

# Congress of the United States

Washington, DC 20515

June 15, 2015

The Honorable Gina McCarthy  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

Dear Administrator McCarthy:

We write regarding two proposed Environmental Protection Agency (“EPA”) rules to reduce carbon dioxide emissions from power plants as part of President Obama’s Climate Action Plan. These rules will regulate greenhouse gas (“GHG”) emissions from both existing<sup>1</sup> and new<sup>2</sup> stationary electric utility generating units and are expected to have wide-ranging environmental and economic impacts. In promulgating these Clean Air Act rules, EPA must carefully and lawfully consider all the effects of its rulemaking, including the effects on endangered and threatened species listed under the Endangered Species Act (“ESA”). However, as the rulemaking process concludes, it appears that EPA has not satisfied its obligations under section 7 of the ESA.

The House Committee on Natural Resources and the Senate Committee on Environment and Public Works (“EPW”) have jurisdiction over the implementation of the ESA. The EPW Committee also has jurisdiction over EPA’s programs in general and the Clean Air Act in particular. Both Committees have been conducting oversight on EPA’s lack of consultation in connection with these rules.

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<sup>1</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (proposed June 18, 2014).

<sup>2</sup> Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1430 (proposed Jan. 8, 2014).

On March 6, 2014, a letter was sent to EPA and the Fish and Wildlife Service (“FWS”) by members of the EPW Committee asking 17 questions about the need for and scope of section 7 consultation for the proposed rule for new power plants. The response from the FWS on May 27, 2014, confirmed that EPA had not requested to engage in ESA consultation. EPA’s response, dated June 20, 2014, said only that EPA would comply with the ESA. Neither response explained EPA’s omission of a “may affect” determination for the proposed rule for new power plants nor included meaningful information necessary to address the EPW Committee’s legitimate oversight concerns.

During a March 19, 2015, hearing before the Natural Resources Committee, FWS Director Dan Ashe testified that EPA had not initiated consultation with FWS on the impacts of the two power plant rules on ESA-listed species, including the endangered manatee.<sup>3</sup> Following that hearing, a letter was sent to Director Ashe that sought to clarify whether FWS intended to request that EPA enter into ESA consultation with the FWS on the two rules.<sup>4</sup>

In his response, dated April 20, 2015, Director Ashe confirmed that FWS had not requested that EPA initiate consultation on the power plant rules and did not intend to do so “because . . . EPA has full knowledge of their Section 7 responsibilities.”<sup>5</sup> This response raises more questions than it answers.

According to section 7 of the ESA, federal agencies must consult with the appropriate Service whenever a discretionary agency action, including a rulemaking, “may affect” a listed species or designated critical habitat.<sup>6</sup> Federal courts routinely enjoin agency actions, including some taken by EPA, for failure to consult pursuant to section 7 of the ESA.<sup>7</sup>

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<sup>3</sup> *Examining the Spending Priorities and Missions of the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration in the President’s FY 2016 Budget Proposal: Hearing Before the Subcomms. on Federal Lands and Water, Power and Oceans of the H. Comm. on Natural Resources*, 114<sup>th</sup> Cong. (2015). The manatee was first listed under the ESA in 1967. See *Endangered Species*, 32 Fed. Reg. 4001 (Feb. 24, 1967).

<sup>4</sup> Letter from Rob Bishop, Chairman, H. Comm. on Natural Resources, to Dan Ashe, Director, U.S. Fish and Wildlife Service (Apr. 2, 2015), [http://naturalresources.house.gov/uploadedfiles/lettertoashe\\_4\\_2\\_15.pdf](http://naturalresources.house.gov/uploadedfiles/lettertoashe_4_2_15.pdf).

<sup>5</sup> Letter from Dan Ashe, Director, U.S. Fish and Wildlife Service, to Rob Bishop, Chairman, H. Comm. on Natural Resources (Apr. 20, 2015), <http://naturalresources.house.gov/uploadedfiles/asherresponseletter.pdf>.

<sup>6</sup> Endangered Species Act §7, 16 U.S.C. § 1536. The agency must consult with the National Marine Fisheries Service (“NMFS”) if the proposed action will affect marine species, or the FWS if the action will affect non-marine species.

<sup>7</sup> See, e.g., *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9<sup>th</sup> Cir. 2011) (enjoining amendments to grazing regulations); *Wash. Toxics Coal. v. Env’tl. Prot. Agency*, 413 F.3d 1024 (9<sup>th</sup> Cir. 2005) (enjoining EPA’s registration of pesticides pending compliance with section 7). The ESA’s citizen suit provision explicitly approves injunctions for “violation[s] of any provision of this Act or regulation issued under the authority thereof.” 16 U.S.C. § 1540(g)(1)(A).

Further, ESA regulations task each federal agency with “review[ing] its actions at the earliest possible time to determine whether any action *may affect* listed species or critical habitat.”<sup>8</sup> According to the FWS’s Endangered Species Consultation Handbook, which is intended to guide federal agencies through the ESA’s consultation requirements, it is appropriate for an agency to make a “may affect” determination “when [its] proposed action may pose **any** effects on listed species or designated critical habitat.”<sup>9</sup> If the agency determines that its proposed action may have *any* effect on a listed species, the agency is required to consult with the appropriate Service – even if the effects are beneficial.<sup>10</sup>

In its “may affect” analysis for the existing power plant rule, EPA determined that the rule is likely to have “positive” effects because it will reduce overall GHG emissions.<sup>11</sup> Citing previous EPA analysis that found it was impossible to determine the effects of reduced GHGs on specific species, EPA also concluded that the reduced GHG emissions brought about by the new rule would cause only “very small changes.”<sup>12</sup> Additionally, EPA analogized the “remote” effects of the new rule to the Ninth Circuit Court of Appeals ruling in *Ground Zero Center for Non-Violent Action v. U.S. Dept. of Navy*, where the court found consultation on the possibility of an accidental missile explosion was unnecessary in part because the chance of the explosion occurring was infinitesimal.<sup>13</sup> Additionally, when EPA asserted that the effects are “very small changes” and “remote” it cited a Department of the Interior (“DOI”) memorandum regarding the

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<sup>8</sup> 50 C.F.R. § 402.14(a) (emphasis added).

<sup>9</sup> U.S. Fish and Wildlife Service, Endangered Species Conservation Handbook xvi (emphasis in original).

<sup>10</sup> *Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1011 (9<sup>th</sup> Cir. 2012) (“The ESA requires consultation with the Fish and Wildlife Service or the NOAA Fisheries Service for any ‘agency action’ that ‘may affect’ a listed species or its critical habitat.”). See also *Conservation Cong. v. U.S. Forest Serv.*, No. CIV. S-13-0832, 2013 U.S. Dist. LEXIS 127671, at \*55, 60 (E.D. Cal. Sept. 6, 2013) (explaining that section 7 consultation is required “[s]o long as a [listed species] is present” and that “[e]ven a beneficial effect on the species or habitat ‘triggers the requirement.’”).

<sup>11</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources, *supra* note 1, at 34,933.

<sup>12</sup> *Id.* at 34,934. In the ESA section of the proposed rule for existing power plants, EPA refers to the effects of its action as “very small” and “remote.” These terms appear to be drawn from consultation regulations promulgated under the previous administration. See *Interagency Cooperation Under the Endangered Species Act*, 73 Fed. Reg. 76,272 (Dec. 16, 2008). See also KRISTINA ALEXANDER & M. LYNNE CORN, CONG. RESEARCH SERV., RL 34641, CHANGES TO THE CONSULTATION REGULATIONS OF THE ENDANGERED SPECIES ACT (ESA) 9 (2009). However, those regulations were rescinded in 2009 shortly after President Obama took office and the 1986 consultation rules were reinstated. See *Interagency Cooperation Under the Endangered Species Act*, 74 Fed. Reg. 20,421 (May 4, 2009). EPA’s apparent reliance on a rescinded rule and related legal guidance (i.e., the 2008 DOI memorandum, *infra* note 14) casts doubt on Director Ashe’s confidence in EPA’s “full knowledge of their Section 7 responsibilities.”

<sup>13</sup> What EPA fails to mention is that section 7 consultation was not required primarily “because the Navy lacks the discretion to cease Trident II operations at Bangor for the protection of the threatened species.” *Ground Zero Ctr. for Non-Violent Action v. U.S. Dept. of Navy*, 383 F.3d 1082, 1092 (9<sup>th</sup> Cir. 2002). The court found that President Clinton – not the Navy – determined where the submarine base would be located, so the risks inherent to Trident missiles were attributable to the President’s decision and not to the Navy’s action. *Id.*

polar bear<sup>14</sup> and a prior EPA rule.<sup>15</sup> EPA conveniently did not mention that these analyses have substantial focus upon the difficulty of tracing the effects of GHG emissions from a single source – not from the entire electricity generating capacity of the United States.

After dismissing these “positive,” “very small,” and “remote” effects of the rule due to overall reductions in GHG emissions, EPA then determined that section 7 consultation was unnecessary.<sup>16</sup>

It is clear that EPA entirely neglected to assess the ground-level effects of its regulation. The most recent government analysis projects that retirements of coal-fired power plants will double by 2020 as a result of the rule.<sup>17</sup> EPA itself has conducted analysis that also anticipates the early retirement of coal-fired generating units.<sup>18</sup> Disruption and early retirement of operational power plants are precisely the kind of real-world impacts that EPA must assess before promulgating a rule. Specifically, EPA must analyze the effects of its action – including the closure of power plants – through the lens of the ESA.

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<sup>14</sup> Memorandum from David Longly Bernhardt, Solicitor, U.S. Department of the Interior re: “Guidance on the applicability of the Endangered Species Act’s Consultation Requirements to Proposed Actions Involving the emissions of Greenhouse Gases” (Oct. 3, 2008).

<sup>15</sup> Environmental Protection Agency, Light Duty Vehicle Greenhouse Gas Standards and Corporate Average Fuel Economy Standards Response to Comment Document for Joint Rulemaking at 4-102 (Docket EPA-OAR-HQ-2009-4782).

<sup>16</sup> While EPA apparently feels that the effects of GHGs on species are negligible, the Services responsible for listing species under the ESA have found that climate change or global warming affects a plethora of endangered species. According to recovery plans from the USFWS and NMFS, the following species are or may be affected by climate change or global warming: Akiapolaau, Akohekohe, Atlantic salmon, Bay checkerspot butterfly, Butte County meadowfoam, Chinook salmon, Chiricahua leopard frog, chum salmon, Colusa grass, conservancy fairy shrimp, Contra Costa goldfields, delta green ground beetle, desert tortoise, few-flowered navarretia, fleshy owl’s clover, Gowen cypress, green’s tuctoria, hairy orcutt grass, Hawaii 'Akepa, Hawaii creeper, Holmgren milk-vetch, Hoover’s broomspurge, Karner blue, Kauai akialoa, Kauai 'o'o, Lake County stonecrop, large Kauai thrush, Laysan duck, Loch Lomond coyote-thistle, longhorn fairy shrimp, many-flowered navarretia, mat-forming quillwort, Maui 'akepa, Maui parrotbill, Moloka'i creeper, Moloka'i thrush, Mount Graham red squirrel, Nukupu'u, Oahu alauahio, Oahu 'elepaio, orca, 'O 'u, palila, Pitcher’s thistle, Po'ouli, Puaiohi, Quino checkerspot butterfly, Sacramento orcutt grass, San Joaquin Valley orcutt grass, Shivwitz milk-vetch, short-tailed Albatross, slender orcutt grass, soft-leaved Indian paintbrush, Solano grass, Spalding’s catchfly, sperm whale, steelhead trout, Steller sea-lion, vernal pool fairy shrimp, vernal pool tadpole shrimp, water Howellia, white abalone, whooping crane. Recovery plans can be found at: <http://www.fws.gov/endangered/species/recovery-plans.html>.

<sup>17</sup> U.S. Energy Information Administration, Analysis of the Impacts of the Clean Power Plan 16 (May 2015) (“Projected coal plant retirements over the 2014-40 period, which are 40GW in the AEO2015 Reference case (most before 2017), increase to 90 GW (nearly all by 2020) in the Base Policy case (CPP).”).

<sup>18</sup> Compare IPM System Summary Report, Base Case (EPA-HQ-OAR-2013-0602-0223) with IPM System Summary Report, Option 1 State (EPA-HQ-OAR-2013-0602-0227). In all scenarios, EPA expects power sector coal use to decline. See Summary of IPM Analysis of Individual Building Blocks for 111(d) (EPA-HQ-OAR-2013-0602-0471).

One power plant that is likely to retire at least some of its coal-powered generating units due to EPA's rule is Big Bend Power Station near Tampa, Florida.<sup>19</sup> Big Bend has been designated as a primary warm-water manatee refuge,<sup>20</sup> is surrounded by a manatee sanctuary,<sup>21</sup> and has a manatee protection plan appended to its National Pollutant Discharge Elimination System ("NPDES") permit.<sup>22</sup> Generation at the Crystal River Plant, another coal-fired power plant in Florida that has been designated as a manatee refuge<sup>23</sup> and has a manatee protection plan appended to its NPDES permit,<sup>24</sup> may also be disrupted by the rule.

Clearly, power plants like Big Bend and Crystal River are critical to the survival of the manatee. The FWS's own Manatee Recovery Plan repeatedly stresses the importance of the warm-water refuges created by the plants. In fact, one of the primary objectives of the Service's Manatee Recovery Plan is to "protect . . . manatee habitats," including "industrial warm-water refuges."<sup>25</sup> FWS also estimates that almost two-thirds of manatees rely on power plants when the water temperature plunges.<sup>26</sup> Without a warm-water refuge, manatees that are subjected to cold experience "skin lesions, fat depletion, internal abscesses, gastrointestinal disorders, constipation and secondary infections" and death.<sup>27</sup>

A regulation that causes designated manatee refuges like Big Bend or Crystal River to shut down or alter their operations would significantly and adversely affect the endangered manatee.<sup>28</sup>

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<sup>19</sup> Sean Cockerham, *Do it for the manatees, GOP lawmaker says of protecting coal plants*, MCCLATCHY DC, Mar. 19, 2015 ("Tampa Electric spokeswoman Cherie Jacobs said the four units at the Big Bend Power Station, a major attraction for manatees and tourists, are currently expected to last from between 2035 and 2050. But the proposed new carbon pollution rule could result in 'one or more units' closed in 2025 instead, she said.").

<sup>20</sup> U.S. Fish and Wildlife Service, Florida Manatee Recovery Plan 16-17 (2001), [http://www.fws.gov/northflorida/Manatee/Recovery%20Plan/2001\\_FWS\\_Florida\\_Manatee\\_Recovery\\_Plan.pdf](http://www.fws.gov/northflorida/Manatee/Recovery%20Plan/2001_FWS_Florida_Manatee_Recovery_Plan.pdf).  
<sup>21</sup> 50 C.F.R. § 17.108.

<sup>22</sup> Big Bend Power Station, NPDES Permit No. FL0000817 ("The Permittee shall continue compliance with the facility's Manatee Protection Plan approved by the Department on August 6, 2003, and as amended thereafter.").

<sup>23</sup> Florida Manatee Recovery Plan, *supra* note 20, at 16-17.

<sup>24</sup> Crystal River Plant, NPDES Permit No. FL0000159 and FL0036366.

<sup>25</sup> Florida Manatee Recovery Plan, *supra* note 20, at 83-84.

<sup>26</sup> *Id.* at 28.

<sup>27</sup> Florida Fish and Wildlife Conservation Commission, Florida Manatee Cold-related Unusual Mortality Event, January-April 2010, Final Report iii (Apr. 19, 2011), [http://myfwc.com/media/1536184/2010\\_Manatee\\_Cold\\_related\\_UME\\_Final.pdf](http://myfwc.com/media/1536184/2010_Manatee_Cold_related_UME_Final.pdf).

<sup>28</sup> Other likely effects of EPA's power plant rules, including increased renewable energy generation, may also affect ESA-protected species. For example, FWS cites an article showing that for every megawatt of energy generated by wind turbines in the United States and Canada, 11.6 bats will die annually. Fish and Wildlife Service, *Indiana Bat Fatalities at Wind Energy Facilities* (2014), <http://www.fws.gov/midwest/wind/wildlifeimpacts/inbafatalities.html> (citing Paul M. Cryan, *Wind Turbines as Landscape Impediments to the Migratory Connectivity of Bats*, 41 ENVTL. L. 355, 364 (2011)).

We are astounded that EPA omitted any reference to the ESA or the section 7 consultation requirement in the proposed rule for new power plants.<sup>29</sup> It is unclear why EPA would consider the impacts of one rule on listed species and conclude there were “positive” effects from GHG reductions, but decline to consider the effects of the companion rule, which will also reduce GHG emissions.<sup>30</sup>

In order for the Committees to better understand EPA’s determination that section 7 consultation was unnecessary for the proposed rule for existing power plants, as well as the decision not to include any ESA analysis in the proposed rule for new power plants, please provide the following documents and information by Monday, June 22, 2015:

- 1) If the likely effects of EPA’s action on ESA-listed species or habitat will be “positive,” would those “positive” effects be best described as “wholly beneficial,” “insignificant,” “discountable,” or “no effect?” Please explain your answer in detail.
- 2) If the likely effects of EPA’s action on ESA-listed species or habitat will be “remote” or “very small,” would those effects be best described as “wholly beneficial,” “insignificant,” “discountable,” or “no effect?” Please explain your answer in detail.
- 3) All records, documents, analyses, memoranda, and communications concerning the effects of the proposed rule for existing power plants on ESA-listed species or habitat, including EPA’s consideration of its ESA obligations with regard to this rule.
- 4) All records, documents, analyses, memoranda, and communications concerning the effects of the proposed rule for new power plants on ESA-listed species or habitat, including EPA’s consideration of its ESA obligations with regard to this rule.
- 5) All documents reflecting communications involving the Department of the Interior, including the FWS, concerning the applicability of the ESA and/or section 7 consultation

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<sup>29</sup> Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, *supra* note 2. Compare 79 Fed. Reg. 34,830, 34,832 (including “Endangered Species Act” in list of “Impacts of the Proposed Action”), with 79 Fed. Reg. 1430, 1432 (omitting “Endangered Species Act” in list of “Impacts of the Proposed Action”).

<sup>30</sup> This is not the first inconsistent position EPA has taken on the consultation requirements for power plant rules. Just last year, EPA concluded consultation with the Services on its Cooling Water Intake Structure (“CWIS”) rule, another wide-ranging regulation affecting power plants. The resulting programmatic Biological Opinion (“BiOp”) issued by FWS and NMFS specifically contemplated effects on endangered species, including the manatee. It also analyzed the impacts of thermal discharges. The very existence of this BiOp confirms that changes to power plant operations have effects on ESA-protected species that merit consultation under section 7 – a fact that EPA now seems to deny.

for the proposed rules for new or existing power plants.

- 6) All documents reflecting communications involving the Council for Environmental Quality concerning the applicability of the ESA and/or section 7 consultation for the proposed rules for new or existing power plants.

Instructions and definitions for responding to this request are enclosed. Please have your staff contact Rob Gordon or Jessica Conrad with the House Committee on Natural Resources at (202) 225-7107, or Byron Brown with the Senate Committee on Environment and Public Works at (202) 224-6167 with any questions.

Sincerely,



Rob Bishop  
Chairman  
House Committee on Natural Resources

James M. Inhofe  
Chairman  
Senate Committee on Environment and  
Public Works