

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RECEIVED

CHAMBER OF COMMERCE OF THE UNITED)
STATES OF AMERICA,)
1615 H Street, NW)
Washington, DC 20062,)

Plaintiff,)

v.)

DIRK KEMPTHORNE, Secretary of the United)
States Department of the Interior,)
LYLE LAVERTY, Assistant Secretary of the)
United States Department of the Interior for Fish)
And Wildlife and Parks, H. DALE HALL,)
Director of the United States Fish and Wildlife)
Service, and UNITED STATES FISH AND)
WILDLIFE SERVICE,)
1849 C Street, NW)
Washington, DC 20240,)

Civil Action No. _____

CARLOS M. GUITIERREZ, Secretary of the)
United States Department of Commerce,)
WILLIAM J. BRENNAN, Acting Administrator)
of the National Oceanic and Atmospheric)
Administration,)
1401 Constitution Avenue, NW)
Washington, DC 20230,)

JAMES W. BALSIGER, Acting Assistant)
Administrator of Fisheries, SAMUEL D. RAUCH,)
Deputy Assistant Administrator of Fisheries for)
Regulatory Programs, and NATIONAL MARINE)
FISHERIES SERVICE,)
1315 East-West Highway)
Silver Spring, MD 20910,)

Defendants.)

COMPLAINT

1. Plaintiff the Chamber of Commerce of the United States of America (“Chamber”) brings this action pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, seeking review of certain provisions of a final agency action by Defendants, Dirk Kempthorne, Secretary of the United States Department of the Interior, Lyle Lavery, Assistant Secretary of the United States Department of the Interior for Fish and Wildlife and Parks, H. Dale Hall, Director of the United States Fish and Wildlife Service (“Director”), the United States Fish and Wildlife Service (“FWS”), Carlos M. Guitierrez, Secretary of the United States Department of Commerce, William J. Brennan, Acting Administrator of the National Oceanic and Atmospheric Administration (“Acting Administrator”), James W. Balsiger, Acting Assistant Administrator of Fisheries (“Acting Assistant Administrator”), Samuel D. Rauch, Deputy Assistant Administrator of Fisheries for Regulatory Programs (“Deputy Assistant Administrator”), and the National Marine Fisheries Service (“NMFS”). On December 11, 2008, FWS and NMFS (collectively, “Services”) issued a final rule amending the Services’ regulations in 50 C.F.R. Part 402 relating to consultation obligations under Section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536. Interagency Cooperation Under the Endangered Species Act, Final Rule (December 11, 2008), *available at* http://www.doi.gov/initiatives/ESA_Section7FR.pdf (to be published in the Federal Register and codified at 50 C.F.R. Part 402) (the “Final Rule”). Although Plaintiff supports the provisions of the final rule clarifying when consultation under Section 7 is necessary, Plaintiff challenges one discrete inconsistency in the “Applicability” section of the Final Rule, 50 C.F.R. § 402.03. Plaintiff does not challenge the remainder of the Rule, which it believes was properly issued under the ESA. Thus, the Plaintiff seeks (1) a declaration that the inconsistency in the Applicability section is arbitrary and capricious; and (2) an order remanding this issue to the Services for further consideration consistent with the Court’s opinion.

JURISDICTION

2. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). The Court has the authority to grant the relief sought herein pursuant to 28 U.S.C. §§ 2201 and 2202 and 5 U.S.C. § 706. The final agency action being challenged is the Interagency Cooperation Under the Endangered Species Act Final Rule, which was signed on November 26, 2008 and made publicly available on December 11, 2008.

VENUE

3. Venue is proper in this court pursuant to 28 U.S.C § 1391(e), because each of the defendants is an officer or employee of an agency of the United States acting in his official capacity or is an agency of the United States. FWS has its headquarters in the District of Columbia and Defendants Dirk Kempthorne, Lyle Lavery, H. Dale Hall, Carlos M. Guitierrez, and William J. Brennan reside in the District of Columbia. Further, a substantial part of the events or omissions giving rise to the claims herein occurred in the District of Columbia. Finally, Plaintiff is incorporated and has its headquarters and principal place of business in the District of Columbia.

PARTIES

4. Plaintiff the Chamber is the world's largest business federation representing an underlying membership of more than three million businesses of every size, sector, and region. The Chamber's members operate and have various businesses and interests in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world.

5. A central function of the Chamber is to represent the interests of its members in important regulatory and litigation matters relating to energy and the environment, such as

climate change and domestic energy production, before the state and federal courts, legislatures, and executive branches.

6. The Chamber and its members have substantial interests that are directly and significantly affected by the resolution of the issues presented in the Complaint. Many of the Chamber's members require federal funding or authorization for their activities. As a result, such funding or authorization can trigger federal environmental reviews, including the potential need for consultations, biological assessments, and biological opinions under Section 7 of the ESA. The ESA consultation process adds costs to projects and can produce extensive delays. The Final Rule clarifies the regulations governing when such Section 7 consultations must occur in certain instances. The Chamber's members have an interest in avoiding unnecessary costs and delays in obtaining authorization for their activities. Thus, to the extent that the Final Rule fails to clarify adequately the circumstances when Section 7 consultation is required, and imposes unnecessary regulatory burdens beyond that required by the ESA, the Chamber's members will suffer harm. The relief Plaintiff requests would redress the Chamber's and its members' injuries.

7. Defendant Dirk Kempthorne is the Secretary of the United States Department of the Interior and is being sued in his official capacity. The Secretary has ultimate responsibility for implementation of the ESA and oversaw promulgation of the Rule.

8. Defendant Lyle Lavery is the Assistant Secretary of the United States Department of the Interior for Fish and Wildlife and Parks and is being sued in his official capacity. The Assistant Secretary is responsible for administration and implementation of the ESA and oversaw promulgation of the Rule. The Assistant Secretary signed the Rule, which included the inconsistency in the Applicability section.

9. Defendant H. Dale Hall is the Director of the FWS and is being sued in his official capacity. The Director is responsible for the administration and implementation of the ESA.

10. Defendant Carlos M. Guitierrez is the Secretary of the United States Department of Commerce and is being sued in his official capacity. The Secretary has ultimate responsibility for implementation of the ESA and oversaw promulgation of the Rule.

11. Defendant William J. Brennan is the Acting Administrator of the National Oceanic and Atmospheric Administration (“NOAA”) and is being sued in his official capacity. The Acting Administrator is responsible for the administration and implementation of the ESA.

12. Defendant James W. Balsiger is the Acting Assistant Administrator of Fisheries and is being sued in his official capacity. The Acting Assistant Administrator is responsible for the administration and implementation of the ESA.

13. Defendant Samuel D. Rauch is the Deputy Assistant Administrator of Fisheries for Regulatory Programs and is being sued in his official capacity. The Deputy Assistant Administrator is responsible for administration and implementation of the ESA. The Deputy Assistant Administrator signed the Rule, which included the inconsistency in the Applicability section.

14. Defendant FWS is an agency of the United States with the primary authority for implementing the ESA with respect to species under the jurisdiction of the FWS.

15. Defendant NMFS is an agency of the United States with primary authority for implementing the ESA with respect to species under the jurisdiction of the NMFS.

BACKGROUND

ESA Section 7

16. Section 7 of the ESA requires federal agencies (“action agencies”) to “insure 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 designated critical habitat. 16 U.S.C. § 1536(a)(2). This statutory obligation is imposed on the action agencies.

17. Section 7(a)(2) requires consultation with the Services for purposes of insuring that an agency’s actions are “not likely to jeopardize the continued existence of” a listed species or “not likely to . . . result in the destruction or adverse modification of” designated critical habitat. Section 7(a)(2) of the ESA does not, however, specify when consultation is triggered or who decides whether consultation is required. Likewise, ESA Section 7(a)(3) requires consultation if “the applicant [for a federally authorized or funded action] has reason to believe that an endangered or a threatened species may be present in the area affected by [the] project and that implementation of such action will likely affect such species.”

18. In 1986, the Services issued comprehensive regulations implementing Section 7 of the ESA. 51 Fed. Reg. 19,926 (June 3, 1986) (codified at 50 C.F.R. Part 402). The 1986 regulations established a tiered process for consultations. Pursuant to these regulations, federal action agencies were required to initiate informal consultation on any federal action that “may affect” listed species or critical habitat. 50 C.F.R. § 402.14(a). Under that regulation, informal consultation was designed to assist the agencies in determining whether “formal” consultation was required. *Id.* § 402.13. Action agencies were allowed to determine whether an action was “not likely to adversely affect” listed species or designated critical habitat, but were required to

seek and obtain written concurrence with this determination from the Services. *Id.* § 402.13(a). If, through informal consultation, the action agency determined, with the written concurrence of the applicable Service, that the proposed action was “not likely to adversely affect” any listed species or critical habitat, then formal consultation was not required, and the action agency’s obligations under Section 7 of the ESA were satisfied. *Id.* § 402.14(b). If, on the other hand, the action agency or applicable Service determined that the action was likely to adversely affect a listed species or critical habitat, then formal consultation was required. *Id.* § 402.14(a), (b).

19. With the exception of two Section 7 counterpart regulations for specific types of consultation, there have been no comprehensive revisions to the Section 7 implementing regulations since 1986.¹ 73 Fed. Reg. 47,868, 47,868 (Aug. 15, 2008). Since 1986, the Services and action agencies have gained significant experience in implementing the ESA. *Id.* In addition, a 2004 Government Accountability Office (“GAO”) report on interagency collaboration during Section 7 consultations found that the Services and action agencies needed to “resolve disagreements about when consultation is needed.” *Id.* at 47,869.

The Proposed Rule

20. To implement the Services’ and action agencies’ collective experience and the suggestions of the GAO, the Services proposed amendments to the Section 7 consultation regulations on August 15, 2008, published at 73 Fed. Reg. 47,868 (“Proposed Rule”). The Proposed Rule was also intended to respond to new challenges with regard to global warming and climate change. *Id.* at 47,869. The Proposed Rule sought “to clarify several definitions, to clarify when the section 7 regulations are applicable and the correct standards for effects

¹ On December 8, 2003, the Services published counterpart regulations for implementing the National Fire Plan. 68 Fed. Reg. 68,254 (Dec. 8, 2003). On August 5, 2004, the Services published counterpart regulations governing actions by the U.S. Environmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”). 69 Fed. Reg. 47,732 (Aug. 5, 2004).

analysis, and to establish time frames for the informal consultation process.” *Id.* at 47,868. With respect to the requirement for consultation, the Proposed Rule provided that consultation need not be undertaken “when the direct and indirect effects of that action are not anticipated to result in take” and the action satisfies one of five criteria confirming that the action is not the proximate cause of the effect. *Id.* at 47,874 (proposed 50 C.F.R. § 402.03(b)). The Proposed Rule also clarified that an “indirect effect” is one for which the action “is an essential cause.” *Id.* (proposed 50 C.F.R. § 402.02).

21. To achieve the goal of reducing unnecessary consultations, the Proposed Rule would have allowed a federal action agency to determine that a proposed action is not likely to adversely affect any listed species or critical habitat without concurrence from the Services when certain criteria are met:

(b) Federal agencies are not required to consult on an action when the direct and indirect effects of that action are not anticipated to result in take and:

- (1) Such action has no effect on a listed species or critical habitat; or
- (2) Such action is an insignificant contributor to any effects on a listed species or critical habitat; or
- (3) The effects of such action on a listed species or critical habitat:
 - (i) Are not capable of being meaningfully identified or detected in a manner that permits evaluation;
 - (ii) Are wholly beneficial; or
 - (iii) Are such that the potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote.

73 Fed. Reg. at 47,874 (proposed 50 C.F.R. § 402.03(b)) (emphasis added). The Proposed Rule further provided that “[i]f all of the effects of an action fall within paragraph (b) of this section, then no consultation is required for the action.” *Id.* (proposed 50 C.F.R. § 402.03(c)) (emphasis added).

Plaintiff's Comments on the Proposed Rule

22. Plaintiff submitted comments generally supporting the Proposed Rule, but suggesting some changes. *Comments of the American Petroleum Institute, U.S. Chamber of Commerce, Alaska Oil & Gas Association, Public Lands Advocacy, and International Association of Geophysical Contractors on the August 15, 2008 Proposed Rule on Interagency Coordination Under the Endangered Species Act (73 Fed. Reg. 47868)* (“Comments”) (Oct. 14, 2008). Plaintiff supported most aspects of the Proposed Rule, and stated that the Proposed Rule serves the purposes of the ESA in limiting unnecessary consultations and enabling the Services to focus their limited resources on proposed federal actions that pose real concerns in terms of species conservation. *Id.* at 1.

23. Plaintiff noted in its comments, among other issues, an inconsistency in the triggers in Sections 402.03(b) and (c) in the Proposed Rule. *Id.* at 3. The proposed Section 402.03(b) made clear that a federal action agency can determine that consultation is not required when the direct and indirect effects of the federal action under consideration satisfy certain criteria. *Id.* Pursuant to Proposed Section 402.03(c), however, consultation was not required only when “all of the effects of the action fall within paragraph (b).” *Id.* Because the definition of “effects of the action” included not only direct and indirect effects, but also the effects of interdependent and interrelated actions, Plaintiff pointed out in its comments that the triggers in section 402.03(b) and (c) are inconsistent. *Id.* Plaintiff suggested in its comments that Section 402.03(c) should be revised to refer to the direct and indirect effects of the specific federal action under consideration. *Id.*

The Final Rule

24. On December 11, 2008, the Services issued the Final Rule. The Final Rule reflects several changes from the Proposed Rule to 50 C.F.R. § 402.03, but the Services failed to make Plaintiff's suggested change to Section 402.03(c).

25. In the preamble to the Final Rule, the Services fail entirely to respond to Plaintiff's comments regarding the inconsistency in 50 C.F.R. § 402.03.

CAUSE OF ACTION

Administrative Procedure Act

26. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 25 of this Complaint.

27. In the Final Rule, Section 402.03(b) makes clear that a federal action agency can determine that consultation is not required when "the direct and indirect effects" of the federal action under consideration satisfy certain criteria. Final Rule, at 64. Pursuant to Section 402.03(c), however, consultation is not required only when "all of the effects of an action fall within paragraph (b)." *Id.* Because the definition of "effects of the action" includes not only direct and indirect effects, but also the effects of interdependent and interrelated actions, the triggers in Sections 402.03(b) and (c) are inconsistent, and the language in Section 402.03(c) is broader than that in Section 402.03(b). *See* Final Rule, at 63 (definition of "effects of the action") (to be codified at 50 C.F.R. § 402.02).

28. As noted in Paragraph 23, Plaintiff submitted comments pointing out this inconsistency in the Proposed Rule and suggesting that Section 402.03(c) should be revised to be consistent with the more narrow language in Section 402.03(b), thereby referring solely to direct and indirect effects of the specific federal action under consultation. Comments, at 3.

29. The Services' failure to incorporate the same triggers in subsections (b) and (c) means that the broader language of subsection (c) could be interpreted to result in the imposition of Section 7 consultation obligations beyond those required by the ESA. These additional burdens would result in unnecessary costs and delays to the Chambers' members.

30. Agencies have an obligation to respond to significant comments. *See* 5 U.S.C. § 553(c); *Am. Mining Congress v. EPA*, 907 F.2d 1179, 1188 (D.C. Cir. 1990). On December 11, 2008, the Services issued the Final Rule. The preamble to the Final Rule failed to respond to Plaintiff's comments regarding the inconsistency in 50 C.F.R. § 402.03.

31. The Final Rule made several changes to 50 C.F.R. § 402.03(b), but retained Section 402.03(c) as proposed. Defendants impermissibly failed to provide a reasoned explanation for this inconsistency. *See* 5 U.S.C. §§ 553(c), 706(2).

32. Under the APA, the inconsistency reflected in Section 402.03(c) is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in Plaintiff's favor, and:

1. Declare the inconsistency in Section 402.03(c) and the Services' failure to respond to Plaintiff's comments on this issue is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and remand that issue back to the Services for further consideration.

2. Grant such other relief as the Court deems just and proper.

Respectfully submitted,



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Dated: December 11, 2008

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