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*protect the best,  
restore the rest*

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October 14, 2008

Public Comment Processing  
Attention: 1018-AT50  
Division of Policy and Directives Management  
U.S. Fish and Wildlife Service  
4401 North Fairfax Drive, Suite 222  
Arlington, VA 22203

Re: Proposed Rule – Interagency Cooperation Under the Endangered Species Act

Dear Fish and Wildlife Service and National Marine Fisheries Service:

The Endangered Species Act (ESA) provides crucial protections for sensitive species that depend upon rivers and watersheds. As an organization dedicated to the protection and restoration of rivers and watersheds, Pacific Rivers Council objects to the proposed regulations set forth in the August 15, 2008, Federal Register (73 Fed. Reg. 47868), to the extent that they diminish existing procedural and/or substantive protections for listed species.

As you know, the ESA requires each Federal agency to “*in consultation with and with the assistance of the Secretary*,” insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.” 16 U.S.C. § 1536(a)(2) (emphasis added). The proposed regulations are not consistent with the language and intent of the ESA because the ESA does not authorize the exclusion of FWS or NMFS from an action agency’s evaluation of whether a project it proposes will jeopardize listed species or adversely modify their critical habitat.

The Services’ attempts to remove themselves from the consultation process do a disservice to the species these agencies are charged with protecting, and these attempts are not consistent with the intent of the ESA. “It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall *utilize their authorities in furtherance of the purposes of this Act*.” 16 U.S.C. § 1531(c)(1) (emphasis added). FWS and NMFS must do all that they can within their own authorities to protect and conserve listed species. Obviously, abdicating authorities to ensure that agency actions do not jeopardize listed species or adversely modify critical habitat does not further the purposes of the ESA.

The consultation process is critical because it allows the agencies charged with protecting listed species to take an objective look at the impacts of a proposed project. If a project is slowed because of its potentially detrimental impacts to listed species, then the ESA is doing what Congress intended, it is protecting those species. The process might seem burdensome to action agencies, but that is because the process is doing its job. Processes that are designed to potentially

place restrictions on what an agency proposes are naturally going to cause disagreement. That does not mean that the process should be eliminated.

We particularly object to two aspects of the proposal. First, the proposal to exclude the activities listed under proposed section 50 CFR § 402.03(b)(2) and (b)(3) from consultation does not comply with the plain language of the ESA. The Services' role under the ESA is explicitly to make sure that action agencies are properly concluding that their actions will not cause jeopardy or adversely modify habitat. The ESA may not define "consultation," but consultation plainly cannot include the Services removing themselves entirely from the evaluation of an action's effect. If the Services are not involved at all, then the action agency is obviously not consulting with the Services. The ESA does not make exceptions for specific circumstances when consultation is not required, nor does it provide the Services with the authority to make those exceptions through regulations. A decision that an agency's effects have some effects, but that those effects are "tantamount to no effect" must be confirmed by the Services.

Second, although deadlines for informal consultation are appropriate, the remedies for the Services' failure to comply with those deadlines are not. As proposed, the burden from the Services' failure to meet deadlines would fall upon listed species. Such a proposal clearly does not further the conservation of listed species. If a slow consultation process delays a proposed action, the action can still be carried out later. If on the other hand, the action goes forward without consultation and causes adverse impacts, those impacts cannot be reversed. The penalty for inaction must fall on the Services, not on listed species.

Thank you for your consideration.  
Sincerely,

A handwritten signature in black ink, appearing to read "Bronwen Wright". The signature is fluid and cursive, with a large initial "B" and a long horizontal stroke.

Bronwen Wright  
Policy Analyst and Attorney