



September 15, 2008

Secretary Dirk Kempthorne
U.S. Department of Interior
Attention: 1018-AT50, Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 North Fairfax Drive, Suite 222
Arlington, VA 22203

RIN 0618-AX15

Dear Secretary Kempthorne,

On behalf of American Bird Conservancy (ABC), I write to express our opposition to proposed changes to Section 7 of the Endangered Species Act (ESA), which requires federal agencies to consult with the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) to determine whether a proposed federal action will jeopardize listed threatened or endangered species.

ABC is a 501(c)(3), non-profit organization dedicated to the conservation of wild native birds and their habitats throughout the Americas. Founded in 1994, ABC has long been a leader in Partners in Flight and the North American Bird Conservation Initiative, and is the only U.S.-based group dedicated solely to overcoming the greatest threats facing native birds in the Western Hemisphere. ABC has 7,500 members, with offices in Virginia and the District of Columbia, and additional staff in California, Missouri, Montana, Kentucky, North Carolina, Idaho, New Hampshire, New York, and Oregon.

The Administration's proposed rule (RIN 0618-AX15), which would allow federal agencies to independently determine whether consultation is necessary with the USFWS or NMFS over the potential impact of projects on threatened or endangered species, runs contrary to Congressional intent, the Supreme Court's rulings, and numerous reviews of the efficacy of agency collaboration by the United States Government Accountability Office (GAO). In addition, the Administration's same attempt to give the U.S. Environmental Protection Agency (EPA) sole discretion over whether to initiate consultations as part of their pesticide registration process was recently overturned in court. *Washington Toxics Coalition v. U.S. Department of the Interior*; 457 F. Supp. 2d 1158.

As you know, the Endangered Species Act was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved ... [and] a program for the conservation of such endangered species and threatened species...” 16 U.S.C. at 1531(b). The Supreme Court’s 1978 review of the ESA’s “language, history, and structure” convinced the Court “beyond a doubt” that “Congress intended endangered species to be afforded the highest of priorities.” *Id.* at 174. As the Court found, “... the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184.

The Supreme Court’s review served as a basis for their 1978 decision to halt construction of the Tellico Dam because it would have jeopardized the continued existence of the endangered snail darter. The Court ruled, “... federal agencies generally are prohibited from authorizing, funding, or carrying out actions if doing so would jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify their critical habitats.” This decision affirmed Congress’s statutory intent to impose an irrevocable obligation on federal agencies to protect endangered species before carrying out their mission-related activities.

Section 2(c) of the ESA establishes that it is “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. at 1531(c)(1). Similarly, Section 7(a)(1) of the ESA “... contains a clear statutory directive requiring the federal agencies to consult and develop programs for the conservation [of listed species],” and requires the Secretary to review “... other programs administered by him and utilize such programs in furtherance of the purposes of the Act.” 16 U.S.C. at 1536(a)(1); *Sierra Club v. Glickman*, 156 F.3d 606, 617 (5th Cir. 1998).

This mandate is further spelled out in Section 7(a)(2), which requires that for all discretionary activities carried out by federal agencies, such as the proposal to permit the proposed project, the acting agency must “insure” that its actions neither “jeopardize the continued existence” of any of the nation’s listed species, nor “result in the destruction or adverse modification” of listed species’ “critical habitat.” *Id.* at 1536(a)(2). The Supreme Court recently reiterated, Section 7(a)(2)’s prohibition against jeopardy, calling it an “imperative.” *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (U.S. 2007)

In completing this formal consultation process, agencies must address both the jeopardy and Critical Habitat prongs of Section 7 by considering the current status of the species, the environmental baseline, and the direct and indirect effects of the proposed action, as well as its cumulative effects. 50 C.F.R. at 402.14(g)(2)-(3); 50 C.F.R. at 402.02. Unfortunately, the majority of federal agencies are ill-equipped to comply with these requirements of the law, lacking the requisite education, training, and expertise of USFWS or NMFS staff.

The Administration claims the proposed rule is in response to "... the tremendous workload and consumption of resources that consultations require," and states that "... it is not an efficient use of limited resources to review literally thousands of proposed federal agency actions." Although fewer than four percent of the more than 18,000 formal inter-agency consultations that took place between 1996 and 2004 resulted in the conclusion that the proposed agency action would likely place a species in jeopardy, this does not diminish the importance of these consultations. Although few federal actions require modification, the consequence to individual endangered species of eliminating the consultation process altogether could be disastrous for those that do. Formal and informal consultations can result in the prevention of the proposed action, cause amendments to proposed actions, or result in mitigation measures to counterbalance detrimental outcomes. The informal consultation process often results in modifications to agency actions that reduce harm to endangered species or provide conservation benefits.

Lastly, it is important to address the assertion made by the Administration in the proposed rule that the GAO's multiple reviews of the efficacy of Section 7 consultation provides the justification for the drastic changes it contains. In the GAO report: *Endangered Species Act, Successes and Challenges in Agency Collaboration and the Use of Scientific Information in the Decision Making Process*, the Office finds that, "Collaboration is central to the consultation process required under section 7(a)(2) of the Endangered Species Act..." and states that "...effective agency collaboration can reduce conflict over competing uses of natural resources and improve agencies' abilities to protect species while carrying out other mission-related activities." Furthermore, the GAO found that, "With regard to the consultation process, while FWS and NMFS have continued to take steps to expand their collaboration processes, the agencies did not believe that disagreements about the consultation process require additional steps." So, while the GAO found that there was room for improvement for the collaboration between federal agencies to reduce conflict, their recommendation was for greater interagency cooperation, not less.

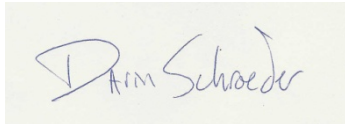
The ESA is perhaps the most important piece of environmental legislation ever passed in the United States. The Act sets a high standard for the protection of threatened species that can be emulated around the world, and it can be credited with numerous successes over its 30-plus-year history. The recoveries of the Bald Eagle and Peregrine Falcon, and growing or stable populations of many other listed species, such as the Whooping Crane, are living examples of the Act's success.

These conclusions are drawn from a report ABC produced, *American Birds - an Endangered Species Act Success Story*," which outlines the current status and population trends of birds listed under the ESA. Analysis of this data shows that significantly more birds listed under the ESA are increasing than are decreasing - of the 43 bird species listed under the ESA that breed in the continental United States, 63% have increasing or stable populations, several of which have grown more than tenfold since being listed.

American Bird Conservancy believes the Endangered Species Act is fundamentally sound, but we believe the Act can be improved to offer better protection for birds, plants, and other wildlife, and to provide greater incentives for landowners to afford some of that protection. ESA should be strengthened—for example, through increased funding, creating a more streamlined process by which species can be listed and de-listed, and reinforcing the consultation process between federal agencies concerning actions that may affect endangered species.

Thank you for the opportunity to comment on the proposed rulemaking to revise the joint regulations relating to interagency cooperation under the Endangered Species Act. We appreciate the thirty day extension for public comment on this proposed rule change that was granted after ABC and other conservation groups voiced our opposition to the wholly inadequate 30-day public comment period initially provided by the Department of Interior. It is our hope this extension will provide the public a better opportunity to address the scope and possible impact of the proposed changes to one of the most important piece of environmental legislation ever passed in the United States.

Sincerely,

A handwritten signature in blue ink that reads "Darin Schroeder". The signature is written in a cursive style with a large, stylized "D" at the beginning.

Darin Schroeder
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