



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  
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Arlington, VA 22203  
Submitted via: [www.regulations.gov](http://www.regulations.gov)

**Re: Docket ID FWS-R9-ES-2008-0093.**  
**Docket Title: Revised Definitions for ESA Section 7 Consultations; 50 CFR Part 402.**  
**Document ID: FWS-R9-ES-2008-0093-0001.**  
**Document Title: Interagency Cooperation Under the Endangered Species Act. Published Aug 15, 2008 (Federal Register, Volume 73, No. 159, pages 47868 – 47875).**

The following comments from the Union of Concerned Scientists (UCS) Scientific Integrity Program are in regards to the proposed changes to the Endangered Species Act Section 7 consultation process, as put forward in the “Interagency Cooperation under the Endangered Species Act” notice published on Aug 15, 2008.

The Scientific Integrity Program requests that the Department of the Interior (DOI) and the National Oceanic and Atmospheric Association (NOAA) withdraw the proposed changes to the Endangered Species Act implementing regulations, as they will:

- Weaken the scientific review of projects with the potential to impact imperiled species protected under the Endangered Species Act,
- Redefine the scope of scientific study into the causation and accumulation of impacts, and
- Impose arbitrary deadlines on the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) which will result in potentially damaging projects moving forward without scientific consultation.

We believe that these changes seek to further minimize the role of science in the implementation of the Endangered Species Act, and open the door to political interference overriding scientific conclusions. The United States has invested heavily in the biological expertise of FWS and NMFS, and this wealth of scientific knowledge should be utilized to make sound decisions on the impacts of proposed federal actions.

## **Context of these Changes**

The Endangered Species Act contains one of the strongest mandates for using the best available science in decision-making in U.S. law. The decision to list or delist a species depends entirely upon science, not economic or political concerns. Other actions under the act, including critical habitat designation, recovery planning, and consultations, are to include the needs of a species, as determined by science, in the final decisions.

We have seen that this opens the door to interference with the science underlying these decisions. The Scientific Integrity Program has documented dozens of individual cases where political or economic interests overrode the expertise of scientists in determining the degree of protections, if any, that imperiled species in the United States should receive under the Endangered Species Act. These tactics include injecting unwarranted uncertainty into the science, editing of scientific conclusions by unqualified political appointees, and intimidating scientists to change their conclusions or force their data to fit a pre-determined conclusion. On top of these case-studies, we are monitoring the growing culture of disdain for independent scientific advice developing within the Department of Interior and the agencies with which it cooperates. In the last several years, we have also seen numerous regulatory changes and informal memos that change who is involved in the process, minimize what science is included, and redefine the protections and scope of the Endangered Species Act. It is our belief that the proposed changes to the consultation process are another step towards sidelining science from the policy-making process.

## **Proposed Changes Remove Expert Biologists**

Under Section 7 of the Endangered Species Act, federal agencies that fund or execute projects such as dam and road building, water management, oil and minerals exploration, and logging (“action agencies”) are required to first consult with biologists at either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (“the Services”) whenever the proposed action will have any effect on a listed species. This is to ensure that the proposed action won’t harm a species federally listed as threatened or endangered. These “informal” consultations typically lead to minor adjustments to the planned action to lessen the anticipated impacts, and also help identify projects with particularly severe or complicated impacts which then receive a thorough “formal” consultation.

But these proposed changes to this process would permit action agencies to decide for themselves whether protected species would be threatened by agency projects. Many of these agencies do not have significant biological expertise or resources to conduct an adequate evaluation. Allowing action agencies, whose mandates often come into direct conflict with the needs of imperiled species, to oversee their own actions will seriously weaken the Endangered Species Act’s effectiveness. The new changes do not address the concerns raised by these conflicts of interest.

The evaluation of potential impacts, including the “Not Likely to Adversely Affect” determination, are based on biological criteria. The proposed changes allow the action agencies to become the gatekeepers of the consultation process, granting them the discretion to determine

the degree of impacts on listed species and whether or not these impacts are severe enough to require a formal consultation with either FWS or NMFS.

DOI and NOAA have attempted to justify these changes by saying that action agencies will err on the side of protecting listed species. However, the Forest Service and the Bureau of Land Management, under a similar set of regulations allowing these action agencies to self-consult for projects under the National Forest Plan, consistently failed to meet the scientific or legal criteria set by FWS or NMFS for valid decisions.<sup>1</sup> If these agencies, which do have at least some experience in land management, have been unable to make scientifically sound decisions on impacts to listed species, there is no reason to assume agencies with even less biological expertise, such as the U.S. Department of Housing and Urban Development, would be able to make valid decisions. Species on the brink of extirpation or extinction could be significantly threatened by the effects of erroneous decisions made by unqualified or conflicted agencies.

### **Proposed Changes Narrow the Scope of Scientific Consideration**

When listing the polar bear as threatened earlier this year, Department of Interior Secretary Dirk Kempthorne made it clear he intended to prevent the Endangered Species Act from being used as a tool to take action on climate change. The proposed regulations take a giant leap towards his goal and, in the process, cause collateral damage to the way that the future and cumulative impacts of federal actions will be assessed in consultation.

Through a series of narrow redefinitions, the regulations limit consultation to actions which are an “essential cause” of the impacts on a species, and these effects must have “clear and substantial information” supporting that they “are reasonably certain to occur.” Besides removing any actions contributing to climate change from review, these broad exemptions will likely apply countless other federal actions which cumulatively have significant negative impacts on the recovery of imperiled species.

By narrowing the scope of science included in the consultation review process and redefining cumulative impacts, DOI and NOAA are opening the door for action agencies to find ways to work around the consultation process by dividing large, consequential projects into smaller individual actions with less obvious impact on species. The effect of these redefinitions will only be clear as their implementation progresses, but the vastly narrowed scope of consultation further weakens this important safety net for species.

### **Proposed Changes Implement Arbitrary and Unprotective Deadlines**

Finally, the changes impose a 60 day deadline on FWS and NMFS (the Services) to respond to an action agency’s request for consultation, and allows the action agency to proceed with their project should the Services fail to meet this deadline. This reverses the burden in the current regulations, where action agencies have no authority to move forward with their project until the consultation process is complete. The proposed changes give action agencies carte blanche to proceed with a potentially devastating action if the Services fail to respond. This opens the door

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<sup>1</sup> NMFS & FWS. Use of the ESA Section 7 Counterpart Regulations for Projects that support the National Fire Plan, Program Review: Year One. January 11, 2008.

to abuse by action agencies by exploiting the short timeframe and hindering the Service from conducting a review. It also leaves the continued existence of species at the mercy of funding and staffing levels at the Services, and undermines the basic conservation goals of the Endangered Species Act.

## **Conclusion**

We believe that the proposed changes to the Section 7 consultation process dangerously minimize the role of the expert scientists at FWS and NMFS, narrowly limit the scope of science used in consultation, and open the door to increased conflicts of interest, delay, and manipulation of science. We therefore request that the Department of the Interior and the National Oceanic and Atmospheric Administration immediately withdraw this fundamentally flawed proposal.

Sincerely,

A handwritten signature in black ink that reads "Francesca T. Grifo". The signature is written in a cursive, flowing style.

Francesca T. Grifo  
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About UCS: The Union of Concerned Scientists is a leading science-based nonprofit working for a healthy environment and a safer world. The UCS Scientific Integrity Program mobilizes scientists and citizens alike to defend science from political interference and restore scientific integrity in federal policy making.