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September 15, 2008

Public Comments Processing
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 North Fairfax Drive, Suite 222
Arlington, VA 22203

ATTN: 1018-AT50

RE: Proposed Rule Regarding Interagency Cooperation Under the
Endangered Species Act (73 Fed. Reg. 47868, August 15, 2008).

Dear Sir or Madam:

The National Ocean Industries Association (NOIA) appreciates the opportunity to respond to your request for comments on the proposed rule regarding interagency cooperation under the Endangered Species Act (ESA). NOIA is the only national trade association that represents all companies engaged in the exploration for, and production of, traditional and alternative energy on the nation's Outer Continental Shelf. The NOIA membership comprises more than 300 companies engaged in activities ranging from producing to drilling, engineering to marine and air transport, offshore construction to equipment manufacture and supply, shipyards to communications, and geophysical surveying to diving operations. The proposed rule is, therefore, of particular importance to us.

NOIA is committed to securing reliable access to the nation's valuable offshore energy resources in order that they may be developed, produced and supplied in an environmentally responsible manner. Our commitment to fulfill this goal has sometimes been stymied, however, by the extensive delays in the endangered species consultation process. For this reason, we are pleased that the agency is attempting to improve its implementation of this important statute.

Summary of Position

NOIA supports the protection and recovery of endangered and threatened species, and we support this effort by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to clarify and streamline the process, as well as eliminate inconsistencies and duplication in the regulations. We believe that the proposed amendments to ESA regulations focused on the section 7 consultation process will improve the overall regulatory process. Agencies will be better able to dedicate their resources to actual threats to species, while other routine projects and activities proceed with certainty and timeliness.

Comments on Proposed Changes

Section 402.02 - Definitions:

The rulemaking proposes to add a sentence to the current regulatory definition of “biological assessment” to clarify that the action agencies do not necessarily have to create a new document where one already exists. This would be a positive change to the definition, eliminating duplication of efforts, and avoiding unnecessary paperwork by the federal government. NOIA strongly supports this change.

The rulemaking would also amend the regulatory definition of “cumulative effects” to clarify that the definition of the term under section 7 of the ESA is not the same as the use of the term in the National Environmental Policy Act. It excludes future federal actions, which will be the subject of separate ESA consultations and consideration. Once again, this is a positive change that would avoid duplicative analyses. NOIA strongly supports the change.

The definition of “effects of the action” would also be amended by the proposal. Currently, the definition establishes that indirect effects are those that are later in time, caused by the action under consideration, and reasonably certain to occur. The proposed rule would provide guidance on what constitutes “caused by” and “reasonably certain to occur” to ensure consistent application of the standard. The proposed language defining “reasonably certain to occur” and “clear and substantial information” would eliminate confusion and inconsistent application of the regulation. NOIA supports the change.

Section 402.03 - Applicability:

The proposed regulation would define the applicability of the regulations to delineate when section 7 is not applicable. Action agencies would not be required to consult: on actions for which they determine there would be no effect on listed species or critical habitat; for actions the effects of which are so inconsequential, uncertain,

unlikely or beneficial that they are, as a practical matter, tantamount to having no effect on listed species or critical habitat; for actions that are insignificant contributors to any effect on listed species or critical habitat; or for actions that are not capable of being meaningfully identified or detected in a manner that permits evaluation, or are wholly beneficial or are such that the potential risk of jeopardy to the listed species is remote.

NOIA supports these proposed changes. They will allow action agencies and the regulatory agencies to focus on real threats to species, rather than directing those resources to actions on projects that do not pose threats, thereby inhibiting the routine projects and siphoning needed resources from those that truly require consultation.

Section 402.13 - Informal Consultation

The proposed rule allows the action agency to decide whether to engage in informal consultation, and whether formal consultation is required. The statute does not specify what triggers consultation or which official decides when consultation is needed. Therefore, it is within the Secretary's discretion to make reasonable decisions on these matters through regulation.

The rule also proposes deadlines for the informal consultation. We believe the proposed deadlines for consultation are reasonable. These time frames are sufficient to review existing data. Section 7 requires the Secretary to act on the basis of the best available data, and does not require that the agency develop new data. Therefore, a 60-day period, with a possible 60-day extension, is ample time to complete the consultation.

Thank you again for considering our comments on the proposed rule. If you have any questions or need additional information, please feel free to contact me at (202)737-0926.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kim Harb', written in a cursive style.

Kim Harb
Director
Policy & Government Affairs