

## Final Rule on ESA Consultation Regulations Published: Litigation, Congressional Reaction and New Administration Will Shape Eventual Implementation

A final rule modifying the implementing regulations for section 7 of the Endangered Species Act (ESA) was published in the Federal Register today, Tuesday, December 16<sup>th</sup> and will become effective on January 15, 2009. The rule primarily addresses changes to “applicability” rules with respect to when consultation with the U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) is required, definitions for direct and indirect effects of a proposed action which must be addressed in a consultation inquiry, and procedural changes to the consultation process.

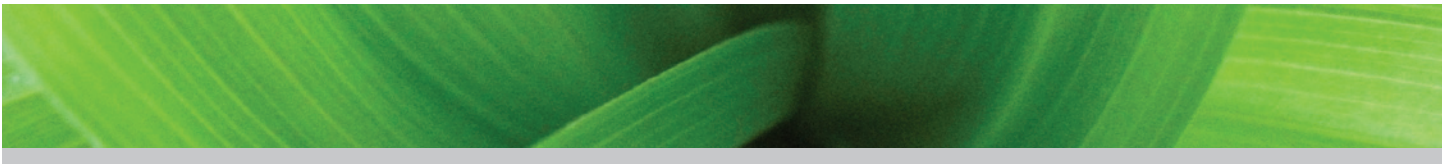
As an initial matter, the rule provides that consultation with FWS or NMFS is not required when the direct and indirect effects of the action are not anticipated to result in take *and* the effects of the action are either:

- (1) wholly beneficial;
- (2) not capable of measurement or detection in a manner that allows “meaningful evaluation;” or
- (3) manifested through “global processes” that cannot be reliability predicted, or would result in an extremely small impact, or pose a remote, potential risk of harm.

The ultimate scope of these categories is open to interpretation, and this issue likely will be a significant one in any litigation challenging the final rule. For those projects that meet these criteria, the final rule eliminates the need for written concurrence from FWS or NMFS regarding the action agency’s determination that the proposed action is not likely to adversely affect a listed species. This has the potential of removing duplicative agency review and expediting federal agency actions.

The second, and more broadly applicable, change to the consultation regulations under the final rule is a clarification of the definition of the “effects of the action”—a critical element of the section 7 inquiry. For the first time, the final rule defines key terms such as “direct effect”, “indirect effect” and “reasonably certain to occur.” This rule clarifies that the effects of the action to be analyzed are those that are immediate effects of the action, which do not depend on the occurrence of intervening events (direct effects) or which can be shown to be reasonably certain to occur and for which the proposed action is the essential cause of the identified effect (indirect effects). Further, a determination that an effect is reasonably certain to occur must be based on clear and substantial information. In defining these terms, FWS and NMFS have articulated the need for a close causal connection between the proposed action and any identified direct and indirect effects to be reviewed in the section 7 inquiry.

Finally, the final rule provides for other procedural changes to the consultation process. For example, a broader range of documents and analyses can be used as the biological assessment for effects of the action upon listed



species. Further, the final rule establishes firm deadlines for the completion of informal consultations. These procedural changes to the consultation process are focused on providing more flexibility to the conduct of the consultation inquiry, while also improving efficiency (in time and use of resources) of the overall process.

The issuance of a final rule is unlikely to end the debate on the changes being implemented. It has been widely reported that Congressional leadership and President-elect Obama's transition team are exploring means to stop implementation of recently finalized environmental regulations and policies, which could include the changes to the ESA section 7 consultation regulations. These efforts could include invocation of the Congressional Review Act, issuance of legal guidance narrowly interpreting the regulatory changes, restriction of implementation funds, and institution of a new (lengthy) rulemaking process to reconsider or reformulate the presently effective consultation regulations. Separately, several environmental groups already have announced plans to file lawsuits challenging the final rule.

The effectiveness of these regulatory changes ultimately will be determined by future actions—in the courts, Congress and the implementation of the ESA by FWS, NMFS and the federal action agencies. In this regard, the issuance of a final rule may, in fact, precipitate a much broader discussion as to the role and nature of ESA, section 7 consultations. This, in turn, could become the catalyst for additional changes to the administration of the ESA, that has been largely static for over two decades.

#### FOR ADDITIONAL INFORMATION

Van Ness Feldman regularly counsels clients on issues related to endangered species, climate change and regulatory compliance with federal environmental laws. If you are interested in additional information regarding compliance with the Endangered Species Act or other federal environmental laws, please contact Joseph Nelson and Sam Kalen in our Washington, DC office at (202) 298-1800 or Matthew Love and Richard Agnew in our Seattle, WA office at (206) 623-9372.

---

© 2008 Van Ness Feldman, P.C.  
All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.