July 23, 2004

VIA FAX AND FIRST CLASS MAIL

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Re: Environmental Assessment for the Joint Counterpart Endangered Species Act Section 7 Consultation Regulations for Interagency Consultation on Regulatory Actions Under the Federal Insecticide, Rodenticide, and Fungicide Act (69 Fed. Reg. 40346, July 2, 2004)

Dear Mr. Frazer and Mr. Williams:

Defenders of Wildlife ("Defenders") and the twenty-seven undersigned groups and individuals respectfully submit the following comments on the Environmental Assessment for the Joint Counterpart Endangered Species Act Section 7 Consultation Regulations for Interagency Consultation on Regulatory Actions Under the Federal Insecticide, Rodenticide and Fungicide Act ("EA"). On April 16, 2004, Defenders submitted comments ("Comment Letter") opposing the Proposed Joint Counterpart Endangered Species Act Section 7 Consultation Regulations ("Proposal") – which outlined potential changes in the consultation procedures for action taken pursuant to the Federal Insecticide, Rodenticide and Fungicide Act ("FIFRA") – on the grounds that it violates the Endangered Species Act ("ESA") and poses serious risks to endangered and threatened species. These comments concern the EA prepared by the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively the "Services") on the environmental effects of the Proposal.

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., has a stated goal of "promot[ing] efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." While NEPA "does not mandate particular results," the statute does impose procedural requirements through which all federal agencies must focus

> on and address the environmental impact of their proposed actions. Robertson v. Methow

Valley Citizens Council, 490 U.S. 332, 349-50 (1989). NEPA requires each federal agency to:

> include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement . . . on -- (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). This detailed statement is called an Environmental Impact Statement ("EIS"). The implementing regulations, promulgated by the Council of Environmental Quality, permit an agency to prepare an Environmental Assessment ("EA") -- a more limited NEPA document -- when the proposed action either is categorically excluded from the requirement to produce an EIS or is not the type of activity which "normally requires an [EIS]." See 40 C.F.R. § 1501.4(a)-(b). An EA is a "concise public document" that "briefly provides sufficient evidence and analysis for determining whether to prepare an [EIS]." Id. § 1508.9(a). This document must "include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." Id. § 1508.8(b). If an agency determines that an EIS is not required, it must issue a "finding of no significant impact," discussing the reasons why the proposed action will not have a significant impact on the human environment. Id. §§ 1501.4(e), 1508.13.

THE ENVIRONMENTAL ASSESSMENT IS INADEQUATE

On July 2, 2004, the Services issued the EA concluding that the Proposal "would not have any adverse environmental effects." EA at 23 (emphasis added). This conclusion is based solely on the assertion that the Proposal would be merely "a procedural change in conducting ESA section 7 consultations." Id. at 22. However, as Defenders noted previously, this Proposal would fundamentally and unlawfully alter the regulatory regime for complying with section 7 of the ESA regarding the regulation of pesticides. See generally Comment Letter. Given the devastating impacts pesticides are known to have on listed species, and the fact that the Proposal would entirely eliminate the critical role of the Services in ensuring that many, if not most, of the actions under FIFRA do not jeopardize or otherwise adversely impact listed species or critical habitat, the assertion that the Proposal would only effect a "procedural change" to the section 7 consultation process is simply false. Indeed, the staggering number of unsubstantiated assertions found in the EA -- which are, in many cases, either inapposite or intellectually dishonest statements of law and fact -- contain almost no analysis of the potential environmental consequences of the Proposal, rendering the document virtually useless for NEPA purposes.

For example, the EA begins with a statement of the need for the regulatory changes, in which the government attempts to justify the Proposal by painting the current consultation process as an administrative burden, stating that "[t]he combination of the number and variety of FIFRA regulatory decisions EPA makes each year means that the number of consultations . . . could be far greater than from any other single Federal regulatory program," and that the current process "would likely result in substantial delays in EPA's ability to processes [sic] applications for registration and re-registration and compromise EPA's ability to register products." Id. at 3. However, the large number of regulatory actions the EPA undertakes pursuant to FIFRA is in and of itself compelling evidence that the Proposal will have a significant impact on the environment, and thus warrants an in-depth analysis.

It is indisputable that each year pesticides harm many thousands of non-target plants and animals, including threatened and endangered species, see Comment Letter at 11-22, and thus each and every decision under FIFRA has the potential to have significant environmental impacts. Yet, under the Proposal, involvement of the expert wildlife agencies will be limited to a small portion of these decisions under FIFRA.[1] Undoubtedly, the conclusion in the EA, that the Proposal will have no significant environmental impacts, fails to account for the fact that a vast majority of the actions under FIFRA will be allowed to proceed without first undergoing the appropriate review by the expert wildlife agencies, as required by the ESA and necessary to protect listed species.

Moreover, the EA fails to consider the reduction in the protections guaranteed to listed species by the ESA, and the associated environmental impacts, that can be expected to result from the Proposal. For example, the EA states that "[b]ecause EPA's approach produces data that is consistent with ESA data standards, the data used by EPA can be used to evaluate EPA's actions with respect to the requirements of the ESA." EA at 4. Yet, as Defenders made clear, this proposition is patently false; EPA's approach does not meet the ESA's standards. See Comment Letter 30-37. Moreover, even if EPA's approach was consistent with the ESA, the information it provides is of little value because the severely limited the role of the Services means that this data may never be interpreted by the expert wildlife agencies. In addition, given that the Services will not be able to retroactively correct erroneous decisions the EPA makes under the proposed regulations, the ability to review the EPA actions will be of no help to species that are harmed by pesticides the EPA mistakenly registered. Therefore, the potential for significant harm to befall a listed species is greater under the Proposal because of the lack of meaningful involvement by the Services, yet the EA avoids addressing the implications of this fact.

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1 According to the FWS, it currently reviews more than 72,000 federal actions annually through the section 7 consultation process, and of this total, approximately 93% are resolved through informal consultation. See U.S. Department of the Interior Fiscal Year 04 Budget Justifications at 74. Thus, if the section 7 changes proposed by the administration regarding FIFRA actions were applied to all federal agency actions, approximately 67,000 federal actions that are currently required to undergo section 7 consultation each year because they pose some risk to endangered or threatened species, would escape consultation and the expert scrutiny of the Services entirely. While the percentage of actions under FIFRA that will be affected by the Proposal is uncertain -- largely because the EPA has systematically failed to consult on the effects of pesticides, thereby preventing a statistical analysis of the breakdown between informal and formal consultation -- and while the numbers may differ greatly from the overall percentages cited here, it is clear that, on the whole, informal consultation plays a major role in the consultation process under the ESA.

Indeed, the EPA and the Services need not look far for examples of pesticides that have had the devastating environment affects, see id. at 11-22, or situations where the Services and the EPA have disagreed about the potential affects of particular pesticides. See id. Therefore, what is required in this NEPA analysis is a thorough, transparent inquiry into the effectiveness of the review EPA employs in registering pesticides, focusing on the ability of this process to effectively protect listed species. In this case, however, the controlling document, Overview of Ecological Risk Assessment Process in the Office of Pesticide Programs, January 2004 ("Overview"), which outlines the methodology the EPA will purportedly use to address the impacts of pesticides on listed species, has been held out as a subservient document and thus has not been directly at issue in the rule making. Therefore, the most important component of the Proposal has been shielded from the appropriate level of scrutiny. Certainly, the Services' previous analysis of the Overview is an insufficient substitute for a complete NEPA analysis with the accompanying public review. While the analysis of the EPA's methodology would preferably draw on the results of past consultations, the EPA's historic failure to comply with the ESA makes this nearly impossible. Therefore, there must be an analysis of the possible shortcomings of the Overview, applying the substantive requirements of the ESA, including a discussion of the consequences of removing the Services' input from the process and the potential that listed species will not be properly protected.

Further evidence of the inadequacy of the EA is found in the limited "Environmental Consequences" section, which simply rephrases various justifications for the Proposal to evade addressing the dramatic impact these regulations will have on the protections afforded to listed species. For example, the government views consultation as duplicative, thus concluding that the involvement of the Services will have no impact on the decision-making process, stating that "when EPA follows its established approach to ecological risk assessment [EPA] will correctly make determinations as to whether an action is or is not likely to adversely affect listed species or critical habitat." EA at 23. However, EPA's expertise is in balancing the costs and benefits of registering pesticides – an analysis which is decidedly different, and indeed, incompatible, with that of evaluating the impacts of an action on listed species. Therefore, the conclusion that the EPA, which lacks expertise on listed species, see Comment Letter at 9-10, and will be applying a flawed environmental risk assessment, see id. at 30-37, will make the "correct" determination is spurious.
What is missing in this EA is a thorough inquiry into the effectiveness of the review EPA employs in registering pesticides and protecting listed species, including EPA's systematic and historic failure to comply with the ESA's consultation requirements.

The government also attempts to bolster its depiction of consultation as an "overlapping review" by focusing on the few situations where the Services would concur with the EPA determination that a pesticide is "not likely to adversely affect" a listed species. EA at 23-24. In doing so the government looks to sidestep the need for a thorough inquiry into the environmental consequences that will arise when the Services are denied involvement in the opposite situation, where the Services disagrees with an EPA determination that a pesticide will not have an adverse effect on a species. Under the Proposal, the Services will be barred from providing meaningful input in these situations. Highlighting those instances where the two agencies would agree on the potential effects of a pesticide ignores entirely the history of the consultation process, which is marked by significant differences of opinion between the Services and action agencies on the impacts of projects, including projects where the action agency made not likely to adversely affect determinations. Thus, the EPA and the Services have again

mischaracterized the facts and the importance of the consultation process, in order to find support for this ill-conceived change, rather than assessing the potential environmental effects.

The EA also rehashes the expediency rationale by stating that the Proposal "should facilitate EPA's ability to address [] high priority registration actions by ensuring that the section 7 interagency consultation process does not delay the public's access to new and safer products unnecessarily [and] will also facilitate completing consultation on currently registered products that have not yet been subjected to section 7 consultations." EA at 24. Again, however, what is absent from this discussion is analysis of the potential environmental impacts of these actions. Obviously, the ability to register pesticides more quickly could increase the number and amount of harmful chemicals in the environment, however, the potential environmental impacts of this increase was never analyzed in the EA.

The alternatives analysis is also extremely limited and weak. The EA briefly discusses the Proposal and the "no action" alternative, and notes two alternatives that were considered previously but which also have major flaws. EA at 5-21. Missing from this discussion, however, is an examination of simply improving EPA compliance with the existing section 7 framework and coordination with the Services. For instance, by promulgating only proposed section 402.43 (Interagency exchanges of information) and section 402.44 (Advance coordination for FIFRA actions), see 69 Fed. Reg. 4478, the EPA could significantly improve its understanding of the issues that surround listed species and pesticides. Using this alternative as a starting point, the Services should commit to an in-depth review of the existing procedures the agencies currently employ when exchanging information on how FIFRA actions affect listed species and critical habitat. A more efficient exchange of information and, in fact, more involvement by the Services throughout the FIFRA registration process could allow for more effective decision-making, without necessitating the kind of unlawful regulatory changes contained in the Proposal.

In sum, the cursory review given to the impacts of the Proposal by this flimsy EA do not meet any known NEPA minimum standards for environmental analysis. Rather than reviewing and evaluating the potential environmental impacts of the Proposal, as required by NEPA, the EA is simply yet another venue for the current administration to restate the policy-driven justifications for this unlawful change.

AN ENVIRONMENTAL IMPACT STATEMENT IS REQUIRED

Not only is the EA patently inadequate but, in light of the fact that the Proposal would profoundly alter the section 7 regulatory regime with respect to the regulation of pesticides with potentially severe negative impacts to endangered and threatened species, the Proposal is clearly a major federal action that will significantly impact the human environment, thus requiring preparation of an EIS under the NEPA. 42 U.S.C. § 4332. To begin, the adoption of the counterpart regulation is undoubtedly a "federal action." See 40 C.F.R § 1508.18(a) ("Actions include . . . new or revised agency . . . regulations"); Id. § 1508.18(b)(1)("Federal actions tend to fall within one of the following categories: Adoption of official policy such as . . . regulations").

Moreover, the effects of this regulatory change are both major and significant, further supporting the need for an EIS. Id. §§ 1502.3; 1508.18 ("Major reinforces but does not have a meaning independent of significantly"). Indeed, at least six of the ten factors established by the Council on Environmental Quality to be considered in assessing whether the environmental effects of an action are "significant" for purposes of NEPA and, therefore, necessitate preparation of an EIS, are implicated by the Proposal. See

id. § 1508.27. First, as evidenced by the over 70, 000 comments submitted by the public, the Proposal's changes to the section 7 consultation regulatory framework are highly controversial. Id. § 1508.27(b)(4). Second, while Defenders believes the Proposal will detrimentally impact listed species and critical habitat, the precise degree to which the human environment will be negatively impacted is uncertain and involves unknown risks. Id. § 1508.27(b)(5). Third, the Proposal will clearly establish a precedent for similar changes to the section 7 consultation regulations with respect to other federal actions and programs. In fact, the Proposal comes on the heels of a similar proposal to greatly restrict the role of the Services under the section 7 process to evaluate the impacts of projects under the National Fire Plan to the land management agencies and thus could be one of the first steps in a movement to fundamentally change the consultation procedures. Id. § 1508.27(6). Fourth, while each regulatory decision un der FIFRA has the potential to have significant environmental consequences individually, the potential synergistic, additive, cumulative, or antagonistic effects of pesticides released into the environment are still largely unknown, and by removing the input of the Services this regulation effectively eliminates the role the Services could play in evaluating these interactions. Id. § 1508.27(b)(7). Fifth, as Defenders stated above and in the Comment Letter, the Proposal poses significant risks to federally-listed species and critical habitat. Id. § 1508.27(b)(8). Finally, the Proposal threatens to directly violate the requirements of section 7 of the ESA. Id. § 1508.27(b)(10). Accordingly, the Services must prepare an EIS if it moves forward with its proposed action alternative.

Furthermore, the Proposal will clearly "affect" the human environment. See 40 C.F.R. §1508.8(b) (Effects include . . . [i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable"). Under NEPA these types of effects can include "related effects on air and water and other natural systems, including ecosystems" which undoubtedly are at issue under the Proposal. Id.; Id. § 1508.8 ("Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative."). By eliminating the input of the expert fish and wildlife agencies on many pesticide-related regulatory decisions under FIFRA, the new regulations will inevitably affect the short and long term success of many species. The potential loss of biodiversity as a result of these decisions will certainly have a major impact on the human environment. Moreover, while not a factor these regulatory changes intend to address, the amount and number of different pesticide products that are registered will certainly be affected by these regulatory changes and will have a significant impact on the environment as a whole.

CONCLUSION

Noting NEPA's clear statutory mandate, the implementing regulations' requirements and the patent deficiencies of the EA, Defenders respectfully requests that the Services evaluate the full extent of the environmental consequences of this unlawful regulatory change through an EIS, before the EPA is given the unilateral authority to allow these deadly toxicants to be unleashed into our environment.

Sincerely,

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