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October 25, 2013

Via Overnight Mail

The Honorable Regina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Ms. Donna Wieting
Director, Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway, F/PR3
Silver Spring, MD 20910

Mr. Gary D. Frazer
Assistant Director, Endangered Species
U.S. Fish and Wildlife Service
4401 North Fairfax Drive
Arlington, VA 22203

Re: Endangered Species Act Consultation on EPA Rulemaking to Establish Additional Restrictions on Cooling Water Intake Structures at Existing Facilities

Dear Administrator McCarthy, Ms. Wieting, and Mr. Frazer:

We submit this letter on behalf of the Utility Water Act Group ("UWAG") to express our concerns with ongoing Endangered Species Act ("ESA") consultation over the U.S. Environmental Protection Agency's ("EPA") proposed restrictions for cooling water intake structures ("CWISs") at existing facilities.

UWAG members operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. Many of UWAG's members operate facilities with cooling water intake structures that will be subject to the "Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities" ("section 316(b) rule") scheduled to be signed by EPA by November 4, 2013.

When final, the section 316(b) rule will place new restrictions on cooling water intake structures at existing power plants and manufacturing facilities. The creation and operation of those intake structures already have been authorized under other state and federal laws. The proposed rule,[1] which does not authorize the creation of any new intake structure but instead only places restrictions on cooling water intake structures at existing facilities, is designed to minimize adverse environmental impacts by protecting aquatic organisms (including but not limited to ESA-listed species) from entrainment and impingement. Thus, the proposed rule will have only beneficial effects on listed species. Indeed, EPA determined that the proposed section 316(b) rule will "reduce impacts to listed species from cooling water intake structures" and "will not cause adverse effects and will benefit affected species whether threatened, endangered or otherwise."[2] The proposed rule also contains a provision specifically requiring permit writers to impose more stringent requirements, as necessary, to ensure compliance with requirements of State law, Tribal law, or other Federal law, including but not limited to the ESA, Marine Mammal Protection Act, the Coastal Zone Management Act, and the Magnuson-Steven Fishery Conservation and Management Act.

EPA correctly observed in its biological evaluation that formal ESA section 7 consultation is not required if EPA determines, and the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) (jointly, the Services) concur, that the proposed rule is not likely to adversely affect listed species. Yet there is no indication that the Services concurred in EPA's determination that the rule is not likely to adversely affect listed species. Instead, EPA and the Services have now engaged in an unnecessary formal consultation process that is delaying and increasing the costs of the rulemaking, and occurring with no public scrutiny or involvement.

We urge the Services and EPA to account for the concerns set forth in this letter.

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[1] 76 Fed. Reg. 22,174 (Apr. 20, 2011).

[2] Letter from Robert K. Wood, Dir., EPA, to Donna Wieting, Dir., NMFS, and Gary Frazer, Assistant Dir., FWS (June 18, 2013), *available at* http://insideepa.com/iwpfile.html?file=jul2013%2Fepa2013_1247a.pdf (Initiation of Formal Consultation on the EPA's Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities) (hereinafter, "EPA Consultation Letter").

First, during consultation, the agencies must base their determinations of the effects of the proposed section 316(b) rule on effects to species that will occur as a result of the proposed section 316(b) rule in relation to *existing baseline conditions* today. The agencies' determinations with respect to jeopardy, adverse modification or other effects may not be based on additional restrictions that the agencies may believe that EPA *could* impose in the new rule. Potential or hypothetical future regulations do not form the baseline for determining effects.

Second, because the proposed section 316(b) rule will have only beneficial effects on listed species, the Services should conclude consultation with either a "not likely to adversely affect" concurrence, or a biological opinion finding that no jeopardy or adverse modification will occur as a result of the rule.

Third, any analysis of baseline environmental conditions or the effects of the proposed section 316(b) rule must be based on "scientific data." The ESA requires use of the "best scientific and commercial data available," 16 U.S.C. § 1536(a)(2), which precludes reliance on speculation or surmise as a substitute for scientifically derived, verifiable data. As EPA acknowledges in its biological evaluation, there is a high degree of uncertainty regarding the possible overlap of facilities that may be subject to the proposed action with the habitat of listed species.

Finally, ESA consultation procedures provide no basis for the imposition of additional restrictions where only beneficial effects will occur. Thus, the consultation process should not result in the imposition of new restrictions in the final section 316(b) rule. In fact, any new restriction that arises not from the rulemaking process, but from closed-door consultation procedures, would violate public notice and comment rulemaking requirements of the Administrative Procedure Act ("APA").

For the reasons more fully set forth below, formal consultation on the section 316(b) rule should be promptly concluded with a not likely to adversely affect concurrence. 50 C.F.R. § 402.14(l)(3). If the agencies nonetheless continue with formal consultation, they must evaluate the effects of the proposed section 316(b) rule based on changes to current baseline conditions today. Because the proposed rule will have only beneficial effects, the Services should conclude consultation with a "not likely to adversely affect" concurrence or a

biological opinion finding that no jeopardy or adverse modification will occur as a result of the rule.

I. Formal Consultation on the Section 316(b) Rule is Not Warranted.

Formal section 7 consultation was not required and should not have been initiated for the section 316(b) rule. The administrative record demonstrates that the rule will have "purely beneficial" effects on threatened or endangered species. In these circumstances, the Services' regulations, Endangered Species Consultation Handbook, and case law all support a "not likely to adversely affect" determination,[3] which negates the need for formal consultation.

A. Section 7 Requirements for Consultation.

Under ESA section 7(a)(2), federal agencies consult with FWS and/or NMFS, when required, to insure that agency actions are not likely to jeopardize the continued existence of a threatened or endangered species, or cause destruction or adverse modification of the species' designated critical habitat. 16 U.S.C. § 1536(a)(2). If an agency determines that its action has "no effect," consultation is not required. 50 C.F.R. §402.14(a).[4] Otherwise, if an agency determines that its action "may affect" listed species or critical habitat, it may either initiate informal consultation with the Services to determine whether formal consultation is required, or it may proceed directly to formal consultation with the Services.

If informal consultation is undertaken, and the action agency determines with the Service's concurrence that the action is "not likely to adversely affect" listed species or designated habitat, consultation concludes without formal consultation. The Handbook explains that a "not likely to adversely affect" determination is appropriate "when effects on listed species are expected to be discountable, insignificant, or completely beneficial." Handbook at 3-12. Formal consultation is required only if a "may affect" determination is made and the Service does not concur in a "not likely to adversely affect" determination. 50 C.F.R. § 402.14(b)(1).

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[3] FWS, Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act at E-11, E-12 (Mar. 1998) (hereinafter "Handbook").

[4] According to the Services, a "no effect" determination is not appropriate when an effect may occur, including discountable, insignificant, or completely beneficial effects. *See* Handbook at 3-12.

B. The Section 316(b) Rule Will Have Purely Beneficial Effects.

In the proposed section 316(b) rule, EPA has included technology-based requirements to restrict impingement and entrainment of aquatic organisms at all existing power generating, manufacturing, and industrial facilities with cooling water intake structures withdrawing more than two million gallons per day. 76 Fed. Reg. 22,174 (Apr. 20, 2011). For impingement (organisms pinned against intake screens), EPA proposed to set performance standards based on use of advanced traveling screens with fish returns, which EPA finds are available for all facilities and achieve performance comparable to wet recirculating cooling at a cost ten times lower than recirculating cooling. 76 Fed. Reg. 22,204-05. For entrainment (organisms drawn through intake screens), EPA proposed that requirements be established by National Pollutant Discharge Elimination System ("NPDES") permit authorities (either EPA or states with delegated permit authority) on a site-specific basis based on factors including costs, benefits, and environmental side-effects of available technologies. 76 Fed. Reg. at 22,207. EPA considered the establishment of performance standards based on closed-cycle cooling systems (which cool and recirculate water for reuse), but found that installing closed-cycle cooling systems was not "practically feasible" at all sites based on factors related to energy reliability, air emissions permits, land availability, and remaining useful life of the facilities. *Id.*

EPA appropriately determined that the proposed section 316(b) rule for existing facilities is not likely to adversely affect listed species. In its June 18, 2013 letter on initiation of formal consultation, EPA states:

> Because the section 316(b) rule will reduce impacts to listed species from cooling water [in]take structures, the Agency continues to believe that it will not cause adverse effects and will benefit affected species . . . . Nonetheless, the EPA has decided to request formal consultation to ensure full and expeditious consideration of the impacts to listed species under section 7(a)(2).[5]

In addition, although the available copy of EPA's biological evaluation ("BE") for the section 316(b) rule is redacted, that copy indicates that EPA concluded that the rule will have only beneficial effects on listed species, although the "nature and magnitude of beneficial effects will be dependent" on a variety of factors.[6] EPA explained that the proposed section 316(b)

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[5] *See* EPA Consultation Letter.

[6] EPA, ESA Biological Evaluation for CWA Section 316(b) Rulemaking at 90 (June 18, 2013).

rule "reduces the adverse environmental impacts ("AEI") to aquatic biota and communities caused by withdrawals of water from streams, rivers, estuaries and coastal marine waters by CWISs."[7]

We agree that EPA's proposed section 316(b) rule for existing facilities will not cause adverse effects to listed species. Indeed, there is no evidence in the administrative record that the rule is likely to cause adverse effects. Rather, the administrative record demonstrates that the effects of the proposed rule will be "completely beneficial." Handbook at 3-12. Therefore, the proposed rule should not be subject to formal consultation under section 7. *Id.*[8]

C. The Services Should Have Concluded Informal Consultation by Issuing a Not Likely to Adversely Affect Concurrence.

The regulations, the Handbook, and case law all support issuance of a "not likely to adversely affect" concurrence for EPA's proposed section 316(b) rule because, as EPA determined, the proposed section 316(b) rule will have only beneficial effects on listed species. A "not likely to adversely affect" determination is appropriate "when effects on listed species are expected to be discountable, or insignificant, or completely beneficial." Handbook at 3-12; *see Friends of the Wild Swan v. U.S. Forest Serv.*, 875 F. Supp. 2d 1199, 1209 (D. Mont. 2012). Thus, the Services should have issued a "not likely to adversely affect" determination for the proposed section 316(b) rule, thereby concluding informal consultation.

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[7] *Id.* at 1.

[8] EPA has not previously engaged in formal consultation on any prior section 316(b) rulemakings, nor was it required to do so. In fact, during the Phase I rulemaking EPA stated, "The regulation does not authorize any activity that may have an effect on listed species. Rather, it sets minimum, technology-based standards for the location, design, construction and capacity of intake structures that must be met in NPDES permits issued to facilities that withdraw water for cooling purposes." EPA, Response to Public Comment, National Pollutant Discharge Elimination System -- Regulations Addressing Cooling Water Intake Structures for New Facilities, at 120 (Jan. 2, 2002) (briefly referred to by EPA as "Response to Public Comment: CWA Section 316(b) New Facility Rule – Final").

II. The Only Effects of the Section 316(b) Rule on Listed Species or Critical Habitat Are Incremental Impacts of the Rule in Relation to Existing Baseline Conditions.

Congress plainly stated in ESA section 7(a)(2) that the purpose of consultation is to determine whether "*action authorized, funded, or carried out*" by an agency is likely to cause jeopardy or adverse modification. 16 U.S.C. § 1536(a)(2). Likewise, Congress specified that a biological opinion must "detail[] how the agency action affects the species or its critical habitat." *Id.* § 1536(b)(3)(A). The statute makes plain that the focus of consultation is on the effects to species *that result from an agency's action*. Correspondingly, the consultation regulations specify that the "effects of the action" are the "direct and indirect effects of an action . . . that will be *added to the environmental baseline*." 50 C.F.R. § 402.02 (emphasis added). The baseline is comprised of "*past and present*" impacts of activities as well as anticipated impacts of other actions "that have *already undergone*" consultation. *Id.*

Although EPA correctly concluded that the section 316(b) rule will have only beneficial effects on listed species, EPA confused the analysis by stating that the section 316(b) rule "may allow as many as 215 [threatened and endangered] species and 30 critical habitats of [threatened and endangered species] to continue to be affected." *See* EPA Consultation Letter. EPA's statements with respect to effects that will "continue" and the Services' apparent refusal to concur in a "not likely to adversely affect" determination point to a crucial flaw in the agencies' analysis that must not be allowed to misdirect the consultation process.

Baseline effects that exist prior to and "continue" after an action are not effects of the action. Rather, the effects of an action are those effects caused by a specific agency action (here the proposed section 316(b) rule), and which are "added to the environmental baseline." 50 C.F.R. § 402.02. The effects of the proposed section 316(b) rule manifestly will be to reduce baseline effects to listed species, not add to those effects. To the extent that EPA's statement may be interpreted to treat "continued" baseline effects as effects of the proposed section 316(b) rule, that interpretation must be rejected as inconsistent with the statute and regulations. EPA otherwise maintains in its letter that the rule will "reduce impacts to listed species from cooling water [in]take structures" and "will not cause adverse effects." EPA Consultation Letter. Indeed, in its BE for the proposed section 316(b) rule, EPA states, "The implementation of the proposed action does not authorize any new activities or increased discharge of pollutants that would increase effects on ESA listed species. In fact, this action is likely to reduce or minimize the potential effects of CWIS-related [impingement and

entrainment mortality] on ESA-listed species whose habitat overlap with the withdrawal and discharge zones of these facilities." BE at 77.

As the statute, regulations and Handbook make plain, the effects of the section 316(b) rule are to be determined based on changes to current baseline conditions today, and not based on whether baseline conditions continue or on additional restrictions that the agencies may believe that EPA *could* impose in the new rule. Thus, agencies must determine the effects of the rule based on the reductions in impingement and entrainment that would result from EPA's proposed rule.

A. A "May Affect" or "Adversely Affect" Determination Must Be Based on the Incremental Impact Resulting From the Proposed Action.

It is essential for the Services to recognize that a "may affect" or "adversely affect" determination must be based on the incremental impact to listed species or critical habitat that results from the proposed section 316(b) rule, not from baseline conditions, and not based on whether the section 316(b) standard could have been *more protective* of listed species.

Effects are determined based on changes that result from the specific agency action in relation to baseline conditions without the agency action. The regulations define "effects of the action" as the "direct and indirect effects of an action . . . that will be added to the environmental baseline." 50 C.F.R. § 402.02. The environmental baseline includes "past and present impacts of all Federal, State, or private actions and other human activities in the action area," as well as "anticipated impacts" of other proposed federal agency actions "that have already undergone" consultation. *Id.*

The Handbook explains that the baseline is a "snapshot" of "the current status of the species" and "does not include the effects of the action under review." Handbook at 4-22. Accordingly, a "may affect" or "adversely affect" determination should be based on the incremental impact on listed species that result from the agency action under consultation, not on impacts attributable to other past, present, or future actions. *See Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 929-930 (9th Cir. 2007); *In re Consolidated Salmonid Cases*, 791 F. Supp. 2d 802, 932 (E.D. Cal. 2011).

In *National Wildlife Federation*, the U.S. Court of Appeals for the Ninth Circuit addressed what effects should be considered in the environmental baseline when analyzing a plan for the continuing operation of an existing federal dam system. *Nat'l Wildlife Fed'n,* 524 F.3d at 930. The agency had assessed the effects of the proposed plan in comparison to a "reference operation" consisting of a hypothetical regime of operating the dams that "was the most beneficial to listed fishes of any possible operating regime." *Id.* at 926. The court rejected the "reference operation" approach, finding that the analysis must focus on the action's effects "when added to the underlying baseline conditions." *Id.* at 929. The court distinguished the effect of the agency's proposed *operation* of the dams, which was at issue in the rulemaking and would be considered in the "effects of the action," from the effects on listed species of "[t]he current *existence* of the FCRPS dams," which "must be included in the environmental baseline" as an existing human activity. *Id.* at 930 (emphasis added). *National Wildlife Federation* demonstrates that the effects of an action (in this case the section 316(b) rule for existing sources) must be determined based on changes that result from that action in relation to baseline conditions without the agency action, focusing on the additional harm or benefit caused by the action.

B. The Effects of the Proposed Section 316(b) Rule Are the Beneficial Impacts on Listed Species of Imposing the New Requirements for Cooling Water Intake Structures.

In the context of the section 316(b) rulemaking, the "effects of the action" (to the extent the rule can be said to have any effect at all) are the effects on listed species of establishing the new requirements for cooling water intake structures that will be promulgated in the section 316(b) rule. The intake structures subject to this regulation already exist. This rule does not authorize the creation of any new intake structure, nor does the rule authorize the continued operation of existing structures. Allocating and authorizing the withdrawal of water by specific users from specific waters is largely the prerogative of the states or other federal agencies. And the United States Army Corps of Engineers is separately responsible for permitting the placement of structures or other work in navigable waters or waters of the United States. This rule does not authorize any of these activities, nor does it purport to authorize the take of any listed species. Rather, EPA's action is the imposition of new restrictions on existing cooling water intake structures that will reduce impacts related to impingement and entrainment. Therefore, to the extent that EPA's section 316(b) rule can be said to have any effect on listed species or critical habitat, any such effects would be limited

to reductions in effects of previously authorized intake structures as a result of proposed impingement mortality performance standard and site-specific entrainment requirements. The only effects of the rule on listed species or critical habitat would be purely beneficial. The current status of listed species, and any harms they may face from ongoing cooling water intake structure operations, are part of the environmental baseline and are not caused by the section 316(b) rulemaking.

EPA's finding that its proposed section 316(b) rule would not adversely affect listed species is well grounded and supported by the administrative record. EPA found that the proposed rule "will reduce the current mortality of aquatic organisms," and that only the "magnitude of mortality reduction" is still in question. EPA Consultation Letter. Thus, the effects will be completely beneficial, and while there may be some question *how* beneficial those effects will be, a biological opinion is not needed to determine the degree of benefits nor do comparative benefits provide a basis for regulation under the auspices of formal consultation. The fact that the only expected effects will be beneficial justifies a "not likely to adversely affect" determination.

While perhaps inadvertent, we are however troubled by EPA's statement in its Consultation Letter that "the rule may *allow* as many as 215 [listed] species and 30 critical habitats of [listed] species to *continue to be affected*." EPA Consultation Letter (emphasis added). This statement could be read to suggest that EPA has adopted a faulty analysis of ESA section 7 requirements that attributes any adverse baseline effects that remain after an agency action to the agency action.[9] By such reasoning, any protective agency rulemaking would be required to either eliminate all adverse baseline environmental effects, or be deemed the cause of those

[9] In joint comments submitted by environmental groups including Riverkeeper, Sierra Club, and NRDC, the groups assert that EPA was required to consult on the effect of the rule's "authoriz[ation of] continued operation of existing cooling water intake structures in a manner that EPA claims will at best 'minimize' over an extremely extended schedule – and, significantly, will not end -- the killing of fish and other aquatic organisms, as well as the wholesale degradation of aquatic ecosystems by CWISs." Riverkeeper, et al., Comments on National Pollutant Discharge Elimination System, Cooling Water Intake Structures at Existing Facilities and Phase I Facilities, 76 fed. Reg. 22,174 (April 20, 2011), Docket No. EPA-HQ-OW-2008-0667 at 136 (Aug. 18, 2011), *available at* http://insideepa.com/iwpfile.html?file=jul2013%2Fepa2013_1247b.pdf (hereinafter, "Riverkeeper, et al., Comments"). The groups cite *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1300 (8th Cir. 1989), but that decision is inapposite. *Defenders* involved allegations that EPA was liable for incidental takes caused by granting FIFRA registrations for use of strychnine pesticides, not failure to consult. Moreover, here EPA is not authorizing activity but rather is placing restrictions on activity (CWIS operations).

effects. Such an approach is not only unworkable, it is unsupported by the legislative history and inconsistent with the ESA.[10] That approach would remove the operation of existing cooling water structures from the environmental baseline, with no lawful basis for doing so. Thus, EPA and the Services should not hold private discussions to devise potential requirements *more protective* of listed species under the guise of section 7 consultation, but must instead focus on whether the proposed rule is likely to cause jeopardy or adverse modification. Under the Act, the Services' regulations, and the Handbook, the continuing operations of cooling water intake structures (which predate the proposed section 316(b) rule) form the baseline, and the effects of the rule must be measured against that baseline. *See* 50 C.F.R. § 402.02; Handbook at 4-22.

Consulting on whether an alternative version of the proposed rule could be even more beneficial to listed species, rather than on the effects of the rule as proposed, would result in an unworkable, precedent-setting standard for section 7 consultation. For every protective regulation, the action agency would have to consult with the Services on what more could be done to protect listed species, and any adverse effects that would remain *after* the rule would be attributed to the rule even though not caused *by* the rule. Such an approach is not supported by precedent or law. The ESA consultation procedures do not require agencies to take actions that maximize benefits to listed species: they prohibit agencies from jeopardizing species. *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998) (ESA section 7 does not require FWS to "pick the best alternative or the one that would most effectively protect the Flycatcher from jeopardy.").

In sum, the agencies are required to treat the continued operation of regulated cooling water intake structures as currently regulated as part of the environmental baseline and may not attribute ongoing baseline effects to the section 316(b) rulemaking. Moreover, under ESA section 7(a)(2), the agencies must consult to ensure that the agency action is "not likely to jeopardize the continued existence of any [endangered or threatened] species or result in the destruction or adverse modification of habitat." 16 U.S.C. § 1536(a)(2). It is inconsistent

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[10] 16 U.S.C. § 1536(a)(2) (agency shall consult on "action authorized, funded or carried out *by such agency*") (emphasis added); S. Rep. No. 95-874 at 6 (May 15, 1978) Federal agencies have a responsibility to identify activities and programs *which they undertake* that may affect listed species or their critical habitat and to request consultation with the Services concerning those activities or programs. Thus, the consultation process must be initiated at that point in the implementation of the action where the Federal agency first recognizes that *the activity* may have a detrimental effect on a species or its critical habitat.) (emphasis added).

with and unsupported by the ESA for the agencies to "consult" on whether the action agency could further increase the benefits of an action.

C. Any Analysis of Baseline Environmental Conditions or the Effects of the Proposed Rule Must Be Based on Scientific Data.

As explained above, the baseline includes the potential effects to threatened and endangered species and critical habitat of the continued operation of intake structures as currently regulated. The scope of the consultation on the effects of EPA's new section 316(b) rule is limited to effects of only that action, namely reduced impingement and entrainment resulting from the proposed impingement mortality performance standard and site-specific entrainment requirements. When analyzing baseline effects and any effects of the proposed rule to be added to the baseline, EPA must use the "best scientific and commercial data available." *Id.* The Supreme Court emphasized, in *Bennett v. Spear*, that the "obvious purpose of the requirement that each agency 'use the best scientific and commercial data available' is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

We are concerned that, despite the plain requirement to use scientific data rather than rely upon speculation or surmise, the BE is characterized by a lack of such data. The BE repeatedly notes uncertainty as to locations of facilities with intake structures, and a "dearth of [impingement and entrainment mortality] monitoring data." BE at 8, 37. In particular, EPA lists eight main sources of uncertainty with respect to effects on individual species, including: lack of data on the universe of facilities to be regulated; uncertainty with respect to the location of facilities relative to associated listed species habitat; variability of facilities' intake structure water withdrawal volume; lack of data with respect to the location and depth of intake structures within receiving waters; variability with respect to the nature and degree of required intake structure modifications; variability with respect to the accuracy of habitat delineations; variability with respect to beneficial effects among functional groups; and uncertainty with respect to the size or importance of listed species habitat that may be affected. *See* BE at 89.

In an attempt to be "highly conservative" in its assessment of baseline effects or effects of the proposed rule, BE at 20, EPA appears to have resorted to speculation and surmise rather than scientific data. For example, EPA noted the "high degree of geographic uncertainty" as to the

location of facilities that may be subject to the proposed action, and the unavailability of relevant data regarding possible overlap of these facilities with the habitat of listed species. *Id.* EPA acknowledged that, for many facilities, the "specific environmental settings, baseline technologies used to reduce the effects of CWIS, any prior consultation with the Services (through other permitting programs, for example) and characteristics of receiving waters are unknown." *Id.* EPA thus engaged in a "worst case analysis" when assessing the potential overlap of existing cooling water intake structures (baseline conditions) and listed species. *Id.* at 54. Worst case analyses, and other forms of speculation or surmise, are no substitute for the requirement to use the "best scientific and commercial data available" in analyzing effects of baseline conditions (much less effects of the proposed rule). 16 U.S.C. § 1536(a)(2).

III. The Agencies Should Conclude Consultation On the Section 316(b) Rule With a "Not Likely to Adversely Affect" Concurrence Or A "No Jeopardy" Biological Opinion.

The Services should issue a "not likely to adversely affect" concurrence for EPA's proposed section 316(b) rule because, as explained above, the proposed section 316(b) rule will have only "completely beneficial" effects on listed species. Notwithstanding the fact that informal section 7 consultation should have been the proper consultation avenue in this instance; when formal consultation is undertaken, as it has been for the section 316(b) rule, consultation may be similarly concluded with a "not likely to adversely affect" concurrence. 50 C.F.R. § 402.14(l)(3). Such an approach would save significant time and costs, and is the far more appropriate course of action here. Otherwise, the consultation must conclude with a "biological opinion" from FWS or NMFS, which states the opinion of the Service whether jeopardy to listed species or adverse modification of critical habitat is likely. *Id.* § 402.14(l)(1). If the Services choose to issue a biological opinion, based on the facts in the administrative record and the law, that biological opinion must find that no jeopardy or adverse modification will occur as a result of the section 316(b) rule.

If the Services conclude in a biological opinion that no jeopardy or adverse modification will occur, the action may proceed as proposed in compliance with section 7(a)(2). Only if a biological opinion concludes that the proposed action will result in jeopardy to one or more listed species or in adverse modification to designated critical habitat (both of which are prohibited by ESA section 7) is there a basis for the Services to suggest "reasonable and prudent alternatives" ("RPAs"). 16 U.S.C. § 1536(b)(3)(A).

To "jeopardize" means to take action that would be expected to "reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. Courts have made clear that distinguishing between the environmental baseline and the *new* effects of the agency action is essential to determine whether agency action will jeopardize listed species. Effects that pre-date the agency action are not a basis for jeopardy or adverse modification. "Agency action can only 'jeopardize' a species' existence if that agency action causes some deterioration in the species' pre-action condition." *Nat'l Wildlife Fed'n*, 524 F.3d at 930. The term jeopardize "implies causation, and thus some *new* risk of harm." *Id.* (emphasis added). Accordingly, even where a species is already in jeopardy, "[a]n agency may still take action that removes a species from jeopardy entirely, or that *lessens the degree* of jeopardy." *Id.* (emphasis added).

EPA explained during informal consultation that the proposed section 316(b) rule does not present any new risk of harm to listed species: its restrictions on cooling water intake structures result only in beneficial impacts. Even *if* the continued existence of some species were already in jeopardy and would remain in that state after the section 316(b) rule requirements take effect, the rule itself will not "jeopardize" those species because it would only "lessen[] the degree of jeopardy." *Id.*

Additionally, whether or not EPA could adopt a section 316(b) rule that is *more* protective of listed species does not alter the outcome of the jeopardy analysis in this case, because the rule itself does not result in jeopardy or adverse modification. Again, the ESA does not require agency actions to maximize benefits to listed species; it merely prohibits them from jeopardizing species. *See Sw. Ctr. for Biological Diversity*, 143 F.3d at 523. Thus, the Services must limit their jeopardy analysis to whether the incremental effect of the section 316(b) rule, considering the environmental baseline, jeopardizes the continued existence of listed species or adversely modifies critical habitat. Because the section 316(b) rule will have only beneficial effects, should the Services elect to prepare and issue a biological opinion (which, as explained above, is neither warranted nor required under 50 C.F.R. § 402.14(l)(3)), the biological opinion must conclude that no jeopardy or adverse modification will occur, and the section 316(b) rule must be allowed to proceed as proposed.

IV. The Consultation Process Must Not Result in the Imposition of New Restrictions to the Final Section 316(b) Rule.

ESA consultation procedures provide no basis for the imposition of additional restrictions where, as here, only beneficial effects will occur. Thus, the consultation process should not result in the imposition of new restrictions in the final section 316(b) rule.

Even in cases (unlike here) where a proposed action will result in jeopardy or adverse modification (thus permitting the Services to suggest RPAs), the Services may not suggest alternatives that exceed the action agency's authority. Any RPA suggested in a biological opinion must be able to "be implemented in a manner consistent with the intended purpose of the action, . . . consistent with the scope of the Federal agency's legal authority and jurisdiction, [and] economically and technologically feasible . . . ." 50 C.F.R. § 402.02.[11] Thus, even if a jeopardy opinion could be reached in this case – which it could not – the Services would not have the authority to attempt to override EPA's determinations that, for example, performance standards based on closed-cycle cooling are not feasible. Thus, even in such a setting, EPA would be required to reject any approach to modify the draft rule to require existing facilities to meet closed-cycle cooling performance standards, and to "obtain the opinions of its sister federal agencies on the Proposed Rule's impact upon threatened and endangered species and the advisability of reasonable and prudent alternatives, such as a nationally uniform closed-cycle cooling standard."[12] "EPA concluded that closed-cycle cooling is not the best technology available for minimizing adverse environmental impact on a national basis. The record shows that closed-cycle cooling is not practically feasible in a number of circumstances." 76 Fed. Reg. at 72,207.

Nor can the agencies add restrictions to the final section 316(b) rule arising from closed-door consultation procedures, rather than public notice and comment rulemaking procedures, without violating the APA. Under the APA, "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the

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[11] The Handbook emphasizes cooperation with action agencies when determining RPAs, and acknowledges that action agencies have the "project expertise necessary to help identify reasonable and prudent alternatives." Handbook at 4-7. Accordingly, the Handbook provides that action agencies "should be given every opportunity to assist in developing" RPAs, and that "[o]ften they are the only ones who can determine if an alternative is within their legal authority and jurisdiction, and if it is economically and technologically feasible." Handbook at 4-43.

[12] Riverkeeper, et al., Comments at vii.

proposal." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). To comply with the APA, the final rule must be a "logical outgrowth" of the proposed rule. *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1315 (D.C. Cir. 1981).

V. Conclusion

In sum, formal consultation on the section 316(b) rule is unwarranted and should be promptly concluded with a not likely to adversely affect concurrence. 50 C.F.R. § 402.14(l)(3). If the agencies nonetheless continue with formal consultation, they must evaluate the effects of the proposed section 316(b) rule based on changes to current baseline conditions today, not based on whether baseline conditions continue or on additional restrictions that the Services may believe that EPA *could* impose in the new rule. Because the proposed rule will have only completely beneficial effects, the Services should conclude consultation with a "not likely to adversely affect" concurrence or a biological opinion finding that no jeopardy or adverse modification will occur as a result of the rule.

We hope that the agencies will work to address the issues set forth in this letter during the consultation. If you would like to discuss this matter further, please contact Kristy Bulleit at (202) 955-1547 or Andrew Turner at (202) 955-1658. Thank you for your attention to this matter.

Sincerely,

Andrew J. Turner

for Kristy A. N. Bulleit