

14 October 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: Docket FWS-R9-ES-2008-0093

I wish to express the serious concerns of the American Society of Mammalogists in regard to your proposed rule to amend consultation procedures relating to the Endangered Species Act of 1973 (ESA).

The American Society of Mammalogists (hereafter, "the Society") is a non-profit, professional scientific and educational Society consisting of nearly 4,000 members from all 50 states and more than 60 other countries worldwide. Founded in 1919, the Society is the world's oldest and largest organization devoted to the study and conservation of mammals. As an organization, we strongly support the concept that conservation of wild mammals should be based on current, sound, and accurate scientific knowledge. We have a long history of reviewing issues of public policy related to mammalian conservation. Our positions are uniformly based on scientific expertise developed by our members and other preeminent scientific professionals around the world.

The Society is a strong proponent of the ESA. It is one of the most important and influential pieces of environmental legislation in history, and it has served as a worldwide model for species conservation. We feel the proposed rule is clearly contrary to the intent of Congress in passing the ESA in 1973. We remind you that the ESA was passed with overwhelming bipartisan support--unanimously in the Senate, only 12 dissenting votes in the House! The ESA clearly mandates consultation with "the Secretary," specifically defined as the secretaries of Interior and Commerce. We strongly believe that the Department of the Interior does not have the authority to issue a rule that undermines the Congressional intent of the ESA.

The current ESA consultation process is soundly based in science in that it requires independent peer review by endangered species experts. We believe this science-based review process is critical to the operation and letter of the ESA. The proposed rule would allow USFWS and NMFS to delegate the authority and responsibility to make biological determinations to the various federal agencies proposing the actions, disregarding whether these agencies have staff with the required biological expertise to carry out these determinations, and not requiring any independent peer review. Giving these agencies the sole power to determine whether federal construction or resource extraction/management projects will or will not harm vulnerable species would result not only in biological determinations being made by those with little or no endangered species expertise, but also in significant instances of conflict of interest.

We suggest that history provides clear examples of how changes similar to those being proposed have failed. A similar self-review rule on pesticide use in 2003 was overturned in court. In

2004, such a non-independent consultation rule allowed the US Forest Service (FS) and Bureau of Land Management (BLM) to determine if their activities under the National Fire Plan would affect protected species. In January 2008, the USFWS and NMFS reported that most biological assessments conducted under that rule were not based on the best available scientific information and that the FS and BLM failed to present scientific information sufficient to justify their decisions. These failures highlight the need for independent science-based oversight in endangered species assessments and demonstrate that even federal agencies with qualified staff have been unable to evaluate adequately whether their own activities are inconsistent with the intent of the law.

We feel strongly that the proposed changes negate the intent of the ESA to protect species based on the “best available” science, that they leave room for dangerous conflicts of interest, and that they leave important decisions about scientific questions, such as the jeopardy placed on a species by human action, up to agencies with insufficiently trained staff. Below, find several other specific reasons why the Society opposes the proposed rule change.

- (1) The proposed rule provides for no review of action agency determinations, or assessment of whether their decisions are biologically sound.
- (2) The Services (USFWS, NMFS) have no recourse should the action agency’s “Not Likely to Adversely Affect” determination be erroneous.
- (3) We find that the proposed definition of “effects of the action” would require an unreasonably high burden of proof of causation.
- (4) The proposed rule makes no mention of the applicability of the consultation requirements to agency decisions that affect ESA-protected species in countries other than the US (international applicability).
- (5) We find that the proposed definition for “cumulative effects” is problematic; by excluding future federal actions from the definition, the USFWS is allowing action agencies to avoid thorough reviews of the cumulative harm to ESA-protected species.
- (6) The proposed rule makes no allowance for including consideration of any impacts resulting from climate change as an effect on ESA-protected species. As we understand it, all federal activities are intended to be subject to consultation, which includes any actions that result in climate change, such as increased greenhouse gas emissions.

In summary, based on the points raised above, we are requesting that the USFWS withdraw this proposed rule. We would suggest that the USFWS and NMFS go about tackling the problems inherent in the consultation process through the convening of one or more meetings of stakeholders to engage in a dialogue regarding methods to improve the administration of the

ESA consultation process. In this way, the science-based, independent, peer-review consultation process, an absolute necessity for the ESA, will remain intact.

Thank you for the opportunity to submit comments on this critically important issue, and please let me know if the Society can assist with further efforts to retain science in the consultation process.

Respectfully submitted,

Suzanne B. McLaren
President, American Society of Mammalogists