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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

DEFENDERS OF WILDLIFE, et al. )  
 )  
 Plaintiffs, ) Civ. No. 04-1230(GK)  
 )  
 v. )  
 )  
 DIRK KEMPTHORNE, in his official capacity as )  
 Secretary, U.S. Department of the Interior; and )  
 H. DALE HALL, in his official capacity )  
 as Director, U.S. Fish and Wildlife Service; )  
 CARLOS GUTIERREZ, in his official capacity as )  
 Secretary, U.S. Department of Commerce; )  
 WILLIAM T. HOGARTH, in his official )  
 capacity as Assistant Administrator for )  
 Fisheries, National Oceanic and Atmospheric )  
 Administration; and MIKE JOHANNNS, in his )  
 official capacity as Secretary, U.S. Department )  
 of Agriculture, )  
 )  
 Defendants. )

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**FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL  
RECONSIDERATION (DE # 61)**

## INTRODUCTION

The Court should deny Plaintiffs' motion for reconsideration because they fail to cite any intervening change of controlling law, any new evidence, or any clear error in the Court's holding. Plaintiffs merely seek to re-hash arguments already raised and refuted in briefing materials previously submitted. To the extent Plaintiffs' arguments warrant any consideration whatsoever, there is ample basis in the record before the Court to support the Court's conclusion that the challenged counterpart regulations must be upheld under the deferential standard of review articulated in Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co. 463 U.S. 29, 52 (1983). See DE # 59 at 48.

## STANDARD OF REVIEW

A motion pursuant to Rule 59(e) to alter or amend a judgment after its entry is rarely granted. Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996). "The primary reasons for reconsideration of judgment are 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" Nat'l Trust for Historic Pres. v. Dep't of State, 834 F.Supp. 453, 455 (D.D.C. 1993), aff'd in part, rev'd in part on other grounds, sub nom., Sheridan-Kallorama Historical Ass'n v. Christopher, 49 F.3d 750 (D.C. Cir. 1995) (quoting Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245,1255 (2d Cir.); Firestone, 76 F.3d at 1208..

"A Rule 59(e) motion to reconsider is not simply an opportunity to reargue facts and theories upon which a court has already ruled." New York v. United States, 880 F. Supp. 37, 38 (D.D.C. 1995). Considerations of fairness and of judicial efficiency strongly disfavor motions for reconsideration where, as here, a party simply seeks a "second bite at the apple." Shell Petroleum v. United States, 47 Fed. Cl. 812, 819 (Fed. Cl. 2000) ("A motion for reconsideration should not be used simply as an opportunity for a party to take a second bite at the apple by rearguing positions that have been rejected."). See also, e.g., Medley v. Westpoint Stevens, Inc., 162 F.R.D. 697, 699-

700 (M.D. Ala 1995) (holding that the plaintiff should not be allowed to "reload and shoot again") (citing Butler v. Sentry Ins. A Mut. Co., 640 F. Supp. 806, 812 (N.D. Ill. 1986)). Accordingly, courts should decline to reconsider decided issues where, as here, there is an absence of extraordinary circumstances.

### **ARGUMENT**

Plaintiffs do not allege that there has been an intervening change of controlling law or any new evidence that would compel the Court to reconsider its decision. Plaintiffs suggest that reconsideration is "necessary and appropriate," DE # 61 at 1, yet Plaintiffs do not directly assert that the Court's well-reasoned decision constitutes "clear error or manifest injustice." On its face, Plaintiffs' motion does not satisfy the stringent criteria of a Rule 59(e) motion under the law of this Circuit.

Assuming for sake of argument that any further response is necessary as to the substance of Plaintiffs' arguments, Federal Defendants note that Plaintiffs do not dispute that the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") have the authority to promulgate "counterpart regulations" pursuant to the Endangered Species Act ("ESA") consultation regulations that date back to 1978.<sup>1</sup> See 50 C.F.R. § 402.04 (as currently

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<sup>1</sup> Almost as an afterthought, Plaintiffs invite the Court to vacate its ruling with respect to the statutory construction of the ESA if the Court concludes that a remand is warranted with respect to the Plaintiffs' Administrative Procedure Act ("APA") claims. See DE # 61 at 24 n. 17. Even here, Plaintiffs do not assert that Federal Defendants lack authority to promulgate counterpart regulations. Instead, Plaintiffs question whether the particular exercise of rulemaking authority in this case comports with the statutory purposes of the ESA as reflected in the 1978 Amendments. As Defendants noted previously, the Congress reviewed and endorsed the original ESA Section 7 regulations at the time it considered the 1978 ESA Amendments. The original ESA regulations included provisions authorizing federal agencies to make their own determinations concerning possible effects on listed species without further consultation. See 43 Fed. Reg. 870, 875 (Jan. 4, 1978) ("If a Federal agency decides that its activities or programs will not affect listed species or their habitat, consultation shall not be initiated unless requested by the Service."). Plaintiffs' assertion that the 1978 ESA amendments themselves reflect Congressional intent to require consultation whenever an action "may affect" a listed species lacks merit. Regardless of where the line is drawn (i.e. "may affect" under the generic regulations versus "likely to adversely affect" under the counterpart regulations), the relevant point is that the action agency itself has the ultimate responsibility to determine when consultation with FWS is triggered. See "Interagency

codified); 43 Fed. Reg. 870, 871 (Jan. 4, 1978) (preamble to 1978 regulations). Therefore, the relevant issue that was properly decided by the Court was whether the counterpart regulations at issue in this case represented a permissible construction of the interagency consultation provision of Section 7(a)(2) of the ESA. See 16 U.S.C. § 1536(a)(2). Although Plaintiffs invite the Court to further scrutinize the agency records supporting their respective decisions to adopt the counterpart regulations, review under the “arbitrary and capricious” standard is “highly deferential” and “presumes the agency’s action to be valid.” Env’tl. Def. Fund, v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981) (citing, inter alia, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419 (1971)).

Applying this presumption of validity, the Court has already considered and rejected Plaintiffs’ arguments concerning the agency records supporting the challenged decision to promulgate the counterpart regulation. The Court has already held that “a clear rationale, that the Government has consistently articulated, underlies the Counterpart Regulations.” DE # 59 at 47 - 48. Thus, further scrutiny under the criteria articulated in State Farm is unnecessary. 463 U.S. at 43 (agency must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’”) (citation omitted). See also Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 105 (1983) (“It is not our task to determine what decision we, as [the federal agency], would have reached. Our only task is to determine whether the Commission has considered the relevant factors and articulated a rational connection between the facts found and the choice made.”) (citations omitted).

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Cooperation-Endangered Species Act of 1973, as Amended; Final Rule,” 51 Fed. Reg. 19,926, 19,928 (June 3, 1986) ([T]he Federal agency has the primary responsibility for implementing section 7's substantive command, and the [generic consultation regulation] does not usurp that function.”.)”

Federal Defendants previously addressed Plaintiffs' various arguments in detail, so only a brief response is warranted here.<sup>2</sup> As to Plaintiffs' assertion that the regulation contains no adequate definition of what constitutes a "National Fire Plan" project (DE # 61 at 7 - 9), Federal Defendants have already shown that FWS and NMFS adopted a flexible definition of actions subject to the counterpart regulations to ensure that the full range of projects intended to reduce risks of catastrophic wildland fires and restore fire-adapted ecosystems would be eligible for the counterpart procedures. "Joint Counterpart Endangered Species Act Section 7 Consultation Regulations," 68 Fed. Reg. 68,254, 68,259 (Dec. 8, 2003). See Fed. Br. at 54-56. Federal Defendants have also refuted Plaintiffs' assertion that Defendants erroneously relied on the rationale that the consultation process previously resulted in delays. See DE # 61 at 9-15. FWS and NMFS stated in the final rule that "[t]hese counterpart regulations are being implemented to proactively reduce these anticipated delays and to increase the Service's capability to focus on Federal actions requiring formal consultation. . . ." 68 Fed. Reg. at 68,257. Plaintiffs' argument that there is no evidence that consultations caused past delays misses the mark, because the final rule simply does not rely upon past delays as a justification for the counterpart regulation. See Fed. Br. at 51-52; Fed. Reply at 22-23.

Federal Defendants also previously responded in detail to Plaintiffs' argument that the counterpart regulations will result in lost conservation benefits in relation to the generic consultation procedures. Federal Defendants have shown that "[t]he Action Agencies' established biological expertise and active participation in the consultation process provides a solid base of knowledge and understanding of how to implement section 7 of the ESA." 68 Fed. Reg. at 68,257. See also Fed. Br. at 58; Fed. Reply at 18-19. Federal Defendants have also refuted Plaintiffs' "fox guarding the henhouse" arguments by showing that FWS and NMFS will

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<sup>2</sup> Where applicable, Federal Defendants refer to briefing materials previously filed as follows: "Fed. Br." is "Federal Defendants' Combined Memorandum..." (June 3, 2005) (DE # 39); "Fed. Reply" is "Federal Defendants' Reply..." (Aug. 1, 2005) (DE # 46).

continue to oversee the conduct of the action agencies and revoke their ability to use the counterpart regulations if an action agency is not acting in a manner that is equally protective of species or their habitat, or otherwise implementing Section 7 of the Act. 50 C.F.R. § 402.34. See Fed. Br. at 46-48 & 53-54; Fed. Reply at 19. Finally, Federal Defendants have shown that critical biological information will not be lost because cumulative impacts can be assessed through periodic review and monitoring. See Fed. Br. at 41, 54 & 58; Fed. Reply at 19, 23-24.

### **CONCLUSION**

In sum, reconsideration is unwarranted even though the Court's opinion did not address in detail each of the Plaintiffs' APA-related arguments concerning the counterpart regulations. Federal Defendants have already responded to each of these arguments. The record before the Court provides ample justification to support the Court's conclusion that "there is no basis on which the Court could conclude that the agencies failed to consider 'the relevant data and articulate a satisfactory explanation for its action.'" DE # 59 at 48 (quoting State Farm, 463 U.S. at 43). Federal Defendants respectfully request that the Court deny Plaintiffs' Motion for Reconsideration (DE # 61).

Respectfully submitted,

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