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November 6, 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: Draft Environmental Assessment for the Proposed Modifications to Regulations Implementing Interagency Cooperation Under the Endangered Species Act

Dear Fish and Wildlife Service and National Marine Fisheries Service:

Thank you for the opportunity to comment on the Draft Environmental Assessment on the proposed rule revising regulations implementing section 7 of the Endangered Species Act (ESA). We previously submitted comments on the proposed regulations as set forth in the August 15, 2008, Federal Register (73 Fed. Reg. 47868).

This letter speaks specifically to the proposed modification of 50 C.F.R. § 402.03, "Applicability." We disagree with the Fish and Wildlife Service and National Marine Fisheries Services' (Services) conclusion that the proposed changes to this regulation will not result in any significant environmental consequences. The Services have no supportable basis upon which to make this conclusion, and by making this conclusion, the Services undermine Congressional intent with respect to the ESA.

The essential problem with the proposed changes is that the Services are attempting to do something that the plain language of the ESA does not allow: the Services are trying to pull out of the consultation process in certain circumstances for efficiency reasons. The ESA, however, does not give the Services the discretion to change the consultation process in this manner, regardless of whether the Services believe the proposed process would be more efficient.

As the EA itself cites, each "Federal agency shall, *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 plain language of the ESA makes clear Congressional intent with respect to agency determinations about the effects of their actions on listed species: *the Services must be consulted*. Nothing in this language allows Federal agencies to make jeopardy determinations *without first consulting the Services*. Nothing in this language permits the Services to waive the requirement that agencies consult with the Services. The Services have argued that consultation is not defined by the ESA, but a Federal agency's decision to seek no opinion from the Services clearly cannot fall within any reasonable definition of "consultation with" the Services. See *TVA v. Hill*, 437 U.S. 153 (1978) ("one would be hard pressed to find a statutory provision whose terms were any plainer than those in Sec. 7 of the Endangered Species Act.")

In fact, the EA admits that it is the Services' intention to excuse compliance with the specific requirements of the ESA, rather than to develop a new process that would be consistent with these requirements and would fall within the meaning of "consultation." The EA explains that the proposed regulations would allow "cases where action agencies do not choose to enter consultation with the appropriate Service." EA at 24. The ESA plainly does not give the action agency a choice whether to enter consultation, and the EA does not argue that such an action agency's "choice" would fall within the meaning of "consultation with" the Services.

Finally, we object to the Services' characterization of the proposed changes as purely "process modifications" (EA at 25) that would cause no substantive changes in the level of species protection (EA at 13, 19). A Federal agency's failure to consult with the Services may indeed reduce protections for listed species because the Services will not provide oversight to ensure that agency conclusions about the effects of their actions are sound. Congress has already decided that the Services' involvement in agency action decisions about jeopardy and adverse modification is necessary. The ESA's procedural standards were put in place precisely to ensure that the substantive standards are met.

[T]he strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions. The ESA's procedural requirements call for a systematic determination of the effects of a federal project on endangered species. If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible.

Thomas v. Peterson, 753 F.2 754, 764 (9th Cir. 1984).

Without substantial compliance with the procedural requirements of the ESA, the Services also cannot provide any assurance that substantive, substantial effects on the environment, which must be disclosed under NEPA, will not occur.

Thank you for your consideration.
Sincerely,



Bronwen Wright
Policy Analyst and Attorney

cc (via email or fax): Senators John Kerry, Barbara Boxer, Chris Dodd, Sheldon Whitehouse, Hillary Clinton, Bernie Sanders, and Frank Lautenberg;
Congressmen Norm Dicks and Nick J. Rahall;
President-elect Barack Obama