

**Written Statement Submitted for the Record
U.S. Environmental Protection Agency**

**Oversight Hearing on “Federal Agencies’ Selective
Enforcement of ESA Consultation”**

**Committee on Natural Resources
United States House of Representatives
July 29, 2015**

This statement describes the Environmental Protection Agency’s role in addressing section 7(a)(2) of the Endangered Species Act (ESA) consultations, specifically as it relates to EPA’s proposed greenhouse gas regulations for new and existing fossil fuel-fired power plants.

EPA is very aware of the requirements of section 7(a)(2) of ESA and is carefully considering those requirements as they relate to the EPA’s proposed greenhouse gas regulations for new and existing power plants. I can assure you that any rule EPA finalizes regulating greenhouse gas emissions from new or existing fossil fuel-fired power plants will be based on sound science, will be legally sound, will comply with the ESA, and will also address any comments we receive on the ESA during the comment period on EPA’s proposed rules.

EPA recognizes that ESA section 7(a)(2) requires federal agencies, in consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service (together, the Services), to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of federally listed endangered or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. Importantly, under the Services’ implementing regulations, section 7(a)(2) applies only to actions where there is discretionary federal involvement or control, and consultation is required only for actions that may affect listed species or

designated critical habitat. Consultation is not required where the action has no effect on such species or habitat. It is the federal agency taking the action that evaluates and determines whether consultation is required.

EPA appreciates that section 7(a)(2) addresses a broad range of potential direct and indirect effects on listed species and critical habitat. However, not all federal actions will meet the ESA's "may affect" threshold. In the Clean Power Plan proposal, the EPA noted that we did not believe there would be effects on listed species that would trigger the section 7(a)(2) consultation requirement. 79 Fed. Reg. 34830. 34,933-34 (June 18, 2014). At this point, the EPA has not finalized this determination or taken any final action in connection with this proposal or with the proposed rule for new power plants. The EPA would finalize its consideration of ESA requirements in connection with the issuance of any final rules and in that context would address any comments raising ESA issues in response to comments.

With regard to the ESA and the Clean Power Plan, EPA considered in the preamble to the proposed rule a variety of categories of potential effects. For example, as described in the proposed Clean Power Plan preamble and my response to your request letter, in the context of a separate rule involving GHG emission standards for light duty vehicles, EPA examined the GHG emission reductions achieved by that rule and concluded that available modeling tools cannot link the calculated small, time-attenuated changes in global metrics to effects on specific listed species in their particular habitats (Docket EPA-OAR-HQ-2009-4782). As EPA noted in the proposed Clean Power Plan, the agency believes the same reasoning would apply to the GHG emission reductions that would be achieved if the proposed regulations for fossil fuel-fired power plants are finalized. EPA thus proposed to conclude that any potential for effects related to GHG emission reductions would be too remote to call for section 7 consultation.

As explained in the preamble for the proposed Clean Power Plan, EPA also considered reductions in non-GHG air emissions that would be achieved by the rule, if promulgated. However, because EPA lacks relevant discretion under section 111 of the Clean Air Act

to adjust the standard based on potential impacts of such pollutants on listed species, EPA proposed to conclude that section 7 consultation would not be required with regard to such emissions, consistent with longstanding ESA regulations promulgated by the Services.

As EPA further stated in the preamble to the proposed Clean Power Plan, the agency also considered other potential outcomes (beyond reductions in air pollutants) and whether any such matters would fall within the ESA regulatory definition of the effects of an action. As EPA explained, there are substantial questions as to whether any potential for relevant effects results from any element of the rule or would result instead from separate decisions and actions made in connection with the development, implementation, and enforcement of plans to implement the standards established in the rule. EPA recognized, for instance, that questions may exist whether decisions such as increased use of solar or wind power could have effects on listed species. Subsequent to publication of the proposal, EPA also received questions from Chairman Bishop regarding whether the rule may have potential effects on certain facilities located in the State of Florida whose discharge effluent may provide a warm water refuge for manatees.

As EPA explained in the preamble to the proposed Clean Power Plan, the precise steps taken to implement any final rule are at this point uncertain and cannot be determined or ordered by the rule. EPA cannot predict with reasonable certainty where specific implementation measures would take effect or which measures would be adopted. It is thus uncertain whether particular types of facilities (such as new wind or solar facilities) might be built, where those facilities might be located, or how a future implementation plan for a particular state, such as Florida, might affect, if at all, the operations of a specific existing facility. Although EPA would only finalize its consideration of ESA issues in the context of a final rulemaking, EPA notes that section 7(a)(2) of the ESA does not provide for such speculation. Rather, effects must be caused by EPA's action and reasonably certain to occur to qualify for ESA purposes.

In conclusion, I would note that climate change is one of the greatest challenges of our time. It already threatens human health and welfare and economic well-being. The science is clear. The risks are clear. And the high costs of climate inaction are clear. We must act. As the climate changes, species will need to either adapt to the new local climate or migrate to stay within their preferred climate zone. The National Research Council stated that some species will be at risk of extinction, particularly those whose migration potential is limited whether because they live on mountaintops or fragmented habitats with barriers to movement, or because climatic conditions are changing more rapidly than the species can move or adapt. Likewise, the 2014 National Climate Assessment found that currently prevalent species may disappear from certain areas due to rapidly changing habitats caused by climate change and other stressors.