



The Otter Project

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To: U.S. Interior Secretary Dirk Kempthorne
C/O U.S. Public Comment Processing
Attn: 1018-AT50 Division of Policy and Directives Management,
U.S. Fish and Wildlife Service
4401 North Fairfax Drive Suite 222
Arlington, VA 22203

Sent via regulation.gov

October 13, 2008

Dear Secretary Kempthorne,

On behalf of the Otter Project, I would like to offer comments on the proposed changes to the Endangered Species Act (hereafter known as the Act) that target the existing consultation process under section 7 of the Act. The Otter Project is a 501(c)(3) listed nonprofit that exists to promote the rapid recovery of the California sea otter, an indicator of near-shore ocean health through science based advocacy and the facilitation and communication of research to the public and public policy-makers. The California sea otter is listed as threatened under the Act.

The Otter Project stands in opposition to the proposed changes. We believe that the proposed changes will only serve to weaken the ability of federal agencies to make the decisions that will protect America's wildlife under the ESA.

Under existing policy, any federal agency that authorizes activities that may affect a listed species must consult with either Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) before taking any action. (Reflecting the language used in the proposed rule change in the Federal Register/Vol. 73, No. 159/Friday, August 15, 2008, 'the Service' will be used to refer to FWS and NMFS collectively.) This oversight ensures that agencies that are not staffed with wildlife specialists familiar with the needs of endangered species do not unwittingly carry out activities that could jeopardize the continued existence of the endangered species in question. The proposed regulation changes are based on the belief that the existing procedure is "burdensome" on federal agencies. Current regulations mandate that an agency must consult with the Service to determine whether their proposed action will affect any listed species. The agency must consult with the Service if their action "may affect" a listed species or critical habitat. In an effort to make the ESA less "burdensome" on these agencies, the

Secretary is proposing to allow a Federal agency to make a “not likely to adversely affect” determination without consulting the Service. The following points are used to justify the proposed changes:

1. The changes would reduce unnecessary consultation by allowing the Federal agency to determine the impacts of its actions on an endangered species (Federal Register, p. 47871)
2. Federal agencies have had years of experience dealing with the ESA and are therefore equally well equipped to deal with its requirements as the Service (Federal Register, p. 47871)
3. A GOA report suggested that the process of interagency collaboration under section 7 consultations had been cause of disputes in the past, and could be streamlined to resolve disagreements about when consultation is needed (Federal Register, p. 47869)
4. Regulatory changes must be made in regard to the new challenges faced by climate change (Federal Register, p.47869)

With regard to the stated justifications, The Otter Project does not believe that the Secretary has made a good case for the changes for the following reason:

1. Stating that the proposed rule change would reduce unnecessary consultation by allowing Federal agencies proposing projects to determine the impacts of their own actions 1) is biased 2) falsely suggests that the proposed changes would result in more efficient procedure and more efficient use of resources, 3) assumes an unsubstantiated level of wildlife knowledge from Federal Agencies 4) obfuscates the time-honored tradition of transparency and public input and 5) sets agencies up for a series of loopholes that would allow them to circumvent the ESA entirely.

The notion that the changes would reduce *unnecessary* consultation is biased and false. By using the word *unnecessary* the Secretary is casting a negative judgment on a process that has in fact had many benefits. In fact, requiring consultation from the Service provides federal agencies with information regarding the impacts of their projects that they may not have access to otherwise. Not all federal agencies are staffed with biologists, ecologists, or wildlife specialists capable of advising planners on the complex relationships between species and their habitat. Asking Federal agencies to make decisions determining how their actions will affect a species or ecosystem about which they may know nothing about would be like asking FWS to oversee the planning of a new highway system. Although experts from other agencies might be able to make educated guesses about the affects of their proposed actions on species and species habitat, they are no more likely to understand the intricacies and details of a system as is an average person off the streets. It is simply outside of the realm of their expertise.

According to NMFS, there are approximately 1,930 species listed under the ESA; it would be unreasonable to expect staff from other Federal agencies to have the resources and expertise necessary to accurately assess the impact of an action on such a wide variety of listed species. The Secretary makes the argument that the proposed rule change will cut out onerous and unnecessary procedure; we argue that not utilizing the federally staffed wildlife experts to make decisions like this would in fact serve to make this decision making process either 1) less

efficient or 2) less accurate. By removing the need for consultation upon determining that an action is an “insignificant contributor”, the Secretary is requiring non-specialists to make judgments that they are not qualified to make. This is not efficient and it does not align with the intent of the ESA.

Furthermore the proposed omission of the Service in deciding whether or not a species will be affected by a proposed project is out of line with the process of transparency and input that the American public has come to expect regarding such decisions. This is another aspect that the Secretary fails to mention when designating consultations with the Service *unnecessary*. By removing the process of independent, scientific review (conducted by qualified experts), the public will not have access to complete, unbiased information regarding the decision.

With these actions, the Secretary is setting up a series of loopholes through which agencies whose interests do not necessarily align with the ESA will be able to step through in order to circumvent the law’s intent. If the Service is not given the chance to present unbiased, scientific information from the start of the process, agencies will be able to easily claim ignorance on the impacts of their actions on endangered species. The decisions will have been made (with the blessing of the Secretary) based on unsubstantiated judgment calls.

2. The proposed rule states that “many Federal action agencies have now had decades of experience with section 7,” and that this is justification for delegating the act of deciding how the Act should be carried out to these agencies.

This is a logical fallacy. Although institutions *may* retain knowledge and know-how beyond the tenure of individual staff, this is no guarantee that federal agencies that are not mandated to look out for endangered species will do so if not bound by procedure. Knowledge and, more significantly, governance philosophies in agencies shift over time. Years of experience learning how to uphold a policy or law does not necessarily translate into the willingness to do so correctly once the agency is no longer under legal mandate to do so. Again, learning the bureaucratic proceedings of the ESA simply does not translate into any kind of expertise in wildlife management, or ability to objectively judge the effects of one’s own projects on wildlife. The background text states, “We recognize that Federal action agencies have more expertise now than in 1986 and are much more aware of the consequences and significance of their findings.” This awareness does not necessarily lead to concrete, specific knowledge or valuation. It certainly does not require that federal agencies with their own independent mandates carry out the mandate of the Service, one of which is to uphold the ESA. Policies and procedures exist to ensure that laws are carried out as mandated in spite of the political fluctuations of agencies and agency agendas. Removing these important oversights obscures the Congressional intent, backed by the will of the American public time and time again that the effects of our actions on endangered species need to be considered in the planning process.

3. The Government Accountability Office found in its 2004 report that “action agencies continued to consider the consultation process [of section 7] burdensome.” (Federal Register, p. 47869) But the report also acknowledges the necessity of the Service, given the “unique requirements and circumstances of different species.” In spite of this the Secretary is proposing to circumvent the Service. While the goal of streamlining the process to resolve disagreements between agencies is admirable, eliminating the Service entirely from the process is not the way to do so. Increased regulations to protect something of intrinsic, social and economic value to the country are no doubt seen by some agencies with conflicting mandates as burdensome. This is all the more reason to ensure that the agencies that are mandated to look out for these resources are included in the process of assessing impact upon them.
4. Lastly, the ability to respond to new challenges related to climate change and global warming are presented as a reason for the proposed rule change. This is presented somewhat as an aside, which is for the best, seeing as it is completely irrelevant and based upon unsubstantiated logic. This suggestion implies that given the uncertainty of the effects of climate change on endangered species, there should be *less* oversight and authority given to the Service and the wildlife specialists it employs. In fact, the opposite is true. Although no one knows for certain the impacts that climate change will have on wildlife, or any species in particular, it is more important now than ever that the Service be a part of the decision making process that will assess these impacts and determine how to deal with them. Now is the time to embrace adaptive management of America’s endangered wildlife, not pass it on to non-experts.

We also object to the procedure through which the Department of Interior is trying to change the Act, which has stood up to over 30 years of attempts by political interests to subvert it. Congress, throughout all of its political fluctuations, has re-affirmed time and time again that the ESA and its original intent is worth upholding. For the Department to modify the Act in this way, without significant chance for review or opposition to influence the decision making process, avoids open and transparent process..

In conclusion, The Otter Project is very concerned with the implications of the proposed rule changes, should they be approved. In this time of environmental uncertainty, we need the Endangered Species Act to stand strong. **We strongly oppose the proposed changes.** Thank you for receiving our comments.

Sincerely,



Allison Ford
Program Manager
The Otter Project