygmy-owls and other listed species.

The fundamental flaw in the analysis employed by FWS is the implicit assumption that vegetation removal and other land use activities outside of jurisdictional "waters of the United States" are authorized or otherwise caused by a Clean Water Act permit.

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[6] Other examples of biological opinions and the conditions imposed to protect habitat deemed "suitable" (but not designated as critical under the ESA) are found in Attachment A to this testimony.

Under the so-called "but for" test typically used by FWS to determine a Federal action's indirect effects, the Federal action (e.g., a Clean Water Act permit) cannot be the cause of an effect unless the Federal action is necessary for that effect to occur. Normally, a landowner may remove or thin vegetation on his property without a Federal permit. While the removal of vegetation may adversely impact the ability of a parcel of land to serve as habitat for a listed species, this impact is not attributable to the Federal permit because the removal of vegetation could take place in the absence of the permit. In other words, true "but for" causation does not exist because the Federal agency lacks authority to prevent or control the activity. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004) ("where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect").[7]

Using this flawed "but for" test, FWS has imposed conditions and requirements on landowners during the consultation process, such as those imposed in examples given above and in Attachment A, based on the Federal nexus provided by a Clean Water Act permit. These conditions and requirements have included the following:

- The acquisition and preservation of off-site conservation land (typically several times the area disturbed by the project)
- Land disturbance is limited to 30% or less within the development

[7] In the Clean Water Act, Congress declared that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use ... of land and water resources." Congress did not intend that EPA and the Corps regulate real estate development or other upland land uses, nor do they have jurisdiction to do so under Clean Water Act, as the circuit court decisions cited previously have held.

- Open space within the development (including individual lots) must be permanently maintained and access must be restricted
- No use of pesticides within the development
- Restrictions on exterior lighting and outdoor activities, such as organized events and outdoor cooking
- An education program for construction workers and/or residents in the development
- Cats, dogs and other pets, if permitted outdoors, must be kept on leashes

These "conservation measures" are not imposed as terms and conditions in an incidental take statement in order to minimize "take," but are included as conditions of the Clean Water Act permit. If the permit applicant refuses to accept these conditions, he is faced with the prospect of a "jeopardy" determination and problems obtaining the permit, which would delay or even halt his project.

Given these sorts of difficulties, it is little wonder that private landowners and trade organizations are suing the Federal government with greater frequency. A narrower and more focused approach to consultation, in which the limits of Federal regulatory authority are recognized, would eliminate these abuses, conserve agency resources and reduce conflicts with the regulated community. The Services' proposed amendments to the Section 7 consultation regulations address the scope of Section 7 consultation and will provide helpful guidance to FWS field employees.

C. Comments Concerning the Services' Proposed Amendments to the Regulations Governing Interagency Consultation

The purpose of the Proposed Rule amending the current regulations governing Section 7 consultation is to "clarify when the section 7 regulations are applicable and the

correct standard for effects analysis," and "to establish time frames for the informal consultation process." *Id.* As discussed below, the proposed changes are consistent with, and supported by, existing law and, assuming they are actually followed in the field, will help to eliminate the problems I have discussed.

1. The Proposed Changes to the Definitions of "Effects of the Action" and "Cumulative Effects" in 50 C.F.R. § 402.02

The Services are proposing changes to the definitions of "effects of the action" and "cumulative effects" found in 50 C.F.R. § 402.02. These changes, although minor in nature, will clarify the scope of analysis required during consultation under Section 7.

With respect to the definition of "effects of the action," the Services propose to clarify, first, that "indirect effects" are those effects "for which the proposed [Federal] action *is an essential cause*, and that are later in time, but still reasonably certain to occur" and that "[i]f an effect will occur whether or not the action takes place, the action is not the cause of the direct or indirect effect." Proposed Rule, 73 Fed. Reg. at 47874 (emphasis supplied). In other words, there must be a reasonably close causal relationship between the effect and the proposed Federal action.

The Services also would add language to clarify that for an indirect effect to be "reasonably certain to occur" (the standard in the current definition), there must be "clear and substantial information" demonstrating that the effect will happen. *Id.* This requirement is mandated by the statutory requirement that the Services "use the best scientific and commercial data available" in fulfilling their obligations under Section 7. 16 U.S.C. § 1536(a)(2). The Supreme Court has explained that the purpose of this

requirement "is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise" and "to avoid needless economic dislocation" by preventing erroneous jeopardy determinations. *Bennett*, 520 U.S. at 176-77. The proposed changes to the definition of "indirect effects" are consistent with the Supreme Court's discussion of Section 7's requirements.

With respect to the definition of "cumulative effects," the Services would add language clarifying that cumulative effects do not include effects caused by future Federal activities. Proposed Rule, 73 Fed. Reg. at 47874. As discussed in the preamble to the Proposed Rule, the current definition already limits cumulative effects to effects caused by future State or private actions. *Id.* at 47869. The preamble also explains that cumulative effects are subject to the same "reasonably certain to occur" standard, which is narrower than the "reasonably foreseeable" standard embodied in National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(f), and that statute's implementing regulations and requires greater certainty concerning the likelihood of effects caused by future State and private projects. *Id.*

As the preamble explains, these basic concepts are contained in the existing definitions, which were adopted in 1986. *See Interagency Cooperation – Endangered Species Act of 1973, as amended; Final Rule*, 51 Fed. Reg. 19926, 19932-33 (June 3, 1986). The preamble to the 1986 rulemaking contains a helpful discussion of the scope of analysis that should be used to determine whether a proposed Federal action is likely to violate the "jeopardy" standard:

> Section 7 consultation will analyze whether the "effects of the action" on listed species, plus any additional, cumulative effects of State and private actions which are reasonably certain to occur in the action area, are likely to jeopardize the continued existence of that species. ... [The jeopardy standard] is a substantive prohibition that applies to the Federal action involved in the consultation. In contrast, NEPA is a procedural in nature, rather than substantive, which would warrant a more expanded review of cumulative effects. Otherwise, in a particular situation the jeopardy prohibition could operate to block "nonjeopardy" actions because future, speculative effects occurring after the Federal action is over might, on a cumulative basis, jeopardize a listed species. Congress did not intend that Federal actions be precluded by such speculative actions.

Id. This discussion has never been repudiated by the Services, and continues to reflect the Services' fundamental policy regarding the appropriate scope of analysis to be used during the consultation process. The changes proposed in the Proposed Rule are consistent with that policy.

The changes to these definitions are also consistent with case law under NEPA.[8] In *Public Citizen, supra*, the Supreme Court addressed the proper scope of analysis under NEPA, holding:

> We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect. Hence, under NEPA and the implementing [Council on Environmental Quality]

[8] NEPA requires that Federal agencies take a "hard look" at the environmental effects of their actions prior to proceeding with them. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989). NEPA and its implementing regulations require Federal agencies to evaluate the "reasonably foreseeable" indirect and cumulative impacts (i.e., effects) of their actions. *See* 40 C.F.R. §§ 1508.7, 1508.8. In contrast to ESA Section 7, however, NEPA imposes no substantive environmental obligations on Federal agencies, but simply mandates that they satisfy certain procedural requirements. *Robertson*, 490 U.S. at 350-51.

> regulations, the agency need not consider these effects in its [environmental assessment] when determining whether its action is a "major Federal action."

The Court also stated that technical "but for" causation is insufficient to make an agency responsible for a particular effect under NEPA. Instead, there must be "a reasonably close causal relationship between the environmental effect and the alleged cause." 541 U.S. at 767 (quotation marks omitted).[9]

Although *Public Citizen* addressed causation in the context of NEPA, the Supreme Court relied on the reasoning of *Public Citizen* in *National Ass'n of Home Builders*, *supra*, in concluding that "[Section 7(a)(2)'s] no-jeopardy duty covers only discretionary agency actions and does not attach to actions ... that an agency is *required* by statute to undertake once certain specified triggering events have occurred." 127 S.Ct. at 2536 (emphasis original). The Court explained that *Public Citizen*'s "basic principle," "that an agency cannot be considered the legal 'cause' of an action that it has no statutory discretion *not* to take," supports the reasonableness of the Services' long-standing interpretation of Section 7 as applying only to discretionary Federal actions. *Id.* at 2535.

The changes proposed by the Services are consistent with the Supreme Court's analysis in *Public Citizen*, and would clarify that both "indirect effects" and "cumulative effects," as defined in 50 C.F.R. § 402.02, must have a close causal relationship to the proposed Federal action, i.e., the proposed action must be an "essential cause" of the

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[9] Included with this testimony, as Attachment B, is a paper that was written and presented by the witness at an ALI/ABA-sponsored conference in Washington, D.C., in November 2006. This paper discusses *Public Citizen* in greater detail, and explains how the *Public Citizen* standard for determining when an effect is properly attributed to a proposed Federal action under NEPA provides guidance in determining the correct scope of analysis under ESA Section 7.

effect. The changes would also emphasize that there must be clear and substantial information that an effect will actually occur, which will ensure that highly uncertain and speculative effects are not improperly considered by the Services. These changes are consistent with Section 7, and do not amount to a sea change, as some groups have groups have contended.

2. The Proposed Changes to 50 C.F.R. § 402.03 Concerning the Applicability of Section 7 to Proposed Federal Actions

The Services also have proposed amendments to 50 C.F.R. § 402.03, entitled "Applicability." The current version of this regulation provides that "Section 7 and the requirements of this part apply to all actions in which there is discretionary involvement or control." The Services propose to revise the regulation in two respects.

First, new subsection (a) restates the existing regulation, providing that "Section 7 of the Act and the requirements of this part apply to all actions in which the Federal agency has discretionary involvement or control." Proposed Rule, 73 Fed. Reg. at 47874. This change merely reaffirms the existing regulation and is consistent with existing law, including the Supreme Court's 2007 decision in *National Ass'n of Home Builders*, discussed previously. Before that decision was issued, however, the courts had recognized that a Federal agency may have decision-making authority (e.g., authority to issue permits authorizing the discharge of pollutants under the Clean Water Act), but nonetheless lack discretion to act for the benefit of listed species due to its limited regulatory authority (e.g., no jurisdiction over upland land uses). *See, e.g., In re Operation of the Missouri River System Litigation,* 421 F.3d 618, 630 (8th Cir. 2005)

("the ESA does not apply where an agency has no statutory authority to act with discretion"); *Ground Zero Ctr. For Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1091-92 (9th Cir. 2004); *American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297-99 (5th Cir. 1998); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 33-34 (D.C. Cir. 1992).

Second, the Services propose to add a new subsection (b) that would impose reasonable limits on the applicability of Section 7 to discretionary Federal actions. As previously explained, under Section 7(a)(2) Federal actions may not proceed if they would either jeopardize the existence of a listed species or destroy or adversely modify a listed species' critical habitat. New subsection (b) identifies certain discretionary actions that are excluded from the consultation process because either they have no effect on listed species or their "effects are so inconsequential, uncertain, unlikely or beneficial that they are, as a practical matter, tantamount to having no effect." Proposed Rule, 73 Fed. Reg. at 47870.

Subpart 50 C.F.R. § 402.03(b)(1), which provides that consultation is not required when a proposed action "has no effect on a listed species or critical habitat" (Proposed Rule, 73 Fed. Reg. at 47874), is a statement of the current law. As explained previously, agencies are currently responsible for determining whether to consult, and are not required to do so when no listed species or critical habitat are present in the project area. *E.g., Defenders of Wildlife*, 414 F.3d at 1070-71; *Newton County Wildlife*, 141 F.3d at 810; *Southwest Ctr.*, 100 F.3d at 1445. In their 1986 rulemaking, the Services emphasized that Federal agencies are responsible for complying with Section 7:

> Two commenters asked that the final rule empower the Director to require a Federal agency to consult. Although the Service will, when appropriate, request consultation on particular Federal actions, *it lacks the authority to require the initiation of consultation.* The determination of possible effects is the Federal agency's responsibility. The Federal agency has the ultimate duty to ensure that its actions are not likely to jeopardize listed species or adversely modify critical habitat. The Federal agency makes the final decision on whether consultation is required, and it likewise bears the risk of an erroneous decision.

Interagency Cooperation, 51 Fed. Reg. at 19949 (emphasis supplied). Consequently, the addition of subpart 402.03(b)(1) merely confirms existing law.

The remaining changes to 50 C.F.R. § 402.03 are consistent with the foregoing authorities and, more broadly, with the basic purpose of Section 7. In summary, consultation would not be triggered when the proposed action is an insignificant contributor to any effects to species (subpart 402.03(b)(2)) or when the effects of the proposed action are not capable of being meaningfully identified or detected in a manner that permits evaluation (i.e. the effects are highly speculative), are wholly beneficial, or are so remote that they pose no legitimate risk of causing jeopardy or adverse modification (subpart 402.03(b)(3)). In all cases, however, consultation is required if the Federal action is anticipated to result in the taking of members of a listed species.

These are appropriate and common-sense change recognizing that the ultimate purpose of the consultation process is to assist Federal agencies in ensuring that their actions will not violate the jeopardy standard. In other words, the Services' consultation procedures are not intended to ensure that a particular process is completed (in contrast, for example, to NEPA's procedural requirements), but instead to ensure that Section 7's

substantive standard is met. In fact, as stated in the Proposed Rule, the current, three-tiered consultation process is a product of the Services' 1986 rulemaking, and is not required by the ESA. Proposed Rule, 73 Fed. Reg. at 47871. In situations like those identified in proposed 50 C.F.R. §§ 402.03(b)(2) and (b)(3), where either a substantive violation is extremely unlikely to occur or listed species would actually benefit from the action, it would be a waste of agency resources and needlessly delay projects to engage in consultation.

In sum, the proposed amendments to 50 C.F.R. §§ 402.02 and 402.03 are not significant changes to the current consultation regulations, nor are they inconsistent with Section 7 or the case law interpreting and applying the statute. Instead, the amendments clarify the scope of analysis that is used in evaluating the effects of proposed Federal actions. In doing so, the amendments – if followed in the field – should provide much needed guidance to the Services' field offices and, in process, reduce disputes, conserve agency and applicant resources and avoid speculative decision-making by ensuring that the best scientific and commercial is used during the consultation process.

EXAMPLES OF CONDITIONS IMPOSED BY IN RECENT BIOLOGICAL OPINIONS INVOLVING NPDES PERMITS

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September 12, 2007

The following are examples of the types of "conservation measures" that are being imposed in biological opinions issued by the Fish and Wildlife Service in connection with land use activities in southern Arizona. In each case, the landowner sought coverage under EPA's construction general permit, which regulates discharges of storm water from construction sites 1 acre or greater. The "pollutant" is typically loose soil washed from an unstabilized construction site during a period of heavy rain, and the "navigable water" is a desert wash.

Notably, the requirements FWS included in these biological opinions were not imposed under an incidental take statement to minimize the taking of species. In none of these consultations was it anticipated that a pygmy-owl would be taken. Nor were any of the projects located within critical habitat for a species. Instead, the requirements were imposed on the landowner by including them as conditions in a Clean Water Act permit to protect habitat considered to be suitable for the species. The scope of the permitting agency's jurisdiction over the project was not considered. *Compare* 50 C.F.R. § 402.02 ("reasonable and prudent alternatives" must be "consistent with the scope of the Federal agency's legal authority and jurisdiction"). In fact, the opinions do not identify and discuss the jurisdictional water receiving the discharge.

1. Pueblo Oasis real estate development (No. 2-21-02-F-088)[1]

- Northwest Tucson (unincorporated Pima County)
- 8.92 acres (including off-site sewer line); 10 single-family homes
- Federal action: NPDES storm water discharge permit
- Species at issue: pygmy-owl
- Dates: initial meeting, May 29, 2001; request for formal consultation, August 10, 2001; biological opinion, July 9, 2002
- Conditions imposed:

[1] The biological opinion is available at http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/02088_Pueblo_Oasis.pdf (visited Sept. 9, 2007).

- 76% of property (6.7 acres) must remain undisturbed, subject to a "permanent, natural, undisturbed open space and conservation easement" enforced by the subdivision's HOA.
- 1.2 acres (including .69 acres on site) must be restored using specified, native vegetation.
- CC&Rs that run with the land must be recorded, encumbering all lots in the subdivision, containing various "conservation elements."
- Building envelopes limited to 6,300 sq. ft.; the remainder of the space within each lot is subject to the conservation easement.
- HOA must approve all site plan and clearing limits; no development activities can proceed until the conservation easement has been recorded for the remainder of the land outside the approved clearing limits.
- Conditions imposed on grading and vegetation clearing, related construction activities; in the event of violation, HOA must seek compliance through a restoration agreement or, if unsuccessful, HOA must complete restoration and collect costs from offending lot owner.
- Domestic animals must be kept within an enclosed area on the lot, within the established clearing limits; all domestic cats must be kept inside the house or leashed.
- Pedestrian activities must be confined to existing roadways or trails; any paths within an individual lot must be counted as part of that lot's allowable surface disturbance.
- Fences along the perimeter of lots is prohibited; fencing may be placed along patios and backyard areas (part of the 6,300 sq. ft. cleared area), but no woven wire or chain link fencing may be used.
- Within the land maintained as natural open space: no artificial lighting; no organized events with more than 10 persons; no vegetation salvage or disturbance; no outdoor cooking; no boarding of horses.
- HOA must submit an annual report containing a summary of development activities and annual monitoring in the past year (including any required pygmy-owl surveys), along with color copies of monitoring photographs, a monitoring log, native plant compliance reports, and half-size (11 x 17) site plans for lots developed during the prior year.
- Any changes to the conservation elements incorporated into the subdivision's CC&Rs must be approved by FWS.

- No incidental take of pygmy-owls is anticipated.

Attachment

2. **Chaparral Heights real estate development (No. 2-21-00-F-131)**[2]

- Northwest Tucson (Town of Oro Valley)
- 150.6 acres plus 1.8 acres disturbed within sewer ROW; 69 residential lots plus improvements to an existing house. Lot sizes range from 1.0 to 6.8 acres.
- Federal action: NPDES storm water permit
- Species at issue: pygmy-owl
- Dates: March 8, 2001, EPA confirms to FWS receipt of NOI; September 21, 2001, critical habitat rule vacated; December 6, 2001, new NOI submitted; settlement negotiated with FWS, and on April 30, 2002, biological opinion issued.
- Conditions imposed:
  - 77% of property designated as open space, including 69 acres designated to preserve "dispersal corridors" for pygmy-owls.
  - Net surface disturbance limited to 36 acres (23%) of total area. Land disturbance by third parties, such as county (sewer line) and water district (well site) included in determining developer's surface disturbance level.
  - Conditions very similar to Pueblo Oasis, above, including formation of HOA, recordation of CC&Rs running with the land, restrictions on land clearing and disturbance, and creation of conservation easement to permanently preserve open space.
  - Two lots must remain natural open space to offset other disturbed areas.
  - Within conservation easement, open space protections include no artificial lighting; no organized events with more than 10 persons; no vegetation salvage or disturbance; no outdoor cooking; no boarding of horses. Also, restrictions on fencing, domestic animals (cats on leashes), etc.
- No incidental take of pygmy-owls is anticipated.

[2] The biological opinion is available at http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/ 00131_Chaparral_Heights.pdf (visited Sept. 9, 2007).

3. Butterfly Mountain real estate development (No. 2-21-01-F-277)[3]

- Northwest Tucson (Town of Marana)
- 100.2 acres; 28 residential lots ranging from 3.1 to 5.2 acres.
- Federal action: NPDES storm water permit
- Species at issue: pygmy-owl
- Dates: May 2, 2001, initiation of informal consultation; July 27, 2001, initiation of formal consultation; April 10, 2002, biological opinion.
- Conditions imposed:
  - 82% of property (82.6 acres) must be left undisturbed and maintained as open space.
  - Limitations imposed on the area that may be disturbed within each lot; average disturbed area is 21,531 sq. ft. (includes driveway, septic system and utility services).
  - Conditions very similar to Pueblo Oasis, above, including formation of HOA, recordation of CC&Rs running with the land, restrictions on land clearing and disturbance, and creation of conservation easement to permanently preserve open space.
  - Within conservation easement, open space protections include no artificial lighting; no organized events with more than 10 persons; no vegetation salvage or disturbance; no outdoor cooking; no boarding of horses. Also, restrictions on fencing, domestic animals (cats on leashes), etc.
- No incidental take of pygmy-owls is anticipated.

[3] The biological opinion is available at http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/01277_Butterfly_Mtn.pdf (visited Sept. 9, 2007).

SECTION 7 CONSULTATION AND *PUBLIC CITIZEN*: APPLYING THE CORRECT SCOPE OF ANALYSIS

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October 6, 2006

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I. INTRODUCTION

The Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, was enacted in 1973 to provide a program for the conservation of endangered species and to comply with certain treaties and conventions concerning species of wildlife, fish and plants. 16 U.S.C. § 1531. Since its enactment, the ESA has evolved into one of the nation's most demanding environmental laws. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Supreme Court, in enjoining construction of the Tellico Dam to prevent the extinction of a listed species of minnow, stated that the "plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, whatever the cost," and that the ESA "reveals a conscious decision to give endangered species priority over the 'primary missions' of Federal agencies." 437 U.S. at 184-85.

Perhaps the most complex and troublesome provision of the ESA is Section 7(a)(2), 16 U.S.C. § 1536, which imposes both substantive and procedural requirements on federal agencies and, in some cases, non-federal "applicants." Section 7(a)(2) requires federal agencies to ensure that "any action authorized, funded, or carried out by such 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 habitat of such species" that has been designated as critical. Thus, federal actions may not proceed if they would either jeopardize the existence of a listed species or destroy or adversely modify a listed species' critical habitat, unless an exemption is granted by the so-called "God Squad" under Section 7(h). Indeed, this was the basis for the Supreme Court's injunction halting construction of the Tellico Dam in *Tennessee Valley Authority*.

In addition, Section 7(a)(2) imposes a procedural obligation to "consult" with the Fish and Wildlife Service ("FWS") (or NOAA Fisheries-National Marine Fisheries Service ("NMFS") in the case of marine species) to ensure that the federal action does not violate the provision's substantive requirements. The procedural requirements of Section 7 are set forth in the joint regulations of FWS and NMFS codified at 50 C.F.R. Part 402 and are summarized below. A violation of these consultation procedures can lead to an injunction halting the federal action until consultation has been completed. *See, e.g., Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) ("Given a substantial procedural violation of the ESA in connection with a federal project, the remedy must be an injunction of the project pending compliance with the ESA.").

In an important new decision, the Ninth Circuit Court of Appeals has expanded the obligations of federal agencies by holding, first, that Section 7(a)(2) independently grants agencies authority to act for the benefit of listed species and, second, that any "authorizing action" creates an obligation to exercise this authority. *Defenders of Wildlife v. EPA*, 420 F.3d 946, 963-67 (9th Cir. 2005), *rehearing denied*, 450 F.3d 394 (9th Cir. 2006).[1] Based on this holding, the court held that the Environmental Protection Agency ("EPA") violated Section 7(a)(2) of the ESA and vacated approval of the State of Arizona's application to administer the

[1] Industry trade associations have filed a petition for writ of certiorari in the Supreme Court, and the State of Arizona has filed a brief in support of the petition. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, Supreme Court No. 06-340 (petition filed Sept. 6, 2006).

National Pollutant Discharge Elimination System ("NPDES") program under Section 402(b) of the Clean Water Act ("CWA"), 33 U.S.C. § 1342(b).

In its opinion, the Ninth Circuit also explained that "negative impact on listed species is the likely direct or indirect effect of an agency's action only if the agency has some control over that result." *Defenders of Wildlife,* 420 F.3d at 962. The court relied on the Supreme Court's opinion in *Dep't of Transp. v. Public Citizen,* 541 U.S. 752 (2004), which addressed the scope of analysis used under an analogous environmental statute, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(f). The Court held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Public Citizen,* 541 U.S. at 770. The Ninth Circuit expressly adopted the *Public Citizen* standard "for purposes of determining the likely effects of agency action under section 7(a)(2)" of the ESA. *Defenders of Wildlife,* 420 F.3d at 963. As explained below, this standard precludes the use of a "but for" causation test and restricts the scope of analysis employed in the consultation process to activities within the permitting agency's jurisdiction.

Given FWS's increasing tendency to ignore federal agencies' authority and control over non-federal activities when consulting under Section 7(a)(2), the adoption of the *Public Citizen* standard may ultimately prove to be as significant as the Ninth Circuit's reinterpretation of federal agencies' obligations. Prior to addressing *Public Citizen* and explaining how its causation analysis should apply in the context of Section 7(a)(2), an overview of the statute's substantive and procedural requirements is provided in the following section.

II. THE BASIC CONSULTATION REQUIREMENTS

A. The Scope of Section 7

The requirements of Section 7 technically apply only to federal agencies, and not to activities by non-federal entities. Thus, strictly private activities are not subject to Section 7's requirements. Moreover, Section 7(a)(2) applies only to activities "in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Thus, even if there is some sort of federal involvement in a private project or activity, consultation may not be required. *See, e.g., Sierra Club v. Babbitt,* 65 F.3d 1502, 1508-12 (9th Cir. 1995) (timber company's rights under reciprocal easement agreement with BLM were vested, and agency had no discretion to modify agreement's terms to protected listed species); *Defenders of Wildlife v. Norton,* 257 F.Supp.2d 253 (D.D.C. 2003) (Bureau of Reclamation had no duty to consult on effects of Colorado River operations in Mexico due to lack of discretionary control).

As previously stated, however, the validity of the discretionary/non-discretionary distinction has been placed in doubt by the Ninth Circuit's opinion in *Defenders of Wildlife,* which held that Section 7(a)(2) independently grants agencies authority to act for the benefit of listed species and any "authorizing action" creates an obligation to exercise this authority. In that case, the State of Arizona sought approval of its NPDES program under Section 402(b) of the CWA, 33 U.S.C. § 1342(b). Section 402(b) states that EPA "*shall* approve each submitted program unless" EPA determines that one or more of nine specified criteria are not satisfied. The petitioners' primary argument was that the transfer of NPDES permitting authority to

Arizona would result in a significant loss of "conservation benefits" produced by the Section 7(a)(2) consultation process. The majority of the panel agreed with the petitioners and vacated approval of Arizona application to administer the AZPDES program. *Defenders of Wildlife*, 420 F.3d at 971.

The majority acknowledged that "the Clean Water Act does not grant the EPA authority to make pollution permitting transfer decisions for the benefit of ... endangered species." *Id.* at 974. The majority concluded instead that the obligation imposed on federal agencies under Section 7(a)(2) to avoid jeopardy and adverse modification of critical habitat "is an obligation in addition to those created by the agencies' own governing statute." *Id.* at 967. This holding expands the scope of Section 7(a)(2) by treating the statute as providing independent authority (as well as creating an affirmative obligation) to impose conditions for the benefit of listed species, and effectively invalidates the limitation on the obligation to consult as codified in 50 C.F.R. § 402.03.

In addition, the definition of the term "action" in the joint regulations on inter-agency consultation is very broad, and includes federal contracts, permits, easements and other types of approvals. 50 C.F.R. § 402.02. As a practical matter, a number of activities occurring on private land require some sort of federal permit or approval, or have some other federal nexus that may trigger Section 7's requirements. Consequently, a federal agency proposing to issue a permit, easement or other land use approval to a private party must ensure that the action complies with Section 7. As other federal regulatory programs have expanded, an increasing number of private land use activities have become subject to Section 7, leading to greater controversy over the consultation process. At the same time, FWS has become increasingly aggressive in exploiting the Section 7 consultation process to extract concessions from landowners and to control the manner in which private land is used.

B. The Consultation Process

A federal agency that is proposing an action must initially determine if the proposed action "may affect" listed species or critical habitat.[2] Consequently, the initial question is whether any listed species or critical habitat are present in the area affected by the action. The federal agency may either request that FWS provide a list of listed species and critical habitat in the area or provide notification of the listed species and critical habitat believed to be in the area to the FWS. 50 C.F.R. § 402.12(c). FWS must respond, in either case, within 30 days, based on the best scientific and commercial data available. 50 C.F.R. § 402.12(d). If no listed species or critical habitat are present, nothing further is required: the action may proceed without violating Section 7. *See* U.S. Fish and Wildlife Service and National Marine Fisheries Service, *Final ESA Section 7 Consultation Handbook*, 3-3 (1998) (flow chart of the informal consultation process); Terry Rabot, "The Federal Role in Habitat Protection," *Endangered Species Bulletin,* (U.S. Fish and Wildlife Service Nov./Dec. 1999) at 10-11 ("*Rabot*"). Notably, this initial determination is

[2] The requirements discussed below apply only to habitat that has been formally designated as critical under Section 4 of the ESA. In theory, the ESA does not protect "suitable" or "potential" habitat. *See Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1244 (9th Cir. 2001). In practice, however, FWS sometimes attempts to require consultation when neither members of a species nor critical habitat are present.

made by the federal agency proposing the action, not by FWS or NMFS. *See Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1069-70 (9th Cir. 2005) (affirming "no effect" determinations made by the Army Corps of Engineers).

However, if listed species or critical habitat are present, then the federal agency proposing the action will perform an analysis to determine whether the action "may affect" the relevant listed species or critical habitat. A formal biological assessment is required if the proposed action constitutes a "major construction activity." A "major construction activity" is defined as "a construction project (or other undertaking having similar physical impacts) which is a major federal action significantly affecting the quality of the human environment" under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C). 50 C.F.R. § 402.02. If the proposed action is not a "major construction activity," the federal agency may perform a less formal analysis of the proposed action's impacts, typically called a biological evaluation. In either case, if the federal agency determines that any listed species and critical habitat that are present in the area will not be affected by the proposed action (a "no effect" determination), then the proposed action may proceed. 50 C.F.R. § 402.12(k); *Consultation Handbook* at 3-3; *Rabot.*

If the federal agency proposing the action believes that the action, while having some effects on listed species or critical habitat, is not likely to adversely affect the listed species or critical habitat, the federal agency may request that FWS concur with its evaluation. If FWS concurs, no additional consultation is required. This process is known as informal consultation. *See* 50 C.F.R. §§ 402.12(j) & (k), 402.13, 402.14(b)(1). *See also Consultation Handbook* at 3-3. As shown in the *Consultation Handbook*'s flow chart, informal consultation is a streamlined process that should conclude very quickly. The vast majority of consultations are conducted informally under 50 C.F.R. § 402.13. *See Rabot.*

However, if the federal agency proposing the action believes that the action is likely to adversely affect listed species or critical habitat, or if FWS does not concur with the federal agency's determination that the impacts on listed species or critical habitat will not be adverse, formal consultation is required. 50 C.F.R. §§ 402.12(k), 402.14(a). During formal consultation, a more thorough analysis of the proposed action is undertaken, and at the conclusion of consultation, FWS prepares a written biological opinion regarding the impacts of the proposed action. 16 U.S.C. § 1536(a)(3); 50 C.F.R. § 402.14(g) & (h). The biological opinion will state whether FWS believes the proposed action is likely to jeopardize the continued existence of any listed species or destroy or adversely modify critical habitat. 50 C.F.R. § 402.14(h)(3).

The statutory time limit for consultation is 90 days or such time as is mutually agreed to between the federal agency and FWS. 16 U.S.C. § 1536(b)(1)(A). However, when a permit or license applicant is involved, the ability of the agencies to mutually extend the consultation period is limited.[3] 16 U.S.C. § 1536(b)(1)(B). The agencies may extend the 90-day consultation

[3] The term "applicant" is defined as "any person ... who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action." 50 C.F.R. § 402.02. An applicant is given a number of opportunities to participate in the consultation process, including the submission of data and information, participation in the development of any reasonable and prudent alternatives, and the right to review and comment on the draft biological opinion. *See* 50 C.F.R. § 402.14(g).

period without the consent of the applicant by an additional 60 days, but only if FWS, prior to the close of the 90-day period, provides the applicant a written statement setting forth (1) the reasons why a longer consultation period is required; (2) the information that is required to complete the consultation; and (3) the estimated date on which the consultation will be completed. 16 U.S.C. § 1536(b)(1)(B)(i); 50 C.F.R. § 402.14(e). In any case, a consultation involving an applicant cannot be extended beyond 150 days unless the applicant expressly consents to an additional time extension. *Id.*

C. The "Jeopardy" and "Adverse Modification" Standards

The "jeopardy" and "adverse modification" standards present high thresholds. To "jeopardize the continued existence of" is defined as:

> . . . to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of *both* the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

50 C.F.R. § 402.02 (italics supplied). The term "destruction or adverse modification" is similarly defined as:

> [A] direct or indirect alteration that appreciably diminishes the value of critical habitat for *both* the survival and the recovery of a listed species. Such alterations include, but are not limited to alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

50 C.F.R. § 402.02 (italics supplied). FWS has explained that the word "both" was included in these definitions "to emphasize that, except in exceptional circumstances, injury to recovery alone would not warrant the issuance of a 'jeopardy' biological opinion." *Interagency Cooperation – Endangered Species Act of 1973, as amended; Final Rule*, 51 Fed. Reg. 19,926, 19,934 (June 3, 1986). Adverse effects to a listed species, including deaths of the species' members, are not prohibited by Section 7. *See id.* at 19,934-35.[4]

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[4] An action that causes the death or injury of members of a listed species violates Section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B). *See also Arizona Cattle Growers*, 273 F.3d at 1237-38. Therefore, the prohibition against the taking of listed species found in Section 9 could prevent an action from going forward even though Section 7 consultation has been completed and the effects of the action do not rise to the level of jeopardy. To eliminate this conflict, Congress amended the ESA in 1982 by authorizing incidental take statements to be issued under Section 7. 16 U.S.C. § 1536(b)(4) & (o). An incidental take statement acts like a permit, authorizing the taking of members of listed species notwithstanding the prohibition found in Section 9, provided that the statement's terms and conditions are followed. *See Arizona Cattle Growers*, 273 F.3d at

The Ninth Circuit Court of Appeals recently held, however, that the regulatory definition of the terms "destruction or adverse modification" is invalid because it defines the destruction/adverse modification standard in terms of both survival and recovery, while Section 3(5)(a) of the ESA defines critical habitat as areas which are "essential to the conservation of the species" – a broader concept than survival. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 U.S. 1059, 1069-71 (9th Cir. 2004). *See also Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 442-44 (5th Cir. 2001) (finding the definition of the terms "destruction or adverse modification" is invalid on similar grounds); *Forest Guardians v. Veneman,* 392 F.Supp.2d 1082, 1083-86 (D. Ariz. 2005) (discussing and distinguishing *Gifford Pinchot*, and concluding that the regulatory definition of "jeopardy" is valid).

In formulating its biological opinion, FWS must use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2). FWS first considers the present environmental baseline within the area affected by the proposed action. The environmental baseline includes (1) the past and present impacts of all activities (whether federal, state or private) in the action area, (2) the anticipated impacts of all proposed federal projects in the action area that have already undergone consultation, and (3) the impact of any state or private actions which are contemporaneous with the subject consultation. 50 C.F.R. § 402.02 (definition of "effects of the action"). FWS then evaluates the "effects of the action," which includes both the direct and indirect effects of the action that is subject to consultation. *Id. See also Interagency Cooperation,* 51 Fed. Reg. at 19932.

In addition, cumulative effects, i.e., the effects of future state or private activities, are also considered. Those activities must be "reasonably certain to occur" within the area impacted by the proposed federal action. 50 C.F.R. § 402.02 (definition of "cumulative effects"). Notably, the analysis of cumulative effects that is to take place under Section 7 is narrower than the analysis required under NEPA. FWS explained in its 1986 rulemaking that Congress did not intend that federal actions be precluded by future, speculative effects. *Interagency Cooperation,* 51 Fed. Reg. at 19,933.

The effects of the proposed action, together with any cumulative effects, are then measured against the environmental baseline:

> [A] project passing muster under § 7 is in effect allocated the right to consume (and is presumed to utilize) a certain portion of the remaining natural resources of the area. It is this "cushion" of remaining natural resources which is available for allocation of projects until the utilization is such that any further use may be likely to jeopardize a listed species or adversely modify or destroy its critical habitat. At this point, any additional federal activity in the area requiring a further consumption of resources would be precluded under § 7.

1239-42 (explaining the relationship between incidental take statements and Section 7 consultation).

Cumulative Impacts Under Section 7 of the Endangered Species Act, Solicitor's Op. M-36938, 88 I.D. 903, 907 (1981).

If FWS ultimately determines that the proposed action is likely to jeopardize a listed species or adversely modify its critical habitat, FWS must suggest reasonable and prudent alternatives that can be taken to avoid a violation of Section 7(a)(2). 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(g) & (h). Any reasonable and prudent alternatives must be consistent with the intended purpose of the action, be implemented consistent with the federal agency's legal authority and jurisdiction, and be economically and technologically feasible. 50 C.F.R. § 402.02 (definition of "reasonable and prudent alternatives"). *See also Interagency Cooperation,* 51 Fed. Reg. at 19,937. To ensure that these criteria are met, FWS is required to utilize the expertise of the federal agency and any applicant in identifying alternatives. 50 C.F.R. § 402.14(g).

D. Limitations on Actions During Consultation

During consultation, the action may proceed subject to two prohibitions. First, as previously noted, all actions (whether federal or non-federal) are subject to the prohibition against the "taking" of individual members of a listed species contained in Section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B). In addition, the federal agency and any applicant are prohibited from making any "irreversible or irretrievable commitment of resources with respect to the agency action which has the affect of foreclosing the formulation or implementation of any reasonable and prudent alternatives" which would avoid jeopardy. 16 U.S.C. § 1536(d). This prohibition was enacted by Congress in 1978 in response to the *Tennessee Valley Authority* decision. *See North Slope Borough v. Andrus*, 486 F.Supp. 332, 356 (D.D.C. 1978), *aff'd in relevant part*, 642 F.2d 590 (D.C. Cir. 1980) ("Congress enacted § 7(d) to prevent Federal agencies from 'steamrolling' activity in order to secure completion of projects").

One issue that periodically surfaces concerning Section 7(d) is the role that FWS is to play under this provision. On its face, there is nothing in Section 7(d) indicating that Congress intended FWS to decide whether certain activities may proceed during consultation. Instead, Section 7(d) simply prohibits the federal action agency and any applicants from violating its requirements. Moreover, when FWS promulgated its current version of the regulations governing inter-agency consultation, FWS added a provision entitled "Irreversible or irretrievable commitment of resources," which is codified at 50 C.F.R. § 402.09. This rule closely tracks the language of Section 7(d). During the promulgation of the rule, FWS specifically rejected modifications under which FWS would consult with the action agency on whether Section 7(d) was being satisfied, stating that the ESA does not provide authority for this type of review. *Interagency Cooperation,* 51 Fed. Reg. at 19,940. Consequently, there should be little disagreement that Section 7(d) does not require an additional round of consultation or otherwise require FWS to approve activities during the pendency of consultation. *See Southwest Ctr. for Biological Diversity v. U.S. Forest Service*, 82 F.Supp.2d 1070, 1080 (D. Ariz. 2000) (federal agencies do not need to obtain the concurrence of FWS prior to relying on Section 7(d)). *But see Pacific Rivers Council v. Thomas*, 936 F.Supp. 738, 746-47 (D. Idaho 1996) (the Forest Service was not permitted to "unilaterally" allow grazing pending completion of consultation).

E. Reinitiation of Consultation

Even though consultation is completed, a federal agency may be required to reinitiate consultation on the project or activity if any of the following circumstances occurs:

(1) If the amount or extent of taking specified in the incidental take statement is exceeded;

(2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(4) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16. However, reinitiation of consultation is required only "where discretionary Federal involvement or control over the action has been retained or is authorized by law." *Id. See, e.g., Environmental Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1079-82 (9th Cir. 2001) (no duty to reinitiate consultation on incidental take permit due to lack of discretionary control); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994) (Forest Service land and resources management plans constituted on-going agency action, and the listing of new species triggered duty to reinitiate consultation).

III. THE *PUBLIC CITIZEN* STANDARD AND THE SCOPE OF ANALYSIS REQUIRED UNDER ESA SECTION 7

A. Current Problems Concerning Section 7 Consultation

Many of the difficulties currently encountered in the consultation process arise out of overbroad or erroneous descriptions of the federal action, the geographic area considered in determining the environmental baseline and the effects of the action, or the scope of the effects analysis. The manner in which these key concepts are applied in a particular consultation can lead to a dramatic expansion in the scope of the consultation and, in extreme cases, the regulation of private activities by means of the imposition of reasonable and prudent alternatives that go well beyond the permitting agency's jurisdiction. In this manner, FWS is able to regulate private activities through the consultation process. As explained below, the Supreme Court's recent holding in *Public Citizen* regarding the scope of analysis required under NEPA, which was recently adopted by the Ninth Circuit for determining the effects of agency action under Section 7(a)(2) of the ESA, precludes the use of a "but for" causation test and restricts the scope of analysis employed in the consultation process to activities within the control of the permitting agency.

1. The Scope of the Federal Agency "Action"

It is obviously important to the consultation process to appropriately define the federal action that triggers Section 7, which applies only to federal actions. As discussed above, the definition of the term "action" is broadly defined, and includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. § 402.02 (definition of "action"). The term includes "the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid." *Id.* Consequently, the issuance of various federal permits and approvals in connection with developing private land may trigger consultation.

For example, many construction activities require a permit under the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.* Two of the most common permits are permits regulating the discharge of pollutants in storm water from construction sites, which are issued pursuant to Section 402 of the CWA, and permits for the discharge of dredged or fill material into the navigable waters of the United States, which are issued pursuant to Section 404 of the CWA. 33 U.S.C. §§ 1342(b) and 1344.[5] In both cases, the relevant federal action is the issuance of the permit and the activities the permit authorizes – the discharge of storm water containing pollutants into waters of the United States in the case of a permit issued under Section 402 or the discharge of dredged or fill material into waters of the United States in the case of a permit issued under Section 404.

While it may seem obvious that the federal action is the issuance of the permit and the activities being authorized under the permit, the federal action is sometimes described in terms of the larger project, notwithstanding the fact that there is no federal control over the balance of the project. Not only does this mistake effectively "federalize" the entire project for the purposes of Section 7 consultation, but also compounds the scope and complexity of the analysis of the effects of the action on listed species and critical habitat, as discussed below.

2. The Scope of the "Action Area" and the "Effects of the Action"

Properly delimiting the "action area," another term defined in 50 C.F.R. § 402.02, is also important. As previously discussed, consultation is normally triggered by the presence of either members of a listed species or critical habitat within the project area. The term "action area," however, is defined in terms of the effects of the underlying federal action:

> *Action area* means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

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[5] This discussion assumes that these permit programs are administered by EPA and the Army Corps of Engineers ("Corps"), respectively. Authority to administer permit programs under Section 402 of the CWA may be assumed by a state upon the satisfaction of certain statutory requirements. 33 U.S.C. §§ 1342(b), 1344(g). In that case, the issuance of the permit no longer constitutes a federal action potentially triggering consultation under Section 7 of the EPA. *See, e.g., American Forest and Paper Ass'n v. EPA*, 137 F.3d 291 (5th Cir. 1998) (EPA lacked authority to require state to consult as a condition to approving a State NPDES permit program).

50 C.F.R. § 402.02. Consequently, the analysis of the federal action's effects on listed species and critical habitat may extend well beyond the project area, depending on the extent of the action's direct and indirect effects. Moreover, this definition requires a determination of the action's effects in order to define the scope of the geographic area to be considered during the consultation.

"Effects of the action" include both the direct and indirect effects of the action that is the subject of the consultation. 50 C.F.R. § 402.02. Under this definition, "direct effects" are the direct or immediate effects on listed species or critical habitat caused by the federal action. "Indirect effects are those that are caused by the proposed action and are later in time, but are still reasonably certain to occur." *Id.* For example, the impacts caused by the construction of a street crossing or flood control structure within a watercourse subject to the Corps' jurisdiction would constitute direct effects of the Corps' Section 404 permit, while future impacts caused by the placement of structures and fill material within the watercourse that are reasonably certain to occur (e.g., altered stream flows or increased downstream sedimentation) would constitute indirect effects of the permit. In this example, the "action area" associated with the Corps permit would include not only the portion of the watercourse directly impacted by the construction of the street crossing, but also any areas upstream or downstream of the crossing reasonably certain to be impacted in the future.

The definition of "effects of the action" also includes "the effects of other activities that are interrelated or interdependent." 50 C.F.R. § 402.02. "Interrelated actions" are actions that "are part of a larger action and depend on the larger action for their justification." *Id.* "Interdependent actions" are actions that "have no independent utility apart from the action under consideration." *Id.* The *Consultation Handbook* instructs FWS to apply a "but for" test in determining whether an action is interrelated or interdependent. For example, the construction of a turbine at a dam is an action that is interrelated to, or interdependent on, the construction of the dam. Another example would be the construction of a temporary road to access an area where a timber sale will take place. The road has no utility apart from the timber sale, and is therefore considered an interdependent action.[6]

In some cases, the action area may be quite large, depending on the scope of the indirect effects that will be caused by the action. In *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985), the court held that the Corps properly considered the indirect effects on downstream critical habitat of the whooping crane along the Platte River that would result from the construction of a dam on a tributary of the river. In that case, the impoundment and diversion of water from the tributary would adversely impact critical habitat some 150 miles downstream, thereby extending the scope of the action area.

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[6] Note, however, that the reverse would not be true: The timber sale is not an interrelated or interdependent action relative to the access road. The timber sale does not depend on the access road for its justification, and it has independent utility apart from the access road. Therefore, if the access road required a federal permit, triggering consultation, the timber sale would not be included as an effect of the action. Unfortunately, as discussed below, FWS sometimes misapplies this test, and uses a simplistic "but for" test to expand the effects analysis to include other actions without regard to the limitations in the definition.

In a more extreme example, which arose in 1975 – only two years after the enactment of the ESA, the Fifth Circuit Court of Appeals held that the Department of Transportation violated Section 7 in connection with the construction of a segment of Interstate 10 through the critical habitat of the Mississippi sandhill crane. *Nat'l Wildlife Fed. v. Coleman*, 529 F.2d 359 (5th Cir.), *cert. den.* 429 U.S. 979 (1976). In that case, the Department of Transportation ignored the Interior Department's concerns about the impact of the highway project on the crane, including the direct loss of habitat resulting from the excavation of borrow pits and future commercial and residential development that would result from the construction of an interchange. 529 F.2d at 366-68. On appeal, the court found that the agency had improperly ignored the indirect effects of the project, principally the private development that would necessarily occur as a result of a project of this nature. "The fact that the private development surrounding the highway and the [freeway] interchange does not result from direct federal action does not lessen the appellees' duty under § 7. ... The appellees do control this development to the extent that they control the placement of the highway and interchanges." *Id.* at 374 (citations omitted).

Nat'l Wildlife Fed. continues to be cited as authority by FWS for the application of a relatively expansive view of the indirect effects of a proposed action. For example, in its *Consultation Handbook*, FWS stated that in *Nat'l Wildlife Fed.*, "the court ruled that indirect effects of private development resulting from proposed construction of highway interchanges had to be considered as impacts of a proposed Federal highway project, even though the private development had not been planned at the time the highway project was proposed." *Consultation Handbook* at 4-28. This description of the court's holding, however, fails to acknowledge the Fifth Circuit's finding, based on the evidence presented below, that residential and commercial development in the species' critical habitat would result from the construction of the highway, in addition to the other unusual facts that prompted the court's ruling.[7] *Nat'l Wildlife Fed.* should be viewed as holding instead that "the effects on listed species or critical habitat of future activities that are induced by the action subject to consultation and that occur after that action is completed" should be considered indirect effects of the action, provided that these effects are reasonably certain to occur. *Interagency Cooperation*, 51 Fed. Reg. at 19932 (also discussing *Nat'l Wildlife Fed.*).

In recent biological opinions, however, FWS has gone well beyond the rather aggressive approach suggested in the *Consultation Handbook*. In consultations involving the impacts of CWA permits on the cactus ferruginous pygmy-owl in the Tucson metropolitan area, for example, FWS has determined that the permit's action area includes all areas within 19 miles of the project site – an area containing 725,000 acres of land. *E.g.*, U.S. Fish and Wildlife Service, *Final Biological Opinion on the Effects of the Thornydale Road Improvement Project in Pima County, Arizona*, 20 (Feb. 25, 2002). These determinations were based on unpublished data on the dispersal distance of juvenile pygmy-owls. *Id.* Thus, in these consultations, the action area was determined by the potential movement of a member the species, rather than the area in which the effects of the federal action would occur.

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[7] For example, the Department of Transportation refused the request of the Assistant Interior Secretary to initiate consultation, which in turn prompted FWS to make an emergency determination of critical habitat for the crane on the day before the trial of the action in the district court. *Nat'l Wildlife Fed.*, 529 F.2d at 367-68.

The specific Pima County project identified in the Thornydale Road improvement project biological opinion involved the widening and improvement of 1.6 miles of an existing arterial street, which would result in the permanent loss of approximately 1.4 acres of desert vegetation along the street. The federal action consisted of coverage under the EPA general permit for storm water discharges from construction activities and a Section 404 permit authorizing certain minor flood control and drainage structures. The biological opinion contained no explanation of how the activities authorized by the CWA permits were reasonably certain to result in direct or indirect effects throughout the 725,000-acre "action area," as required under the agency's regulations. Nevertheless, Pima County was required to acquire approximately 36 acres of suitable pygmy-owl habitat, which will be set aside and managed in perpetuity for the benefit of the species, in addition to complying with numerous on-site conservation measures.

As the foregoing example suggests, the flaw in the analysis employed by FWS is the implicit determination that vegetation removal and related activities outside of "waters of the United States" are authorized or otherwise induced by the relevant CWA permit. Normally, a landowner may remove or thin vegetation on their property without a federal permit.[8] While the removal or modification of vegetation may adversely impact the ability of a parcel of land to serve as wildlife habitat, such impact cannot properly be attributed to the federal action because the destruction of vegetation could take place in the absence of the federal permit.

Using this flawed "but for" test, FWS routinely imposes requirements on landowners during the consultation process, such as those imposed on Pima County in the example given above, based on the federal nexus provided by a CWA permit. In Arizona, these conditions and requirements have included the following:

- The acquisition and preservation of off-site conservation land (typically three or four times the area disturbed by the project)
- Land disturbance is limited to 30% or less within the development
- Open space within the development (including individual lots) must be permanently maintained and access restricted
- No use of pesticides within the development
- Restrictions on exterior lighting and outdoor activities, such as organized events and outdoor cooking
- An education program for construction workers and/or residents in the development
- Cats, dogs and other pets, if permitted outdoors, must be kept on leashes

[8] There may be state or local restrictions on the destruction or relocation of certain types of plants. However, these laws generally recognize that landowners own trees and other vegetation found on their property, which is a basic right incident to land ownership and, in any case, do not provide a federal nexus.

These "conservation measures" have been included in various biological opinions issued by FWS during the past six years, which are available for review on the website of the Arizona Ecological Services Office, http://www.fws.gov/arizonaes/Biological.htm. Notably, these requirements were not imposed under an incidental take statement to minimize the taking of species. Instead, they were imposed on the landowner by including them as conditions of a federal permit, most often a Corps' permit issued under Section 404 of the CWA. The scope of the permitting agency's jurisdiction was not considered. *Compare* 50 C.F.R. § 402.02 (definition of "reasonable and prudent alternatives").

In short, the consultation process is increasingly used to restrict land use activities based on the existence of a federal permit or other federal authorization. There may be little or no attempt to accurately segregate the effects of the activities requiring the permit from the remainder of the project. Instead, the effects of all non-federal activities are attributed to the federal permit, without regard to whether the non-federal activity could be conducted independently. The Ninth Circuit's adoption of the *Public Citizen* causation test should eliminate these regulatory abuses.

B. *Public Citizen* and the Scope of Analysis Required Under NEPA

1. Overview of NEPA

Before discussing *Public Citizen*, it is helpful to review NEPA's essential features. Congress sought to advance two major goals through NEPA. First, Congress sought to ensure that federal agencies take a "hard look" at the environmental consequences of their actions. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976). Second, NEPA ensures that agencies make available to the public relevant information regarding proposed federal actions. 40 C.F.R. § 1500.1(b); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). However, NEPA does not impose any substantive requirements (e.g., mitigation of environmental impacts) or alter a federal agency's legal authority or jurisdiction. "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989).

NEPA's goals are realized primarily through its requirement that federal agencies prepare an environmental impact statement ("EIS") for "every recommendation or report on proposals for legislation ... and other major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). Under the regulations adopted by the Council on Environmental Quality ("CEQ"), a "major Federal action" is defined as "actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. "Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." § 1508.18(a).

If an agency is unsure whether its proposed action meets this threshold requirement, the agency is required to prepare an environmental assessment ("EA"). 40 C.F.R. § 1501.4. The primary purpose of an EA is to help the agency determine if it needs to prepare an EIS. *Id.* An EA is intended to produce enough information to allow an agency to determine the degree of

impact the agency's proposed action will have on the environment. If the agency determines the proposed action will not have a significant impact, the agency will issue a Finding of No Significant Impact ("FONSI"). 40 C.F.R. § 1508.13.

If the agency decides a FONSI is not warranted, the agency will indicate its intent to prepare an EIS, which must address:

> (i) the environmental impact of the proposed action; (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C).

The CEQ's has adopted regulations that define the "effects" an agency must evaluate in a manner very similar to the definition of "effects of the action" in 50 C.F.R. § 402.02. Under NEPA, "effects" are divided into two principal categories: (1) "direct effects," which are caused by the action and occur simultaneously; and (2) "indirect effects," which are caused by an agency's action, are later in time or farther removed in distance, but are still reasonably foreseeable. 40 C.F.R. § 1508.8. An indirect effect, generally speaking, is "reasonably foreseeable" if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). In contrast, "highly speculative or indefinite" effects are not considered reasonably foreseeable. *Id.* at 768.

In addition to direct and indirect effects, agencies must examine the cumulative impact of their proposed actions. Cumulative impacts are defined as "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. The requirement to evaluate cumulative impacts prevents a project proponent from dividing a project into small spatial or temporal pieces that appear insignificant. 40 C.F.R. § 1508.27(b)(7).

2. The Supreme Court's Decision in *Public Citizen*

In *Public Citizen*, the Federal Motor Carrier Safety Administration ("FMCSA") adopted rules imposing registration and safety requirements on Mexican-domiciled motor carriers operating in the United States. To comply with NEPA, FMCSA prepared an EA evaluating the impact of its proposed rules, and determined that the rules would not have a significant impact on the environment. The agency did not evaluate the overall environmental impacts caused by Mexican trucks operating in the United States, and instead limited the scope of its analysis to the impacts caused by the rules themselves. Although implementation of the rules was a statutory prerequisite for the entry of Mexican trucks into the United States, FMCSA reasoned that the impacts resulting from Mexican truck operations would be caused by the President's decision to

lift a long-standing moratorium, over which the agency had no control. *Public Citizen*, 541 U.S. at 759-62.

The agency's rules were challenged on several grounds, including the narrow scope of NEPA analysis used in the EA. *Public Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1021-27 (9th Cir. 2003). The petitioners argued that the adoption of the rules would cause significant increases in cross-border truck traffic, in turn causing significant increases in air pollution at various locations, which the agency failed to consider. According to petitioners, the environmental effects of the registration and safety rules would be significant, requiring the preparation of an EIS. The Ninth Circuit agreed, concluding that FMCSA violated NEPA by not preparing an EIS in order to fully evaluate the environmental impacts of cross-border truck traffic. *Id.*

The Supreme Court, in a unanimous opinion, reversed the Ninth Circuit, holding the FMCSA's EA was sufficient under NEPA. In approving the scope of analysis employed by FMCSA, the Court stated that a "but for" causal relationship between an agency's action and an environmental effect "is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. ... NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause." 541 U.S. at 767 (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). Thus, FMCSA was not required to evaluate all of the environmental impacts resulting from cross-border operations by Mexican trucks simply because adoption of the registration and safety rules was necessary to allow Mexican trucks to enter the United States.

The Court also explained that NEPA and its implementing regulations are qualified by "a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Id.* The FMCSA lacked authority to prevent cross-border operations by Mexican trucks. Consequently, the environmental impact of those operations would have no effect on the agency's decision-making, and there would be no point in preparing an EIS to evaluate those impacts. *Id.* at 768-69.

Finally, the Supreme Court concluded that the CEQ's rule on cumulative impacts, 40 C.F.R. § 1508.7, did not alter the agency's NEPA obligations. The FMCSA appropriately evaluated the incremental impact of its registration and safety rules in its EA. The agency was not required by NEPA to treat the President's decision to lift the moratorium on Mexican truck operations as a cumulative effect related to the adoption of the rules. Id. at 769-70.

Applying the foregoing principles, the Court concluded:

> We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a "major Federal action."

Id. at 770. Because FMCSA could not authorize (or prohibit) cross-border operations by Mexican motor carriers, and may only impose certain registration and safety requirements on them, the agency appropriately limited the scope of its analysis under NEPA to the effects related to the adoption of its rules. *Id.*

C. Reconciling the Section 7 "Effects" Analysis With the *Public Citizen* Standard

1. Under the *Public Citizen* Standard, the Scope of Analysis Is Restricted

The Ninth Circuit's adoption of the *Public Citizen* standard for determining when an effect is properly attributed to a proposed federal action for the purpose of Section 7 consultation alters the scope of analysis in several important respects. First, and most obviously, under *Public Citizen*, the use of a "but for" test for determining whether an effect is an "effect of the action" is improper. Instead, the appropriate test is whether the permitting agency has the authority to prevent the effect from occurring. This necessarily requires FWS to consider the permitting agency's regulatory authority and responsibility in defining the scope of analysis. If an effect is caused by the action of another, non-federal entity, and the permitting agency lacks authority to control that entity's action, the effect is not attributable to the permitting agency and should be excluded from the effects analysis.

Second, by narrowing the scope of effects that may be considered during consultation, the *Public Citizen* standard restricts the size of the action area. As previously discussed, "action area" is defined in a circular fashion by reference to the direct and indirect effects of the federal action that is subject to consultation. 50 C.F.R. § 402.02 (the action area includes "all areas to be affected directly and indirectly by the Federal action"). Thus, if the scope of the direct and indirect effects of the action is limited by the permitting agency's regulatory authority, the size of the action area will likewise be restricted.

Finally, the cumulative effects that are attributable to the federal action are narrowed. As previously discussed, cumulative effects are defined in the regulations governing consultation as "effects of future State and private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02. This definition is intended to be narrower in scope than the definition of cumulative effects under NEPA to ensure that future, speculative effects are excluded from the analysis. *Interagency Cooperation,* 51 Fed. Reg. at 19,933. If the size of the action area is restricted, the scope of cumulative effects will be restricted as well.

Whether and to what extent the effects analysis changes by applying the *Public Citizen* standard will obviously vary, depending on the nature of the project and the federal action triggering consultation. For example, if the federal action undergoing consultation is a timber sale conducted by the Forest Service on National Forest System land, the extent of federal control would compel a broad scope of analysis. If, in contrast, the federal action is a permit issued to a landowner in connection with a private project, the extent of the agency's jurisdiction and control over the landowner's project would determine the proper scope of the effects analysis. Again, this will vary, depending on the particular circumstances.

2. Examples Applying the *Public Citizen* Standard to Clean Water Act Permits

To illustrate how the *Public Citizen* standard would apply in the context of a private (or other non-federal) project, it is appropriate to consider several examples. To be consistent, each example will involve the issuance of a permit to a private entity under Section 404 of the CWA. Under that statue, the Corps is authorized to regulate and issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). "Navigable waters" under the CWA are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). *See, e.g., Rapanos v. United States*, 126 S.Ct. 2208 (2006) (addressing the scope of the Corps' jurisdiction).

Assuming a watercourse meets the regulatory definition of "waters of the United States" and is subject to the Corps' jurisdiction, Section 404 authorizes the Corps to permit "discharges" of "dredged or fill material." These terms are also defined under the CWA and the Corps' regulations. "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A) and (16). "Fill material" is defined as material used for the "primary purpose" of replacing an aquatic area with dry land or changing the bottom elevation of a water body. 33 C.F.R. § 323.2(e). *See also Resource Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162, 1165-67 (9th Cir. 1998) (holding the Corps lacks jurisdiction over the construction of a landfill in a wetland).

In short, under the CWA, the Corps' jurisdiction extends to "waters of the United States" and to activities that involve dredging or filling within those jurisdictional waters. "Because the [Corps'] jurisdiction is limited to the issuing of permits for such discharges, ... any conditions imposed in a permit must themselves be related to the discharge." *United States v. Mango*, 199 F.3d 85, 93 (2nd Cir. 1999).

a. Example 1: *Riverside Irrigation District*

The first example illustrating the application of the *Public Citizen* standard in the context of Section 7 consultation is based on the facts in *Riverside Irrigation Dist.*, discussed above, and is taken from the *Consultation Handbook*. *Consultation Handbook* at 4-17.[9] In that case, an irrigation district applied for and was denied coverage under a nationwide permit for the discharge of material in Wildcat Creek, a tributary of the South Platte River, for the construction of a dam and reservoir. *Riverside Irrigation Dist.*, 758 F.2d 510-11. The Corps denied coverage because the increased use of water resulting from the project would deplete downstream flows in the Platte River, adversely modifying the critical habitat of the whooping crane. *Id.* As shown in the illustration in the *Consultation Handbook*, the indirect effects of the permitted activity would extend some 150 miles downstream to the reach of the Platte River in central Nebraska. The court upheld the use of this extended action area on the basis that the CWA and the Corps' regulations "authorized the Corps to consider downstream effects of changes in water quantity as well as on-site changes in water quality in determining whether a proposed discharge qualifies for a nationwide permit." *Id.* at 512.

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[9] A copy of the illustration found in the *Consultation Handbook* is attached to this paper.

If the *Public Citizen* standard were applied to this example, the scope of the effects of the action and the action area would not change. Under the CWA and its implementing regulations, the Corps had jurisdiction over the watercourses and, as the court stated, authority to evaluate the downstream effects on the aquatic environment in determining whether the project was eligible for coverage under a nationwide permit. In other words, the scope of the effect analysis coincided with the Corps' regulatory authority. Although not addressed in the decision, the scope of the effects analysis and action area are consistent with the regulations governing Section 7 consultation. If FWS had determined that the permitted activity was likely to adversely modify critical habitat, FWS would suggest a reasonable and prudent alternative "that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction." 50 C.F.R. § 402.02. In short, this example would pass muster under *Public Citizen*.

b. Example 2: A Typical Real Estate Project

The second example is based on another illustration provided in the *Consultation Handbook* purporting to show the proper method of determining the action area. *Consultation Handbook* at 4-18.[10] In this example, the proposed federal action is again the issuance of a permit under Section 404 of the CWA that would allow a portion of a wetland to be filled for the construction of a road providing access to a proposed real estate development. *Id.* As shown in the illustration, the wetland (which is assumed to constitute a jurisdictional water under the CWA) is not located within the developer's property; however, the property is located within the range of a listed species (which is, presumably, a terrestrial species). *Id.* In this scenario, FWS identified two discrete action areas: an action area within the portion of the wetland that would be impacted by the construction of the access road, and a separate action area consisting of the developer's property. *Id.* This example would violate the *Public Citizen* standard.

The obvious problem with this example is that the action area includes the developer's property, which is located outside of the area within the Corps' CWA jurisdiction. It is unclear from the *Consultation Handbook* exactly how the developer's property was determined to fall within the action area. The authors may have focused on the range of the species and not the Corps' regulatory authority, in much the same way that FWS used an action area containing 725,000 acres of land in consulting on CWA permits for the improvement of 1.6 miles of an arterial street in Pima County, discussed above. Or the authors may have used a simplistic "but for" test, and assumed the development could not proceed without the access road. Obviously, however, the Corps has no authority or control over the private housing development in the example, and could not lawfully include conditions in the 404 permit restricting the developer's land use activities. The development cannot be considered an interrelated or interdependent action because, under the definitions of those terms, the development would not depend on the access road for its justification and it would clearly have independent utility apart from the access road. Nor can the housing development be regarded as a cumulative effect of the permit because it is located outside of the correct action area, which is the portion of the wetland impacted by the access road.

If the facts in this example are changed slightly, the import of the Ninth Circuit's adoption of the *Public Citizen* standard becomes even more apparent. Assume that instead of the

[10] A copy of the illustration is also attached to this paper.

off-site wetland, the developer's property is bisected by a watercourse that constitutes a jurisdictional water. The developer applies for a Section 404 permit in order to build several road and utility line crossings over the watercourse. A portion of the developer's property, located in an upland area, has been designated as critical habitat for a terrestrial species, such as a squirrel or snake, that does not regularly use the watercourse. In this example, the scope of the effects of the action – the Section 404 permit – and the action area would be limited to the watercourse and, potentially, adjoining riparian land. The action area would not include the remaining upland (i.e., non-jurisdictional) area of the developer's property where the critical habitat is located.

In that case, under the *Public Citizen* standard, the Corps would not be required to consult with FWS. The Corps lacks authority to control the effects resulting from land clearing and related activities in the upland portions of the developer's property, i.e., the requisite causal relationship between the Corps' permit and the upland construction activities is not present. The action area would be restricted to the watercourse and adjoining riparian areas, and the effects of the developer's construction activities on the critical habitat would not constitute an effect of the action or a cumulative effect.

As the foregoing examples suggest, the *Public Citizen* standard should operate much like the "control and responsibility" test adopted by the Corps in its NEPA implementation regulations, codified at 33 C.F.R. Part 325, Appendix B. Section 7(b) of Appendix B requires the Corps' NEPA analysis to "address the impacts of the [Corps'] permit and those portions of the entire project over which the [Corps] has sufficient control and responsibility to warrant Federal review." 33 C.F.R. Pt. 325, App. B § 7(b)(1). The regulation also provides:

> Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project. These are cases where the environmental consequences of the additional portions of the project are essentially products of Federal financing, assistance, direction, regulation, or approval . . . .

Id. at § 7(b)(2)(A). *See, e.g., Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1116-18 (9th Cir. 2000) (upholding Corps' decision to limit the scope of its NEPA analysis to the specific activities authorized by the federal permit).

Although adopted in 1988, the Corps' "federal control and responsibility" test in Appendix B mirrors the Supreme Court's holding in *Public Citizen*. Where the Corps' jurisdiction over a non-federal project is limited to a small portion of the project, and there is no other federal involvement in or control over the project, it would make no sense to require the Corps to evaluate the environmental impacts of the entire project. That would be akin to requiring the FMCSA to evaluate potential increases in air pollution caused by Mexican motor carriers operating in the United States, even though the agency would be powerless to prevent those impacts due to its limited regulatory authority. The same basic approach should be used to

determine the effects of the action and the action area used in consulting under Section 7 of the ESA.

IV. CONCLUSION

The Ninth Circuit's express adoption of *Public Citizen*'s standard for determining the scope of the effects analysis required under Section 7(a)(2) of the ESA should provide relief to landowners that require a federal permit or similar approval in connection with private land use activities. In *Public Citizen*, the Supreme Court rejected the use of "but for" causation, and instead emphasized that the scope of analysis under NEPA is predicated on a "rule of reason" that takes into account the agency's regulatory authority in determining whether an effect is causally related to the proposed action. The use of this causation standard will limit the ability of FWS to "federalize" non-federal activities during the consultation, and require FWS to limit its effects analysis to actions that are truly federal in nature, as contemplated by Section 7(a)(2). While the majority's holding in *Defenders of Wildlife* that Section 7(a)(2) constitutes an independent source of authority, requiring federal agencies to act for the benefit of listed species, is certainly controversial, the majority's recognition that federal agencies are not responsible for effects over which they lack jurisdiction may ultimately prove to be equally important to the regulated community.

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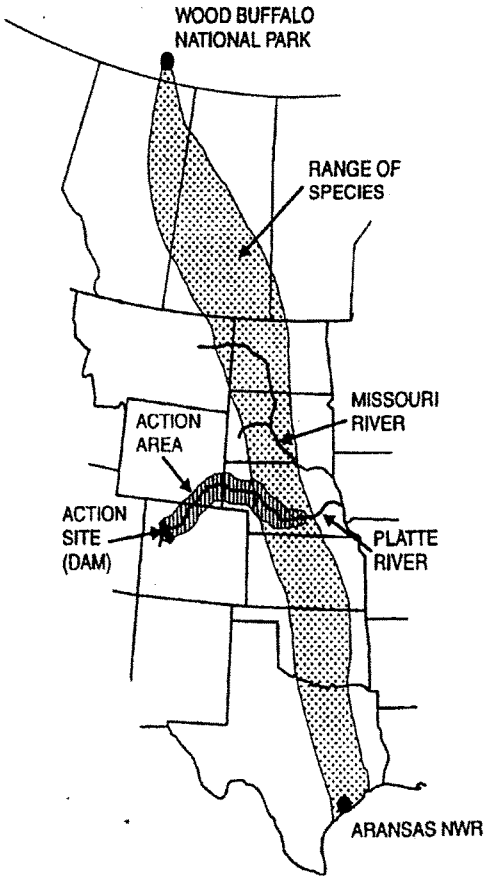
Figure 4-5. Example of an action area involving an effect not at the project site.

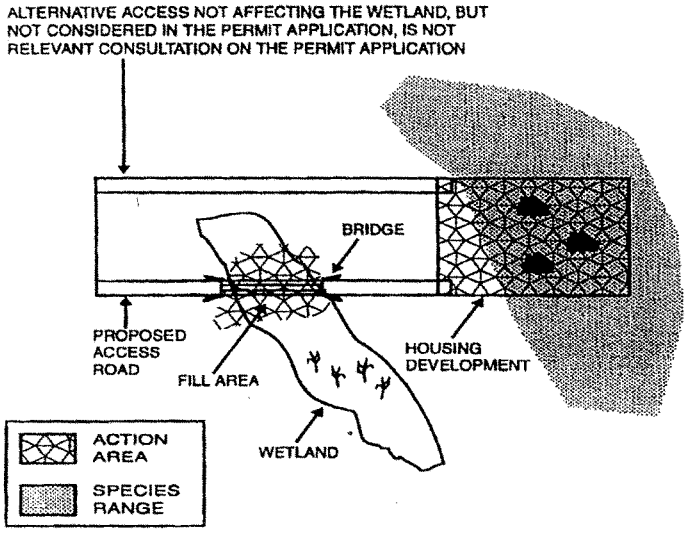
A dam on the Platte River in Colorado (project site) also may affect the water regime for whooping crane critical habitat (action area) 150 miles downstream in Nebraska.



Description of the proposed action (cont'd)

Determining the action area relates only to the action proposed by the action agency. Even if the applicant has an alternative not requiring Federal permits or funding, this does not enter into the Services' analyses. Such alternatives can be discussed in the reasonable and prudent alternatives or conservation recommendations if the alternative is within the agency's jurisdiction. The action area should be determined based on consideration of all direct and indirect effects of the proposed agency action [50 CFR 402.02 and 402.14(h)(2)]. For example (Figure 4-6), if the proposed action is a wetland fill (requiring a federal permit) to accommodate access to a proposed development (the actual area of impact to the species), then the development is included in the action area. Whether or not the applicant can build a road that does not impact the wetland, the analysis of effects of the action still encompasses the proposed development. If the applicant is seriously considering the alternative with no Federal nexus, the applicant should be advised of the need for acquiring a section 10(a)(1)(B) permit before proceeding with development for actions that will result in a taking.

Figure 4-6. Determining the action area.



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