IN RE DOS REPUBLICAS RESOURCES CO., INC.

NPDES Appeal No. 96-1

ORDER DENYING REVIEW

Decided December 2, 1996

Syllabus

The National Parks and Conservation Association and the Lone Star Chapter of the Sierra Club (collectively, "Petitioners") seek review of the denial of their request for an evidentiary hearing by U.S. EPA Region VI on matters relating to the issuance of a permit for a new source discharge under the National Pollutant Discharge Elimination System ("NPDES permit"), Clean Water Act ("CWA") section 402, 33 U.S.C. § 1342. The new source, the Eagle Pass Mine in Maverick County, Texas, is intended to be a surface mining operation providing coal for a power plant in Mexico.

Petitioners sought an evidentiary hearing, not relating to the discharges authorized by the NPDES permit, but on factual and legal issues going to whether the Region had satisfied its obligations under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, in its consideration of the permit. Petitioners' concerns relate to whether two endangered species of cat, ocelots and jaguarundi, are afforded sufficient protection during the development and operation of the mine site. More particularly, Petitioners are concerned about the removal of a corridor of brush located along a creek at the site which is believed to be used by one or more of the endangered cats.

Petitioners challenge the adequacy of the Environmental Impact Statement ("EIS") prepared by the Region pursuant to NEPA. They assert that there was insufficient attention given to a project alternative of leaving intact the corridor of brush on the site and instead relocating several miles of railroad right of way to provide an alternative mining location.

Petitioners also raise a number of issues under the ESA which they believe warrant an evidentiary hearing. They argue that there is an issue as to the finding under the ESA that the project is not likely to jeopardize the continued existence of the endangered species. They cite an alleged ambiguity in the biological opinion prepared by the Fish and Wildlife Service ("FWS") as creating an inconsistency between the experts at the FWS and at EPA.

Additional ESA issues are: (1) The Region has relied upon measures to mitigate the impact of the project without adequate assurance of their success; and (2) the permit should require the completion by the permittee of a trapping survey to obtain better data on usage of the brush corridor by the ocelot and jaguarundi.

Held: The petition for review is denied. As to the NEPA issue, the record clearly establishes that the railroad relocation option is not a promising alternative. Therefore, while the Region was required to consider this option, it did not need to spend considerable time on it. The Region's consideration was adequate and met the "rule of reason" standard established for consideration of options under NEPA.

On the central ESA issue, relating to the finding that the project is not likely to jeopardize the endangered species, there is no dispute between the FWS and EPA. The statement which Petitioners rely upon as allegedly creating an inconsistency does not do so when read in context. Reading FWS' biological opinion as a whole, it is clear that FWS finds (as does EPA) no likely jeopardy. The statement cited by Petitioners simply recognizes some uncertainties and encourages and supports the imposition of reasonable and prudent measures to mitigate the impacts of the project. There are no factual matters in dispute on the issue of jeopardy that would warrant an evidentiary hearing.

The Region did not err in including mitigation measures without a certainty of success. Neither NEPA nor the ESA requires such certainty. Moreover, Petitioners do not point to any evidence in the record or that they possess that creates a genuine issue of material fact as to the likelihood of success so as to warrant an evidentiary hearing.

Finally, Petitioners' arguments that the NPDES permit should require completion of the trapping survey are rejected. To the extent that they argue that trapping survey completion should be considered a reasonable and prudent mitigation measure, this argument was not raised in the evidentiary hearing request and thus was not preserved for review. To the extent that they argue that the survey should be included as a conservation measure, this argument fails to recognize that the Region has legal authority to include in the NPDES permit only such terms and conditions as relate to the proposed discharges at the mine site. Nothing in the Clean Water Act (or the ESA) authorizes the Region to include a provision compelling completion of a trapping survey as a conservation measure.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Reich:

The National Parks and Conservation Association ("NPCA") and the Lone Star Chapter of the Sierra Club (collectively, "Petitioners"), seek review of the denial of their request for an evidentiary hearing by U.S. EPA Region VI ("the Region") on matters relating to the issuance of a permit for a new source discharge under the National Pollutant Discharge Elimination System ("NPDES permit"), Clean Water Act ("CWA") section 402, 33 U.S.C. § 1342. The new source, the Eagle Pass Mine in Maverick County, Texas ("the mine" or "the Site"), is intended to be a surface mining operation providing coal for a power plant in Mexico.[1]

The permit applicant, Dos Republicas Resources Co., Inc. ("DRRC"), is seeking an NPDES permit from EPA which will allow it to discharge material to Elm Creek at various points that are located within DRRC's

[1] Under the CWA, discharges into waters of the United States by point sources, like those at the Eagle Pass Mine, must be authorized by a permit in order to be lawful. 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. The permit for the mine authorizes "the intermittent discharge of mine drainage, storm water runoff from active mining areas and storm water runoff from coal preparation areas" from sixteen outfalls on the Site, all leading to Elm Creek. Erosion and sediment control plans are part of the permit.

proposed surface mine. DRRC intends to relocate Elm Creek and an adjacent dense corridor of brush[2] so as to surface mine the area where the Creek and brush are presently located, recovering the underlying coal.[3] The brush corridor may be utilized by two endangered feline species, the ocelot and the jaguarundi. There is to be a replacement brush corridor constructed and in place before the natural corridor is removed. The proposal for mining contemplates that there will be restoration of the Creek and the brush after the completion of mining. After mining the natural corridor will be restored and both corridors will remain.

Before the Region, the Petitioners focused not on the discharges authorized by the NPDES permit, but on whether the Region had satisfied its obligations under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, in its consideration of the permit.[4] More particularly, Petitioners challenged the EIS prepared by the Region for the issuance of the NPDES permit upon the ground that there was insufficient attention given to a project alternative, leaving intact the corridor of brush along Elm Creek and instead relocating several miles of railroad right of way to provide an alternate mining location. Petitioners also asserted that the Region had not sufficiently satisfied the requirements of the ESA for protection of the ocelot and the jaguarundi. The Petitioners based their evidentiary hearing request in large part upon alleged ambiguities in the biological opinion issued by the Fish and Wildlife Service under the ESA.[5] The Petitioners argued that the NPDES permit should not be issued, or should be issued with certain conditions to assure ESA compliance.[6] As previously noted, and

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[2] The corridor contains nearly 400 acres of brush and extends for about three miles.

[3] It is estimated that, over the life of the mine, nearly 40 millions tons of coal will be extracted from three seams, running as deep as 120 feet. There will be support facilities including haul roads, power lines, surface water control, sedimentation ponds, and crushing and loading facilities, including a railroad siding.

[4] CWA section 511(c)(1), 33 U.S.C. § 1371(c)(1), and 40 C.F.R. § 122.29(c)(1)(i), require that EPA follow the NEPA review procedures whenever it issues an NPDES permit for a new source. *See infra* Section II.A.2. Additionally, an Environmental Impact Statement ("EIS") is required for a new source NPDES permit if the new source will have an adverse effect upon the habitat of endangered species. 40 C.F.R. § 6.605(b)(3). *See infra* Section II.A.3. The issues arising under the ESA were addressed as part of the EIS process.

[5] The Petitioners also raised the legal question of the extent of EPA's statutory responsibility to assist endangered species.

[6] Although Petitioners seek to have the permit either conditioned or denied, we note that the NPCA, in commenting on the draft EIS, stated that since EPA "can only impose conditions

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unlike most NPDES permit appeals, the Petitioners did not challenge in any way the discharges to be authorized by the NPDES permit itself, either as to discharge content or discharge location.

An evidentiary hearing was requested by Petitioners[7] on July 6, 1995,[8] and denied on January 16, 1996.[9] On February 14, 1996, the Petitioners sent a Notice Of Appeal And Petition For Review Of Decision Denying Request For Evidentiary Hearing to EPA by overnight courier.[10] In their Appeal And Petition For Review, the Petitioners set forth issues both similar to, and different from, those in their hearing request.[11] For the reasons set forth below, we deny the Petitioners' Appeal And Petition For Review.

I. *BACKGROUND*

A. *Statutory Background*

1. *The Clean Water Act*

Under section 301(a) of the CWA, 33 U.S.C. § 1311(a), the discharge of any pollutant is unlawful, except as in compliance with certain enumerated sections of the CWA, including section 402, 33 U.S.C. § 1342, which provides for the issuance of NPDES permits, including the permit which is required here for discharges to the waters on the Site. DRRC's

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on the permit that are authorized by the Clean Water Act" and that the permit here needed conditions which would be beyond the scope of the CWA, the permit must be denied. NPCA letter of August 16, 1994, Appendix C to Final EIS, at C-114.

[7] Under 40 C.F.R. § 124.74, any interested person may submit a request to the Regional Administrator for an evidentiary hearing within 30 days following the service of notice of the Regional Administrator's final permit decision.

[8] The request for hearing was supplemented on August 14, 1995, in response to a letter from the Region.

[9] The Region's decision denying a hearing appears as Exhibit A to DRRC's opposition to the Petitioners' Appeal.

[10] Under 40 C.F.R. § 124.91, within 30 days of the denial of a request for an evidentiary hearing, any requester may appeal any issue set forth in the denial by filing a notice of appeal and petition for review with the Environmental Appeals Board.

[11] The Region has filed a Response To Notice Of Appeal and Petition For Review, together with a selected number of documents attached as exhibits thereto. DRRC also filed a Supplemental Response Of Dos Republicas Resources Company, Inc. To The Notice Of Appeal And Petition For Review Of Decision Denying Requests For Evidentiary Hearing, asserting that the Petitioners had waived any issue relating to completion of a trapping survey by failing to raise the matter in their Request For Hearing. DRRC also moved for summary judgment upon the ground that the Petitioners failed to raise any factual issues for an evidentiary hearing.

planned mining activities are a "new source" within the meaning of CWA sections 306(a)(2) and 511(c)(1)[12] as well as 40 C.F.R. § 122.2.[13]

Pursuant to CWA section 511(c)(1)[14] and 40 C.F.R. § 122.29(c),[15] the Region prepared an EIS, as described in section 102(2)(C) of the National Environmental Policy Act[16] addressing the environmental consequences of DRRC's proposed surface mine.

2. *The National Environmental Policy Act*

NEPA section 102(2)(C) requires that all federal agencies, before taking "major Federal actions significantly affecting the quality of the human environment" must prepare a "detailed statement" discussing the environmental impacts of, and the alternatives to, the proposed actions. The requirements of NEPA are procedural, requiring examination of the environmental consequences of possible agency actions. NEPA does not require any particular substantive results. *See In re Louisville Gas and Electric Company*, 1 E.A.D. 687, 688-89 (JO 1981); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-51 (1989); *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980); *Flint Ridge Development Co. v. Scenic Rivers Assn.*, 426 U.S. 776, 788 (1976).

In performing their NEPA obligations, agencies need not spend a great deal of time discussing issues that are not significant. *See In re Spokane Regional Waste-To-Energy*, 2 E.A.D. 809, 816-17 (Adm'r 1989); 40 C.F.R. § 1502.2(b) ("There shall be only brief discussion of other than significant issues.").[17] Agencies' consideration of alterna-

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[12] 33 U.S.C. §§ 1316(a)(2), 1371(c)(1).

[13] 40 C.F.R. § 122.2, paralleling CWA §§ 306(a)(2) and (3), defines "new source" as "any building, structure, facility, or installation from which there is or may be a 'discharge of pollutants,' the construction of which commenced [after the proposal or promulgation of certain applicable standards]."

[14] 33 U.S.C. § 1371(c)(1).

[15] 40 C.F.R. § 122.29(c)(1) provides that "[t]he issuance of an NPDES permit to a new source [by EPA may be a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act * * *." As such, it is subject to review under NEPA, including possible preparation of an EIS. *See also* 40 C.F.R. § 122.29(c)(3).

[16] 42 U.S.C. § 4332(2)(C).

[17] There was a printing error made in the 1995 edition of 40 C.F.R. Parts 1501 and 1502, omitting nearly all of those provisions. Accordingly, references in this opinion to 40 C.F.R. Parts 1501 and 1502 are to the 1994 edition.

tives need only be reasonable. *In re Louisville Gas and Electric Company*, 1 E.A.D. at 694; *Roosevelt Campobello Intern. Park v. EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982) (challenge to issuance of NPDES permit based upon NEPA and ESA grounds). However, the lead Federal agency[18] must explore all reasonable alternatives to the proposed action, including reasonable alternatives which are not within the jurisdiction of the lead agency. 40 C.F.R. § 1502.14(a), (c).

Although most individual EPA permitting actions under the CWA are not regarded as a "major Federal action significantly affecting the quality of the human environment," the issuance of an NPDES permit for a new source may be regarded as such and is expressly required to follow the NEPA process by CWA section 511(c)(1). Additionally, an EIS is required for a new source NPDES permit if "[a]ny major part of the new source will have significant adverse effect on the habitat of * * * endangered species * * *." 40 C.F.R. § 6.605(b)(3).[19] The issues arising under the ESA were therefore addressed here as part of the EIS process, as contemplated by ESA sections 7(c)(1) and (k),[20] and by 40 C.F.R. §§ 1502.25(a) and 1508.27(b)(9):

> To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related studies required by the * * * Endangered Species Act * * *.

40 C.F.R. § 1502.25(a).

As part of both the EIS and ESA processes, DRRC and the Region consulted with the Fish and Wildlife Service of the Department of the Interior ("FWS") about the ocelot and the jaguarundi and their habitat, in particular the corridor of brush inside of the proposed mining area, adjacent to Elm Creek.

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[18] The criteria for identifying the lead agency for a federal project are set out in 40 C.F.R. § 1501.5. They include magnitude of agency involvement, project approval authority, expertise concerning the environmental effects of the proposed action, duration of agency involvement, and sequence of agency involvement.

[19] *See also* 40 C.F.R. §§ 6.302(h) and 6.108(d).

[20] 16 U.S.C. § 1536(c)(1) and(k).

3. *The Endangered Species Act*[21]

This case involves three concepts contained within the ESA, "jeopardy," "incidental takes," and "reasonable and prudent measures." The Region must implement the latter concept so as to minimize the impact of incidental takes. "Reasonable and prudent measures" are sometimes also referred to in these proceedings as "mitigation."

Under the ESA, "Congress intended endangered species to be afforded the highest of priorities." *TVA v. Hill*, 437 U.S. 153, 174 (1978) (decision halting construction and operation of a dam which would jeopardize the existence of an endangered species of fish).[22] To that end, ESA section 7(a)(2)[23] directs each Federal agency to consult with the Secretary[24] to ensure that any action which it authorizes, funds, or carries out "*is not likely to jeopardize* the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary * * * to be critical * * *" (emphasis added).[25] Covered ESA Federal actions include the granting of a permit. *See* the definition of "action," 50 C.F.R. § 402.02.[26] The requirements of ESA section 7(a)(2) are implemented for the NPDES permit program by regulation at 40 C.F.R. § 122.49.[27]

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[21] A recent overview of the ESA appears in *Sierra Club v. Babbitt*, 65 F.3d 1502, 1504-05 (9th Cir. 1995). A concise history and general background of the ESA may be found in *Sierra Club v. Marsh*, 816 F.2d 1376, 1379 (9th Cir. 1987). The ESA regulations of chief interest here, those implementing ESA section 7, are to be found at 50 C.F.R. Part 402.

[22] ESA section 4, 16 U.S.C. § 1533, directs the Secretary of the Department of the Interior ("the Secretary") to determine which species are "endangered" or "threatened," and to list such species.

[23] 16 U.S.C. § 1536(a)(2).

[24] Because the consultation here actually takes place with FWS, we refer to FWS, and not the Secretary, when addressing the consultation process.

[25] Critical habitat is defined at length in ESA section 3(5), 16 U.S.C. § 1532(5). Critical habitat expressly does not include the entire geographic area which could be occupied by the endangered species at issue. ESA section 3(5)(C). There is no critical habitat involved here.

[26] "Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States * * *. Examples include * * *: (c) the granting of licenses [or] permits * * *."

[27] *Cf. In re Renkiewicz SWD*, 4 E.A.D. 61, 65 (EAB 1992) (applying 40 C.F.R. § 144.4, the underground injection well permit regulation, which parallels 40 C.F.R. § 122.49).

Most of the dispute in this case revolves around the interplay between sections 7 and 9 of the ESA.[28] ESA section 7(a)(2) generally prohibits Federal agency action which is likely to jeopardize the continued existence of endangered or threatened species, with exceptions not here relevant.[29] ESA sections 9(a)(1)(B) and (C) generally prohibit takes of animals which are members of endangered species. Section 7 sets out a detailed course of consideration and consultation among Federal agencies so as to protect endangered species. If Federal agency action will not likely jeopardize an endangered species, but may cause the incidental take of members of endangered species, then steps must be taken to minimize the impact of incidental takes. ESA section 7(b)(4). If these steps are utilized, then the prohibition against takes in ESA section 9(a)(1) does not apply. ESA section 7(o).

As noted, even if a project is not likely to jeopardize the existence of an endangered species,[30] a project will sometimes be expected to incidentally kill or injure one or more members of an endangered species. Any such event constitutes a "take."[31] If FWS finds that a take incidental to the agency action involved in the project is not likely to jeopardize the endangered species, then, ESA section 9(a) notwithstanding, the take is authorized, subject to certain conditions. ESA sections 7(b)(4) and (o)(2).[32] In the event that incidental takes are anticipated, FWS is to specify reasonable and prudent measures considered necessary to minimize the impact of the takes. ESA section 7(b)(4)(C)(ii).

B. *Factual Background*

1. *Introduction*

DRRC applied to EPA for an NPDES permit for a surface mine near Eagle Pass, Texas. The mine would supply coal, by rail, to a

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[28] 16 U.S.C. §§ 1536 and 1538.

[29] Only endangered species are involved here, and threatened species will not be discussed.

[30] "To jeopardize the continued existence of an endangered species" is defined in 50 C.F.R. § 402.02 as "to engage in an action that reasonably would be expected, directly or indirectly, 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."

[31] "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." ESA section 3(19), 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3.

[32] 16 U.S.C. §§ 1536(b)(4) and (o)(2).

power plant about 20 miles away in Mexico. The Site has a railroad right of way through it at the present time. Also on the Site is a waterway, Elm Creek, which has good quality coal underneath it. DRRC proposes to relocate Elm Creek during mining operations in order to recover that coal, which coal DRRC expects will be needed in order to bring the average quality of the coal being mined up to the standards required by DRRC's contract with the power plant.

DRRC has a surface mining permit from the State of Texas, pursuant to the Surface Mining Reclamation And Control Act ("SMCRA"), section 503, 30 U.S.C. § 1253.[33] The adequacy of that permit is not before us. A permit from the Corps of Engineers, pursuant to CWA section 404, 33 U.S.C. § 1344, is required before DRRC may fill and relocate Elm Creek. The Corps of Engineers has indicated that it may not issue an individual permit for this surface mine as there is a nationwide permit for surface mines.[34] EPA's issuance of the NPDES permit for the project is thus the lead federal action relating to the coal mining project for purposes of NEPA and ESA analysis. *See* 40 C.F.R. § 1501.5. In accordance with CWA section 511(c)(1), and ESA section 7, the Region has proceeded through the NEPA and ESA processes for consideration of all of the environmental impacts of the proposed mining operation, including possible ESA jeopardy and related concerns from this project, because the project will be made possible by EPA's grant of an NPDES permit.

As previously noted, the Petitioners concentrate not on any discharges arising under the permit, but rather upon the effect of the coal mine upon two endangered species of cat. The endangered felines of concern are the ocelot and the jaguarundi, which may use brush that grows along Elm Creek as either habitat or as a way of travel from the Rio Grande valley to elsewhere in Texas. The ocelot is about the size of a bobcat, and is known to occur in the United States only in Texas.[35] There have been undocumented sightings (*i.e.* without any supporting physical evidence or photographs) of ocelots in the Eagle

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[33] The application for that permit must demonstrate how reclamation will be accomplished and how environmental issues, including effects on wildlife, will be resolved. SMCRA sections 506(a), 508, 510, 515, 30 U.S.C. §§ 1256(a), 1258, 1260, 1265. EPA has relied upon information submitted during the State mining permit process. Draft Environmental Impact Statement ("DEIS") at 3-4. The endangered cats are discussed at pages 11-12 of the State permit, which may be found in Final Environmental Impact Statement ("FEIS") Appendix E.

[34] DEIS at 3-5, 5-39; FEIS at III-4; FEIS Appendix C, at C-4, Corps Letter of August 1, 1994.

[35] It may also occur in Arizona. It is known to occur in Mexico. DEIS at 5-30 - 5-31.

Pass area in the past. The ocelot is nocturnal, secretive, and prefers to live in dense cover. Since the 1920's, more than 95 per cent of the native brush in South Texas, which is optimal ocelot habitat, has been converted to agricultural or urban use. DEIS at 5-30 - 5-31.[36] The jaguarundi is about the size of a house cat, but is longer and slender. Its distribution is similar to that of the ocelot, preferring dense thickets. The jaguarundi occurs in Texas, Arizona, and Mexico. It is highly secretive, to the point where habitat figures are unknown. There have been undocumented jaguarundi sightings in the Eagle Pass area in the past, and it is assumed that the animal is present in the area. *Id.* at 5-28, 5-33 - 5-34. The fate of the brush along Elm Creek is a central concern in this matter, because of its relationship to the endangered cats.

2. *The Record*

a. *Initial Exploration of Endangered Species Concerns*

There was an extensive investigation into the relationship between the endangered cats and the Site, beginning with DRRC's preparation of a biological assessment for its proposed mine, as provided for in ESA section 7(c).[37] This was followed by a meeting among FWS, FWS' consultant (Caesar-Kleberg Wildlife Research Center ("CKWRC")), the Texas Parks and Wildlife Department, and DRRC.[38] CKWRC was not satisfied with this assessment process, pointing out that the entire area was not surveyed by trapping, and that if an ocelot were present, it could be genetically distinct, making the area important, even necessary, to the survival of the species in Texas (Minutes at 1-3). CKWRC estimated 80-120 ocelots in Texas, and said that a computer model suggested that takes of 2-10 cats could affect survival in Texas (*Id.* at 4).

NEPA consideration of the ocelot and jaguarundi began with the Draft EIS, issued in June 1994. DEIS at 1-5, 3-4. The Region assumed that the Elm Creek habitat is potentially used by and is important to the ocelot and jaguarundi.[39] *Id.* at 5-33 - 5-34, 5-39. The Region deter-

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[36] It should be noted that the Region did not issue a separate and independent FEIS here. The FEIS incorporates much of the DEIS by reference and adds to it or amends it.

[37] Region's Exhibit 8, Biological Assessment For The Dos Republicas Company Proposed Eagle Pass Coal Mine (June 1994). The Assessment is almost completely directed towards endangered species.

[38] Minutes of that meeting, in August of 1994, are the Region's Exhibit 11 ("Minutes").

[39] In so doing, the Region adopted the same view expressed by FWS in its letter of January 14, 1994. DEIS Appendix D.

mined to request formal consultation with FWS, pursuant to ESA section 7. *Id.* at 5-42.

b. *FWS' Biological Opinion on Likely Jeopardy*

On November 23, 1994, FWS issued a letter biological opinion ("BO"),[40] which is Appendix F to the Final EIS.[41] The letter contains within it a formal biological opinion section entitled "*BIOLOGICAL OPINION*" as well as several other sections devoted to discussion of background, conclusions, reasonable and prudent measures, and conservation recommendations. The formal biological opinion section sets forth FWS' conclusion "that the proposed action will not jeopardize the continued existence of the endangered Texas populations of the ocelot and jaguarundi." BO at 2.[42] However, despite this clear statement of no jeopardy (which by its terms — will not jeopardize — goes beyond the statutory standard of no *likely* jeopardy), the BO, in a separate section entitled, "*Vulnerability To Extinction*," also included the following statement, heavily relied upon by the Petitioners, and referred to by the Region as creating an "ambiguity" as to jeopardy in the BO:

> The most significant issues about the ocelot and the jaguarundi are that there are no firm data available on the present size of their South Texas populations and on whether their numbers are growing, stable, or declining. Consequently, the Service cannot state that the loss of a single individual would not be likely to jeopardize the continued existence of those populations.

Id. at 8.

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[40] At the end of the consultation period, FWS is obligated by ESA section 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A), to provide to the Region, and to the applicant, "a written statement setting forth the Secretary's opinion, and a summary of the information upon which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the federal action." This statement is FWS' "biological opinion" or "BO."

[41] FWS' BO here is based upon information provided by the Region, the DEIS, DRRC's Biological Assessment and Addendum, other documents and materials provided by DRRC to the Texas Railroad Commission, field trips, meetings, attendance at public hearings, available literature, data in FWS files, and consultation with experts. BO at 2.

[42] The term "formal biological opinion" is used to refer to the section of the BO actually entitled "*BIOLOGICAL OPINION*" so as to distinguish it from the document as a whole which, as noted, is also referred to as the "biological opinion."

c. *FWS' Additional Comments On The Impact of Incidental Takes*

As discussed above in subsection b., and in footnote 40, a definite yes or no conclusion is required by statute and regulation as to *likely* jeopardy. As noted above, FWS definitely found no likely jeopardy. However, FWS' statutorily mandated finding on likely jeopardy did not end FWS' responsibilities. FWS is additionally obligated to address the effect of incidental takes upon endangered species, even if the project will not likely jeopardize the endangered species. ESA section 7(b)(4)(C)(i); 50 C.F.R. §§ 402.14(h)(2), (3) and (i)(1)(i). When FWS issued its required BO, it had before it some evidence that the numbers of animals in the area might be quite small, or that genetic isolation might have produced a genetically different strain of cat in the project area. It was in that regard, in the section of the BO letter addressing vulnerability to extinction, that FWS noted that it could not *definitively* say what the effect would be of the incidental take of one animal. That question is separate and distinct from the inquiry into whether jeopardy to the species is *likely*, which was addressed in the formal biological opinion portion of the BO. FWS' BO does not exclude the possibility of jeopardy but does not find it to be likely. This uncertainty does not undo the formal biological opinion of no likely jeopardy.

This conclusion is bolstered by FWS' inclusion in the BO of reasonable and prudent measures only, without also including reasonable and prudent alternatives.[43] BO at 17. If FWS had found likely jeopardy, it would have been required to include reasonable and prudent alternatives in its BO, not just reasonable and prudent measures. ESA section 7(b)(3)(A). If it had found likely jeopardy from an incidental take, it could not have authorized incidental takes in the manner that it did here.

The formal biological opinion section of the BO continued on to say that:

> [I]n view of the degrees of uncertainty surrounding the statuses of the [cat] populations, the continuing lack of scientific data regarding the possible Site use of the

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[43] "Reasonable and prudent *measures*," imposed by FWS to minimize the impact of incidental takes (ESA § 7(b)(4)), is a different concept from "reasonable and prudent *alternatives*" which is what FWS must propose when it finds that a project would likely jeopardize the continued existence of endangered species. ESA section 7(b)(3)(A); 50 C.F.R. §§ 402.02 and 402.14(h)(3). Those terms are also different from the "alternatives" which must be considered in a NEPA section 102(2)(C)(iii) EIS, although the ESA terms would usually overlap with the NEPA alternatives. *Cf. Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352.

> project site as habitat by these species, and the potentially severe consequences of an unanticipated taking, EPA should use its authority to insure, through the implementation of reasonable and prudent measures, that the project's likelihood of taking is further reduced.

BO at 2. Thus, these uncertainties were cited not to modify the finding of no likely jeopardy but rather to support and encourage the imposition of reasonable and prudent measures.

The BO proceeded to examine proposed reasonable and prudent measures to reduce the chances of incidental takes, suggesting changes to the timing of the work. The BO also asked for the completion of a trapping survey program in support of FWS' recovery plan.[44] The BO stated that because the jaguarundi was so secretive and so elusive, but inhabited similar areas to that of the ocelot, there was no need to study especially for the jaguarundi, but that study of the ocelot alone would be sufficient. *Id.* at 14. The BO then reiterated its earlier conclusion, "that the proposed action will not jeopardize the continued existence of the endangered Texas populations of the ocelot and jaguarundi." *Id.* at 16. The BO then continued on to say that an incidental take, within ESA section 9, would be allowed, pursuant to ESA sections 7(b)(4) and (o)(2). *Id.* at 17.[45] In the event of an incidental take, the BO required the reinstitution of consultation, without, however, requiring formal proceedings or project shutdown. *Id.*

d. *The Region's Consideration of Endangered Species Matters*

The Region issued its Final EIS for comment in January 1995. Region Exhibit 18. The FEIS' Summary describes the project proposal

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[44] The contractor originally retained to perform the biological assessment submitted by DRRC, had called for 9,000 trap-days of live trapping to see if either cat were present in the area. Such a trapping study is in accord with FWS' recovery plan for the ocelot which seeks to establish a trapping (and photo-documentation) program. *Listed Cats of Texas and Arizona Recovery Plan*, 1990, Region's Exhibit 1, at 30. At the time that the Region issued its DEIS, a live trapping program had gone on for 3,066 trap-days covering the project area and the most promising area, without trapping any ocelots or jaguarundi, although 14 bobcats were trapped, along with numerous non-felines. Region's Exhibit 2, Table 2, Summary of Trapping Efforts For The Period 9/29/93 - 11/11/93. DRRC did not complete the trapping program before the full 10-mile radius was surveyed. DRRC, based on its informal consultation with FWS, concluded that FWS considered the Site to be potential habitat, and that FWS' opinion would not change even if the survey were completed without trapping an ocelot or jaguarundi. FEIS at III-3. From DRRC's point of view, this made further trapping pointless.

[45] The BO notes, at that point, that the likelihood of a take is small, but unquantifiable.

(FEIS I-2) and the expected environmental consequences, including a notation that possible land use by ocelot and jaguarundi is a special problem (*Id.* at I-8). At pages 2-3 of the accompanying Table I-2, the Region sets out, in some detail, mitigation commitments for the endangered species.

The Region noted that its authority here is narrow, being limited to the decision on DRRC's NPDES permit application, and that that decision is restricted to issuing the permit (with various conditions), or denying the permit. However, the Region also noted that, while its authority here is limited, it is still required, by the applicable regulations, "to explore and evaluate reasonable alternatives, including those not within its jurisdiction." *Id.* at II-3. The Region stated that it believed that issuance of the NPDES permit for the project is likely to adversely affect the endangered ocelot and jaguarundi, and that FWS had issued a BO which did not entirely resolve the Region's concerns. However, the Region stated that it was obligated to issue a decision in any event, and committed to do so after receipt of comments on the FEIS. *Id.* at II-12 - II-13.

Finally, alternatives were discussed.[46] These were: not mining (rejected as not producing any benefit, but also because it would not guarantee protection of brush habitat from the actions of future landowners); not mining the Elm Creek corridor (rejected for economic infeasibility, losing 35 per cent of the coal reserves either directly or for lack of superior quality coal to blend with lower quality coal); mining another location (rejected for lack of another known economically viable location and because impacts on endangered species at another location are unknown);[47] and, moving the railroad right of way and mining under the current railroad track instead of Elm Creek (rejected for high cost, the need to obtain the consent of the Southern Pacific Railroad, and the impact on area landholdings by splitting them). *Id.* at III-24 - III-25.

In May of 1995, the Region issued its Record of Decision ("ROD"), which is the official name of the document that completes the EIS process. The ROD includes the Region's response to the comments it

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[46] The findings on alternatives are set out in the FEIS as if made by DRRC's Biological Assessment, rather than by the Region. However, the Region has stated that it has made an independent review of the material provided to it by DRRC to assure itself of accuracy. Reference to material from DRRC in the Region's FEIS process is a statement that the Region has verified the information and agrees with it, unless otherwise stated. FEIS at II-5. Hence, the findings on alternatives here are in fact the Region's findings, despite their unusual form.

[47] FWS also found no economically viable alternative to the project. BO at 9.

received on the FEIS, as well as an explanation of why the Region elected to issue the NPDES permit. The Region believed that ESA section 7 puts constraints upon the consultation process which limit the Region's ability to address concerns about "insufficient data and attendant uncertainties."[48] More significantly, the Region also determined that the missing information about the cat population is not essential to a reasoned decision on the issuance of the permit (ROD at 2-2 - 2-3)[49] and that the cat species would adjust to the effects of the project, even if unmitigated, without likely jeopardy to their continued existence (ROD at 2-16 - 2-17).

e. *The Region's Reliance Upon DRRC's Project Plans*

Even though the EIS process evaluated reasonable alternatives not within EPA's jurisdiction, in the Region's view the law limits the Region to deciding whether to issue or to deny the NPDES permit, and what conditions are authorized by the CWA to be included in the permit, citing to *NRDC v. EPA*, 859 F.2d 156, 168-170 (D.C. Cir. 1988) (holding that EPA may not include conditions in an NPDES permit that do not relate to water quality).[50] ROD at 2-2 - 2-3. The Region decided to issue the NPDES permit to DRRC for the project as altered as a consequence of the ESA consultation process.[51] The Region noted that had DRRC not

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[48] ESA section 7(b)(1) provides for time limitations upon the consultation process between the Region and FWS. 16 U.S.C. § 1536(b)(1). In general, the consultation process is not to exceed 90 days. In certain circumstances, FWS and the Region may agree to an extension of time such that the consultation period may reach 150 days in total. However, no extension beyond that time may be agreed to unless the consent of the applicant is previously obtained. ESA sections 7(b)(1)(B)(i), (ii). In this case, consultation consumed the initial 90 days, plus the additional 60 days that the Agencies could agree to between themselves, plus an additional period agreed to by DRRC, eventually totaling 167 days.

[49] Additional information on incidental takes of an endangered ocelot or jaguarundi, possibly derived from a trapping survey, would not actually affect the Region's decision on the issuance of an NPDES permit because the Region has already assumed that the cats utilize the riparian brush habitat. Confirmation of the Region's assumption by trapping one or two cats would therefore not change the decision to issue the NPDES permit. Neither would failure to trap any cats change the Region's decision. The Region has assumed that a take is likely in or after year 7 of the mining operation in any event. Hence, the Region would also not change the permit if no cats were trapped during the survey period.

[50] The Region notes that it could also impose more stringent effluent limitations. However, effluent limitations are not at issue here. *See* DEIS, at Table 1-2, p. 1 and at 3-3 - 3-4. "EPA has identified no need to impose limitations on the mine discharges to protect the designated uses of the Rio Grande." DEIS at 4-12. *See also* FEIS at II-11.

[51] DRRC formally alerted the Region to changes in DRRC's plans in a letter amending DRRC's NPDES permit application, dated May 2, 1995. Region's Exhibit 19. Among other things,

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accommodated ESA concerns in its project plans, the Region would probably have denied the permit for the project. *Id.* at 2-3.[52] If DRRC significantly changes its plans further, there will have to be a supplemental EIS and/or reinstitution of ESA consultation. *Id.* at 2-4.

As to alternatives, the Region agreed that it was required to address all reasonable alternatives, citing to 40 C.F.R. § 1502.14, which requires that an EIS done by EPA address alternatives in a thorough and rigorous manner. The Region then detailed the alternatives that it had considered as worthy of discussion. ROD at 2-5 - 2-6.

The Region supported its decision to issue the final NPDES permit by noting that the discharge is projected to meet all NPDES and CWA requirements. The Region found that the project provides substantial benefits and that all potentially significant adverse impacts of the project "are subject to regulatory controls and/or mitigation measures which reduce impacts to acceptable levels." *Id.* at 3-1.

3. *The Request For An Evidentiary Hearing*

The Petitioners thereafter requested an evidentiary hearing,[53] setting out the following points in support of the need for a hearing, Petitioners' Letter of July 6, 1995, at 3:

1. Whether relocation of the railroad right of way (and mining under it instead of Elm Creek) is a reasonable alternative;

2. There is an ambiguity in the BO as to whether the taking of one animal would jeopardize either species;

3. Whether the mitigation measures committed to by DRRC will really mitigate to an acceptable decree;[54]

DRRC committed to establish and maintain an alternative brush corridor prior to mining through the existing Elm Creek corridor (including specifications for the alternative corridor), to take interim steps to keep construction activity from affecting use of the existing Elm Creek corridor, to restore the Elm Creek corridor after mining (including specifications), and to install protective culverts and fencing.

[52] The replacement brush corridor is recognized to be experimental, without any guarantee of success. However, based upon the best available data, the effort is regarded as likely to succeed. Moreover, should the efforts fail, the Region will take action, including reinitiation of consultation with the Secretary. ROD at 2-3.

[53] Letter of July 6, 1995, supplemented by letter of August 14, 1995, copies attached to the Notice of Appeal and Petition for Review.

[54] *See* DRRC's permit application amendment of May, 2, 1995, Region's Exhibit 19, discussed in note 51, *supra.*

4. Whether EPA must act to protect the brush habitat as a required conservation measure.[55]

The Petitioners also raised as legal issues that the Region has incorrectly limited itself as to permit conditions which it might impose to protect the animals,[56] and that the grant of the NPDES permit will unlawfully lead to the taking of one or more animals and the jeopardization of a species.[57] The Petitioners have never claimed to have any independent evidence of their own to produce at a hearing on any of the issues raised. The Petitioners rest their assertion of the need for a hearing on the need to cross-examine the various agency persons who issued opinions on the fate of the endangered cats, so as to achieve "clarity."[58]

4. *The Appeal and Petition For Review*

The Petitioners' Notice of Appeal and Petition for Review ("NA") does not squarely track the Petitioners' Request for a Hearing. As a result, the Petitioners have raised matters in some instances that are new and not eligible for consideration on appeal. They have also abandoned some issues made in their evidentiary hearing request. The issues raised in the NA are as follows:

1. Petitioners once again allege that there are relevant issues of fact to be explored with respect to possible relocation of several miles of railroad right of way as an alternative to mining under Elm Creek. No specifics are provided as to the nature of the disputed facts. NA at 4-5.

2. The Petitioners assert in their appeal that a hearing is needed to address the factual accuracy of the finding that the project is not likely to jeopardize the continued existence of the ocelot and the jaguarundi in light of the alleged "inconsistency on the key issue of jeopardy * * * between the experts of the Fish and Wildlife Service and

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[55] This, while posed as a fact issue, appears to be a purely legal issue.

[56] Letter of July 6, 1995, at 3.

[57] Letter of July 6, 1995, at 1.

The Petitioners also alleged in support of their hearing request that the Region had incorrectly relied upon "mitigation" efforts in order to find that the project would not jeopardize the endangered species. Letter of July 6, 1995, at 1; Letter of August 14, 1995, at 3-4. The Region stated in its decision denying a hearing that it had not relied upon "mitigation" measures as part of its no jeopardy decision, citing to the record. Region's Denial, January 16, 1995, at 5-6. The Petitioners have not reasserted this claim in their Notice of Appeal and Petition for Review.

[58] Letter of August 14, 1995, at 2-3.

EPA staff."[59] Petitioners do not claim to have any evidence of their own to adduce, or to have any position on what would be the likely resolution of such a hearing, but assert that there is still a relevant issue of material fact involved in this aspect of the requested hearing. *Id.* at 2-3.

3. The Petitioners assert that the Region relied upon the success of the proposed "mitigation" measures when it issued the permit, but that the mitigation is experimental, requiring a hearing on likelihood of success.[60]

4. An additional claim in the NA, not present in the Request For a Hearing, is that the BO does not protect EPA from the ESA section 9 prohibition against a take of an endangered species. "EPA is prohibited from taking any action that would result in the taking of listed species" because the BO does not effectively authorize an incidental take for this project. Petitioners argue that the BO does not authorize any incidental takes because the Region has not required DRRC to comply with a "term or condition" for implementing the "reasonable and prudent measures" set forth in the BO (*i.e.* completion of the trapping survey). NA at 2.[61]

5. Lastly, in their appeal the Petitioners assert that ESA sections 2 and 7 require conservation efforts and that the Region is either required by law or should, as a policy matter, require resumption of a trapping program as a conservation measure. NA at 6-8.

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[59] The Petitioners assert that the Region supposed that the project, if unmitigated, would incidentally take one ocelot and/or jaguarundi, that the chance of a take of an ocelot or jaguarundi by the project, as mitigated, is unquantified, and that FWS had said that FWS could not state that the taking of even one individual would not jeopardize the continued existence of the species. This, say Petitioners, demonstrates inconsistency between the views of the Region and FWS as to possible jeopardy, mandating a hearing at which the agencies' experts may be cross-examined and observed.

[60] This is not the same as the Petitioners' prior assertion, when requesting a hearing, that the Region was relying upon "mitigation" to find no likely jeopardy. NA at 5-6. In the Request For a Hearing, Petitioners indicate that they "do not really care" about mitigation measures, except as the Region may have relied upon them in support of its no jeopardy determination, because they do not think that the measures will succeed. Letter of August 14, 1995, at 4.

[61] ESA section 7(b)(4)(C)(iv) provides that FWS may set out "terms and conditions" to implement its "reasonable and prudent measures" needed to minimize the impact of incidental takes. These "terms and conditions" must be met in order to obtain protection from the prohibition against takes set out in ESA section 9.

II. *ANALYSIS*

A. *Standard of Review*

The Petitioners seek reversal of the denial of an evidentiary hearing on the grant of an NPDES permit, raising alleged factual and legal disputes. Requests for hearings are governed by 40 C.F.R. §§ 124.74 and 124.76. The person requesting the evidentiary hearing must set out "each legal or factual question alleged to be at issue, and their relevance to the permit decision. * * * Information supporting the request * * * shall be submitted * * * unless they are already part of the administrative record." 40 C.F.R. § 124.74. "No issues shall be raised by any party that were not submitted to the administrative record * * * unless good cause is shown * * *." 40 C.F.R. § 124.76. Board review of the denial of such a hearing is governed by 40 C.F.R. § 124.91. That section requires that the petition for review contain a statement and supporting reasons showing:

> (i) A finding of fact or conclusion of law which is clearly erroneous.
>
> (ii) An exercise of discretion or policy which is important and which the Environmental Appeals Board should review.

There is no review, as a matter of right, from the denial of an evidentiary hearing, and the Board will not grant such a petition unless the denial is clearly erroneous or involves an important exercise of discretion or policy. *See In re City of Fort Worth*, 6 E.A.D. 392, 401 (EAB 1996); *In re Florida Pulp and Paper Association*, 6 E.A.D. 49, 51-52 and n.7 (EAB 1995); *In re J&L Specialty Products Corp.*, 5 E.A.D. 31, 41 (EAB 1994). EPA's policy is that NPDES permits should ordinarily be decided at the Regional level, with the Board exercising its power to review only sparingly. *Id.* The Petitioners bear the burden of demonstrating that review should be granted. *Id.*

Review by this Board of the denial of a request for an evidentiary hearing is governed by an administrative summary judgment standard, requiring the timely presentation of a genuine and material factual dispute, similar to Rule 56, Fed. R. Civ. P. *See Adams v. EPA*, 38 F.3d 43, 53 (1st Cir. 1994); *In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 780-82 (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 300 (1st Cir. 1994), citing to 40 C.F.R. §§ 124.74(b)(1) and 124.75(a)(1). In *Mayaguez*, we referred in particular to *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985), which states that, "[o]nly disputes over facts that might

affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." We have continued to follow the tests set out in *Mayaguez. In re City of Fort Worth*, 6 E.A.D. at 406 and n.17. In *Fort Worth,* we reiterated our rule that evidentiary hearings are appropriate only to resolve genuine disputes over facts which are material to the NPDES permit, *viz.*, disputes of fact which may affect the outcome of the permit proceedings.

Not only must a party opposing summary judgment raise an issue of material fact, but that party must demonstrate that the dispute is "genuine" by referencing probative evidence in the record, or by producing such evidence. *In re City of Fort Worth*, 6 E.A.D. at 406 n.17; *In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. at 782; *Hicks v. Southern Md. Health Systems Agency*, 737 F.2d 399, 402-03 n.4 (4th Cir. 1984). Summary judgment may not be avoided by merely alleging that a factual dispute may exist, or that future proceedings may turn something up. *United States v. Potamkin Cadillac Corp.*, 689 F.2d 379, 381 (2d Cir. 1982) (quoting *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980), "[T]he mere possibility that a factual dispute *may* exist, without more, is not sufficient to overcome a convincing presentation by the moving party."); *Contemporary Mission, Inc. v. U.S. Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981).

B. *The NEPA Process*

In carrying out its NEPA responsibilities, the Region, as is contemplated by statute and regulation, combined the NEPA and ESA processes into a single set of documents. For convenience, we first address those questions which are NEPA's alone.

1. *Relocation Of The Railroad*

The Petitioners argue that the Region did not spend enough time examining the possible alternative of relocating the railroad right of way which runs through the Site, so as to allow mining under the right of way instead of under the Elm Creek and brush corridor. The Region developed a sufficient record to show that the relocation would cost well over $10 million for construction alone, would result in a longer right of way, through rougher country, and would require the railroad to acquire, perhaps by condemnation, the interests of third parties in the needed land (dividing those holdings in two). This would all require the consent of the Southern Pacific Railroad, which is not a participant in the mining project, but which would ultimately have to maintain and use the new, less desirable, right of way. Additionally,

the best known coal reserves are under Elm Creek.[62] The coal in those reserves is superior and is needed to blend with inferior coal so as to meet the requirements of DRRC's contract with the power plant. DRRC estimates that loss of the Elm Creek corridor would mean loss of 35 per cent of the reserves at the Site. The Region had the obligation to examine this alternative, even though it could not effectuate it. The Region did so. Although it did not spend considerable time on this alternative, it was not obligated to do so because it is so unlikely. "'The concept of alternatives [under NEPA] must be bounded by some notion of feasibility.'" (brackets in original).[63] "[A]gencies are not required to consider alternatives that are 'remote and speculative.'" (citation omitted). *NRDC v. Hodel*, 865 F.2d 288, 295 (D.C. Cir. 1988) (EIS for Outer Continental Shelf Act oil leasing, discussion of conservation alternative). "NEPA does not demand a full discussion of land use alternatives 'whose implementation is deemed remote and speculative.'" (citation omitted). *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 988 (9th Cir. 1988) (no EIS required for permit to take endangered butterflies); *cf. In re Spokane Regional Waste-To-Energy,* 2 E.A.D. at 816-17 (A permit for air emissions from a waste incinerator was challenged for insufficient attention to alternative technologies. In a discussion parallel to NEPA consideration, it was held that the agency's "response can be in proportion to the substantive merit of the comments."); 40 C.F.R. § 1502.2(b).

The Petitioners neither produced any evidence to support a conclusion that the right of way relocation was a promising line of inquiry, nor did they indicate where such evidence was to be found. The Region's treatment of the relocation alternative fully meets the "rule of reason" standard for consideration of alternatives under NEPA. *See In re Spokane Regional Waste-To-Energy,* 2 E.A.D. at 816- 817; *In re Louisville Gas and Electric Company*, 1 E.A.D. 687, 694-95 (JO, Sept. 24, 1981) (An EIS drafted for an NPDES permit for a power plant was challenged for inadequate attention to an alternative smaller plant, based upon an additional season's power consumption data. It was held that the agency was reasonable in not waiting for another season's worth of data before issuing the EIS.); *Roosevelt Campobello Intern. Park v. EPA*, 684 F.2d at 1047; *NRDC v. Hodel*, 865 F.2d at 294-95; 40 C.F.R. § 1502.2(b).

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[62] There does not appear to be any evidence in the record relating to the quantity or quality of coal under the railroad right of way.

[63] Citing to and quoting from *Vermont Yankee Nuclear Power Co. v. NRDC*, 435 U.S. 519, 551 (1978).

2. *Permit Conditions*

The Petitioners suggest that the Region should have used the information it developed in the NEPA process to attach conditions to the NPDES permit here. The Region was charged here with the grant or denial of an NPDES permit, allowing DRRC's mining operation to discharge to waters of the United States within the project area. Nowhere in the course of these proceedings has it been seriously contended that the discharges being permitted will have any impermissible impact upon water quality in contravention of the CWA. The problem being raised here is that the project, which needs the NPDES permit in order to operate lawfully, allegedly will have a significant impact upon two endangered species of cat. However, that impact will arise from the removal of brush habitat along Elm Creek. The removal (and the restoration) of the brush, and Elm Creek, is governed by a State surface mining permit. The filling and removal of Elm Creek is governed by a permit issued by the Corps of Engineers.[64]

Nothing in NEPA gives to the Region the power to put conditions into the NPDES permit here which have nothing to do with discharges to Elm Creek. *NRDC v. EPA*, 859 F.2d 156, 168-70 (D.C. Cir. 1988). However, the Region may take all of the environmental consequences of the project into account in deciding whether or not to issue the permit:

> EPA can properly take only those actions authorized by the CWA–allowing, prohibiting, or conditioning the pollutant discharge * * *.
>
> This is not to say that EPA lacks authority to take action in the wake of its NEPA-mandated review. To the contrary, it can deny a new-source permit on NEPA-related grounds or impose NEPA-inspired conditions on *discharges* that the agency determines to allow.

NRDC v. EPA, at 169-70 (emphasis in original, citations omitted).[65]

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[64] As required by 40 C.F.R. § 1502.25(c), EPA has noted and listed the numerous permits which this project will need to have. FEIS Table I-2 at 5.

[65] The decision in *NRDC v. EPA* uses the term "discharge" without addressing how broad that term and related terms may be. EPA has defined the scope of its NPDES authority to impose effluent limitations very broadly. As we recently noted in *In re District of Columbia, Department of Public Works*, 6 E.A.D. 470, 476 and n.8 (EAB 1996):

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Additionally, 40 C.F.R. § 122.29(c)(3) provides that:

> The Regional Administrator, to the extent allowed by law, shall issue, condition * * *, or deny the new source NPDES permit following a complete evaluation of any significant beneficial and adverse impacts of the proposed action and a review of the recommendations contained in the EIS * * *.

The Region noted that it could have denied the NPDES permit on ESA grounds had there been evidence to support such a decision. If the project would have violated the ESA, the Region would have been required to deny the permit. *TVA v. Hill*, 437 U.S. 153 (1978).

As noted above, when the Region did issue the NPDES permit it expressly relied upon the representations made by DRRC about the plan of work for constructing, operating, and reclaiming the mine. These were essential predicates for the Region's decision to grant the permit. The Region, while not incorporating DRRC's plans into the NPDES permit, issued the permit based upon DRRC's project plans as modified to address the environmental and endangered species concerns raised during the EIS and ESA processes. If DRRC changes its project plans significantly, a new project would be created, DRRC would have to apply for a new NPDES permit, and there would be a supplemental EIS and a new ESA consultation. ROD at 2-4.[66] In other words, the Region took into account more than just the impacts of discharges to the relevant waters here. It took into account all of the known environmental issues. That is all that NEPA requires.[67]

The Agency has defined "effluent limitation" to mean:

> [A]ny restriction imposed by the Director on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean.
>
> 40 C.F.R. § 122.2. The Agency's definition was upheld on appeal in *American Iron & Steel v. EPA*, 543 F.2d 521, 526 (3d Cir. 1976).

Thus we interpret the reference in the *NRDC* case as intending to describe what is regulated under the NPDES program and in no way limiting the broad definition of what form such regulation might take.

[66] *See also* 40 C.F.R. § 1502.9(c)(1)(ii).

[67] The Region had no obligation to keep the NEPA process and decision-making open indefinitely for ever more study. *Vermont Yankee Nuclear Power Co. v. NRDC*, 435 U.S. 519, 554-55 (1978).

The Region correctly dealt with the NEPA aspects of the NPDES permit process. The Petitioners did not raise any genuine or material issue of fact requiring a hearing on any NEPA issue.

C. *The ESA Process*

As noted above, ESA's requirements, unlike those of NEPA, are substantive, and require the Region to give priority to the endangered species of felines involved here, after going through a prescribed consultation process.

1. *Jeopardy Assessment*

Procedurally, this matter began to move through the ESA process when DRRC noted the possible presence of the ocelots and jaguarundi and began the consultation process by preparing a biological assessment.[68] This gave rise to formal consultation, under section 7 of the ESA, between EPA and FWS. As required by ESA section 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A), at the end of the consultation period, FWS provided to the Region, and to the applicant, FWS' "biological opinion" or BO. FWS found, in its formal biological opinion, that the project would not be likely to jeopardize the continued existence of the endangered cats. *See* discussion at footnotes 37-42, *supra*, and accompanying text. The Region, as is required by law, made its own analysis, and reached the same conclusion.[69]

The ESA issues raised by the Petitioners are several. The first is whether the ESA process resulted in an ambiguity relating to likely jeopardy to the continued existence of the two endangered species, resulting from this project, and, if so, whether that ambiguity gave rise to a genuine issue of material fact, requiring a hearing.

The second issue is whether the Region should have issued the NPDES permit in the face of the BO's requirement of completion of the trapping survey as a "term and condition" implementing the "rea-

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[68] This was required by ESA section 7(c), which requires that there be a biological assessment, and that it be performed within 180 days. Section 7(c)(1). The biological assessment may be performed by the applicant in cooperation with FWS and under the supervision of the agency, here the Region. ESA section 7(c)(2). The biological assessment should not be confused with FWS' biological opinion.

[69] Once consultation has been completed, it is the responsibility of the action agency, here the Region, not FWS, to determine whether, and how, to proceed with the proposed action in light of the biological opinion. *See Roosevelt Campobello Intern. Park v. EPA*, 684 F.2d at 1049; *National Wildlife Federation v. Coleman*, 529 F.2d 359, 371 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1303-04 (8th Cir. 1976); 50 C.F.R. § 402.15(a).

sonable and prudent measures" required to minimize the impact of incidental takes.

The third issue is is whether the Region had to do more to assure itself that "mitigation" efforts would be successful.

The fourth issue is purely a legal issue, whether the Region had an affirmative conservation duty to require completion of a trapping survey.

a. *The Region's Decision*

The Region, in its denial of a hearing, noted that DRRC proposes to mine through three miles of dense brush on Elm Creek. "[S]uch riparian brush provides habitat and dispersal corridors for ocelots and jaguarundi, feline species FWS lists as endangered under ESA." Region's Denial ("Denial"), January 16, 1995, at 1. The Region further noted, at 1-2 (citations to record omitted), that:

> Region 6 found the riparian brush was probably used as a dispersal corridor by both cat species and by one or two jaguarundi as home range. It further found that unmitigated destruction of that riparian brush would be unlikely to jeopardize the continued existence of either species, but would foreseeably result in incidental "takes" of cats traversing the area *via* other less desirable routes or using the existing brush to rear kittens. To minimize those takes, Region 6 obtained commitments from DRRC to construct an "upland bypass" brush corridor for use by dispersing cats, to adopt certain management practices to avoid takes during brush clearing operations, and to replace the riparian brush corridor when mining ceases.

The Region went on to reject the Petitioners' request for a hearing because the Petitioners had failed to raise any issues of genuinely disputed fact which might affect the decision here. Denial at 2. The decision continues by noting that, while "FWS injected a note of ambiguity in the no jeopardy BO * * * by stating 'the Service cannot say that the loss of a single individual would not be likely to jeopardize the continued existence of these populations,'" the Petitioners do not claim that the Region necessarily reached an incorrect no likely jeopardy decision. Rather, they only seek to "clarify" whether that no likely jeopardy decision was correct or incorrect. Thus, the question of whether the Region should have held a hearing on jeopardy issues includes the question of whether FWS' statement of opinion consti-

tutes a basis for alleging that there is a genuine issue of material fact. The Region also decided that holding a hearing solely to resolve an alleged ambiguity in FWS' BO would constitute a renewed consultation with FWS in violation of the time limits of ESA section 7(b)(1)(B)(ii). *Id.* at 3.[70]

Turning to the details of the Petitioners' claim, the Region noted that it had been obligated by the ESA to issue a jeopardy opinion on the available evidence, and had done so, finding that the unmitigated loss of the brush was unlikely to jeopardize either species. In so doing, the Region found that one or two jaguarundi likely used the brush as habitat, but that ocelots did not, and that resident cats would adjust to the project. Denial at 4. The Region followed these observations by pointing out that, as a matter of fact, it had therefore not relied upon mitigation in its no jeopardy decision.[71] *Id.* at 5-6.[72]

b. *The Petitioners' Appeal*

The primary focus of the Petitioners' challenge to the NPDES permit before the Region, and in the Petitioners' appeal, is the alleged disagreement between FWS and the Region, based upon FWS' allegedly ambiguous statement. However, contrary to the contentions of the Petitioners, FWS and the Region do not disagree on any material point. The Petitioners point to FWS' language about being unable to say that the loss of even one animal would not jeopardize the cats. However, FWS' formal biological opinion found that there was no likely jeopardy to the existence of either endangered species here, the same finding made by the Region.[73] Neither is there any material ambiguity in any decision by either the Region or FWS.

It must be borne in mind that there is not a great deal of information about these cats in general, and even less about them in the

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[70] Because we find that a hearing is not required, we do not address the Region's argument that such a hearing would constitute renewed consultation in contravention of the ESA.

[71] Petitioners appear to have accepted this and have not asserted on appeal that the Region's no likely jeopardy opinion rests upon mitigation efforts.

[72] The Region also rejected the Petitioners' claim that the ESA required that more be done to "conserve" the cats, pointing out that after the project there would be more habitat than at present. Denial at 7-8.

[73] While not binding upon the action agency, FWS BOs are entitled to substantial deference. *See Roosevelt Campobello Intern. Park v. EPA*, 684 F.2d at 1049. FWS' no likely jeopardy conclusion carries significant weight.

area of the project.[74] However, the information that was available was collected and carefully considered by experts. In the end, FWS and the Region are required to take action utilizing the information that is available to decide, even if that information is only modest in amount. But decide they must. Additionally, the Region and FWS are required to give the benefit of the doubt to the endangered animals. *Roosevelt Campobello Intern. Park v. EPA*, 684 F.2d at 1049; 52 Fed. Reg. 19952 (June 3, 1986).

A definite yes or no conclusion is required by statute and regulation as to *likely* jeopardy. As noted, FWS definitely found no likely jeopardy in its formal biological opinion. BO at 2, 16. However, since FWS could not state with absolute certainty what the effect of a take would be, it suggested that the Region ensure implementation of reasonable and prudent measures to reduce the likelihood of a take. That is precisely what the Region did through mitigation measures, designed to minimize the chance of incidental takes of the endangered cats, that have been incorporated into the project plans. *See* discussion at section 'I.B.2., *supra*, subsections b. *FWS' Biological Opinion on Likely Jeopardy*, c. *FWS' Additional Comments On The Impact of Incidental Takes*, and e. *The Region's Reliance Upon DRRC's Project Plans.*

The Region's task, as the action agency, was to decide what to do. The Region also had to give the benefit of the doubt to the animals. It did this by assuming that there were endangered cats present,[75] that the project, if not mitigated, would result in an incidental take of at least one animal, and by requiring that mitigation efforts be included in the project plans. There may be some differences in language and form between FWS' opinion and that of the Region, but there is, at bottom, no disagreement between the Region and FWS on any essential point. It is absolutely clear that the agencies agree that the project is *not likely* to jeopardize the continued existence of the endangered ocelot and jaguarundi. BO at 2, 16; ROD at 2-16 - 2-17.

FWS' statement as to its inability to state with certainty the effect of the take of a single animal is a statement of opinion (as is the formal biological opinion) rather than a fact, which does not give rise to a genuine issue of material fact. Petitioners are unable to point to any

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[74] "In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." ESA section 7(a)(2).

[75] This view is in accord with FWS' letter of January 14, 1994, DEIS Appendix D, and does not reflect any difference of opinion between FWS and the Region.

alleged specific fact in dispute here, much less a factual dispute whose resolution could change the result here. There being no disagreement on the essential facts, Petitioners' assertion that there should be a hearing to achieve clarity is not well taken.

Neither FWS nor the Region were obligated to conduct still more fact-finding before reaching their no likely jeopardy opinions here merely because there was not a great deal of evidence for the agencies to rely upon. A reasoned ESA conclusion of no likely jeopardy may be reached even though evidence is "weak," if it is based upon analysis and opinion of experts and employs the best evidence available. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336-37 (9th Cir. 1992) (suit to enjoin fishing season based upon possible injury to endangered sea lion, dismissed where Secretary had acted based upon best but admittedly limited information); *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d at 1415 (suit to block certain land and water use practices as jeopardizing protected species, dismissed where the Navy's actions were based upon best but weak information). It was the Petitioners' responsibility to come forward with additional evidence, if such evidence was known to them. The Region was correct in not holding a hearing on the issue of no likely jeopardy to the continued existence of the ocelot and the jaguarundi from this project as there were no genuine disputes of material fact raised by Petitioners.

2. *Reasonable and Prudent Measures or Mitigation*[76]

There are two possible concerns with reasonable and prudent measures which Petitioners seek to raise in their appeal. The first is that the Region should not have issued the NPDES permit because it did not require the completion of a trapping survey, a "term and condition" required to implement the "reasonable and prudent measures." The second is that the Region did not do enough to assure itself that the reasonable and prudent measures, or mitigation, would be effective. We turn first to the trapping survey.

a. *Completion of a Trapping Survey*

Having found the possibility that there would be an incidental take, FWS was required to pass upon whether an incidental take would be acceptable, and to set forth reasonable and prudent mea-

[76] Mitigation is commonly used as a term describing NEPA alternatives. *Cf. Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352. In this case, ESA reasonable and prudent measures and NEPA mitigation are largely, if not entirely, the same factual concerns.

sures necessary or appropriate to minimize the impact of incidental takes. ESA section 7(b)(4); 50 C.F.R. § 402.14(i)(1)(ii). FWS considered the matter, expressly found that an incidental take would be allowed, and set out reasonable and prudent measures to minimize the impact of incidental takes. Any take which is authorized in the BO is not prohibited and no other authority is required for that take. ESA section 7(b)(4); 50 C.F.R. § 402.14(i)(5). The Petitioners are incorrect if they mean to imply that ESA section 9 compels a different result.[77] Incidental takes which are allowed under ESA section 7 are also allowed under ESA section 9.[78] *Babbitt v. Sweet Home Ch. Of Commun. For Great Or.*, 115 S.Ct. 2407, 2412, 2415 and n.17 (1995). In fact, incidental takes of just the kind here at issue, by habitat modification, were expressly foreseen by Congress as a reason for the 1982 amendments to the ESA, and are intentionally allowed. *Id.* at 2417-18.

Moreover, the Petitioners do not actually point to any reasonable and prudent measure which the Region has failed to implement. The Petitioners instead assert in their appeal, for the first time, that the Region has failed to observe a term and condition which FWS has required as part of its BO implementing the reasonable and prudent measures under ESA section 7(b)(4)(iv),[79] namely completion of a trapping survey. This claim was not raised before the Region. The Petitioners raised neither the trapping survey nor the "terms and conditions" provision of the BO in their request for an evidentiary hearing. This is dispositive, as alleged factual issues must be fairly raised before the Region in the request for an evidentiary hearing, or they are not preserved for appeal to this Board, *In re Sequoyah Fuels Corp.*, 4 E.A.D. 215, 218 (EAB 1992):

> The rules set forth in 40 CFR Part 124 are intended to ensure that the Region has an opportunity to address

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[77] As used in the ESA, "person" is defined by section 3(13) to include Federal agencies and employees, and, as noted above, "take" is defined by section 3(19) to include, among other things, to harm, trap, or kill, or, to attempt to harm, trap, or kill. 16 U.S.C. § 1532(19).

[78] The ESA regulations do provide separate definitions for Federal and non-Federal incidental takes. An incidental take is generally defined, under ESA section 9, as "any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 50 C.F.R. § 17.3. However, an incidental take, in the context of Federal agency action within ESA section 7, is separately defined as referring to takes that result from, but are not the purpose of, the carrying out of an otherwise lawful activity conducted by a Federal agency or applicant. 50 C.F.R. § 402.02.

[79] Reasonable and prudent measures, and the terms and conditions to implement them, cannot alter the basic design, location, scope, duration, or timing of the project, and may only involve minor changes. 50 C.F.R. § 402.14(i)(2).

> any concerns raised by the permit, thereby promoting the Agency's longstanding policy that most permit issues be resolved at the Regional level. * * * To preserve an issue for appeal, the petitioner must also raise that issue in its request for an evidentiary hearing.

b. *Assurance of Successful Mitigation*

Aside from the refusal to require the trapping survey as a mitigation measure, the Petitioners do not point to any impropriety in the mitigation measures adopted for use in the project, except for the fact that the measures lack certainty of success. However, neither the ESA nor NEPA require that mitigation measures be certain to succeed.[80] FWS, after finding that the likelihood of a take in the project as mitigated was unquantifiable, asked the Region to reinstitute consultation if it becomes clear that there has been a take of an animal. The Region has agreed that reinstitution of consultation is required in that event. Region's Response To Notice of Appeal and Petition for Review at 27.[81] The requirement of reinstitution of consultation in the event of a future take, and the Region's commitment to take remedial action, is all that the ESA or NEPA might be construed to require. The Petitioners do not point to any contrary evidence, and do not allege that they have any evidence to produce upon this point. Thus, there is no genuine dispute as to a material fact which would warrant an evidentiary hearing on the likelihood of success of mitigation measures.

3. *Conservation*[82]

The Petitioners make an additional argument for completion of the trapping survey, that it should be completed as a conservation measure. They argue that this is legally required by the ESA, or alter-

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[80] The Petitioners do not make clear whether they regard this as a legal or a factual issue. It appears to be primarily a factual issue. To the extent that they mean it to be a legal issue, then we note that it has been held that ESA mitigation plans are held to the same standard as no likely jeopardy opinions, *i.e.* they may be based upon a careful study of whatever evidence is available, and need not have a high degree of certainty of success. *Greenpeace Action v. Franklin*, 14 F.3d at 1337. *See also* the similar NEPA standard for mitigation plans, *id.* at 1335.

[81] Reinstitution of consultation may be required in the event of an incidental take here. *See* 50 C.F.R. §§ 402.14(i)(4) and 402.16, which require reinstitution of consultation when takes exceed expectations or when new evidence becomes available.

[82] To "conserve" is defined in ESA section 3(3), in part, as "to use * * * all methods and procedures which are necessary to bring any endangered species or threatened species to the point where the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3).

natively, should be required as a matter of policy.[83] Conservation is different from avoiding likely jeopardy or from applying reasonable and prudent conditions. Avoiding likely jeopardy and applying reasonable and prudent conditions seek to avoid damaging the survival prospects of endangered species. Conservation activities seek to bring an endangered species back to an improved condition, further from extinction. ESA section 3(3), 16 U.S.C. § 1532(3). The ESA clearly puts conservation responsibilities upon Federal agencies, chiefly the Department of the Interior.[84] ESA sections 2, 5, and 7(a)(1); *see Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 261 and n.3 (9th Cir. 1984), *cert. denied*, 470 U.S. 1083 (1985).

The ESA directs agencies to use their authorities to conserve endangered species. However, the legislative history makes it clear that each agency's actions under the ESA are only to be undertaken within the area of that agency's jurisdiction. H.R. Rep. 95-1625, 95th Cong. 2d Sess. 20, *reprinted in* 1978 U.S.C.C.A. 9470. The ESA does not expand an agency's jurisdiction or powers beyond those set out in its enabling act. *Platte River Whooping Crane Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (unsuccessful suit to compel FERC to add conditions to operating license in excess of Agency's enabling act powers, based instead upon ESA conservation provisions). Nothing in EPA's enabling Act, or in the ESA, provides EPA with general power or authority to carry out the Secretary's recovery plan for the ocelot and jaguarundi, which would include a trapping or photographic survey of those endangered animals. Neither does this particular project give rise to some incidental EPA power to perform or require such a survey. The only specific power being exercised here by EPA is the Region's power to issue an NPDES permit for discharges incidental to operation of a surface mine. As noted above, there being no issues related to discharges, that power only involves the grant or denial of a permit. The Region was correct in deciding that it lacked authority to *require* DRRC to complete the trapping survey as a conservation measure, although the Region did *recommend* the trapping survey as

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[83] FWS has not expressly asked that the trapping survey also be considered as a conservation measure. However, FWS mentions the trapping survey in its discussion of conservation measures, BO at 20. Even if this reference were considered to be a recommendation, an FWS request to complete the trapping survey as a conservation measure would not be a binding recommendation, but would only be advisory. *See* 50 C.F.R. § 402.14(j).

[84] We note that the conservation issues here are entirely legal questions. *See In re City of Fort Worth*, 6 E.A.D. at 403 n.12 ("Because these two issues are purely legal in nature, the Region did not clearly err in denying [the] request for an evidentiary hearing on these issues"); *In re Town of Seabrook*, 4 E.A.D. at 817 ("legal issues 'cannot themselves provide a basis for an evidentiary hearing, a process reserved for factual issues.'")

a conservation measure (ROD at 2-23).[85] Since the Region lacks the legal authority to require the trapping survey, it clearly cannot require it as a matter of policy.

III. *CONCLUSION*

For all the reasons set forth above, review of the denial of the request for an evidentiary hearing is denied.

So ordered.

[85] DRRC has committed to completion of the trapping survey. Amended Permit Application of May 2, 1995, Ex. 19. The BO makes completion of the trapping survey a condition of its authorization of incidental takes. BO at 19. If DRRC wishes to be protected from the consequences of an incidental take in violation of ESA section 9, it will carry out its commitment to complete the trapping survey. Certainly, the Petitioners offer no evidence, or reason to believe, that the trapping survey will not in fact be completed.