

ORNITHOLOGICAL COUNCIL THE WILDLIFE SOCIETY SOCIETY FOR CONSERVATION
BIOLOGY



27 April 2009

The Honorable Ken Salazar
Secretary
Department of the Interior
1849 C Street NW
Washington, DC 20240

The Honorable Gary Locke
Secretary
Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

Dear Secretary Salazar and Secretary Locke,

Science is essential to effective conservation of biological diversity. Fulfilling the purpose of the Endangered Species Act (ESA) requires credible analysis of scientific information. For this reason, our three scientific societies were gravely concerned about the changes made by the Bush Administration that all but eliminated oversight of the scientific component of ESA compliance in federal agency actions by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) under the consultation provisions of Section 7 of the ESA. Had that regulation (73 FR 76272) not been suspended by President Obama on 3 March, it would have allowed federal agencies to determine whether their actions were likely to adversely affect listed species. When the regulatory changes were proposed, there was ample evidence that recent regulations delegating similar authority for evaluating their own biological assessments to the Forest Service and the Bureau of Land Management (the “counterpart regulations”) were not working well. Evaluation by NMFS and USFWS demonstrated that even action agencies with scientifically trained staff had been unable to conduct adequate scientific analyses (Use of the ESA Section 7 Counterpart Regulations for Projects that Support the National Fire Plan; One Year Program Review by USFWS and NMFS; 11 January 2008). This program review illustrated that impartial review by the USFWS or NMFS was an important aspect of the consultation process and comprised a necessary system of agency checks and balances. For this reason alone, the regulatory changes were ill-advised.

Our organizations filed comprehensive comments on 29 September 2008, objecting to the changes on scientific, legal, and policy grounds. Between 15 October 2008, when the comment period closed, and 16 December 2009, when the Department of the Interior published the final

rule in the Federal Register, the Department considered some 235,000 comments, including 215,000 form letters [73 FR 76272]. Apparently, then, the Department considered 20,000 individual comments in 60 days (an average of 333 comments per day, including weekends). In our experience, this is extraordinary. More typically, the elapsed time between the publication of proposed rule and the publication of a final rule is 433 days (Balla and Wright, 1999). Given the importance of the consultation process, we suggest that a more thorough review was warranted.

We are also concerned about the thoroughness of the National Environmental Policy Act process. The draft environmental assessment was issued on 27 October 2008, followed by a ten-day comment period. This extraordinarily short comment process was insufficient. We are particularly concerned about the inadequate consideration given to Alternative C, which would have ensured some degree of oversight of action agency determinations through periodic review, similar to the process developed under the counterpart regulations.

Congress has given your departments the authority to take a major step in restoring scientific and legal integrity to both the ESA consultation and regulatory processes. The recent decision by the Department of the Interior to ask for judicial remand of the recovery plan for the Northern Spotted Owl (*Strix occidentalis caurina*) sends a strong signal that you will follow the scientific process and the laws that protect biological diversity.

Science can be restored to the consultation process, as mandated by the ESA, in a simple and direct way. We urge you to avail yourselves of the Congressional authority to withdraw the Interagency Cooperation rule. This action will leave no doubt that the Department of the Interior and the Department of Commerce have committed to use science for the effective conservation of biological diversity.

In addition, we urge your Departments to revoke the National Fire Plan counterpart regulations and the counterpart regulations for the Federal Insecticide, Fungicide, and Rodenticide Act, although we recognize that doing so would require formal rulemaking. Revoking these regulations would further strengthen the scientific basis for conservation of our nation's natural resources as mandated by law.

Congress also allowed the Department of the Interior to withdraw the special rule for the polar bear (73 FR 76249). The special rule precluded science-based decision-making by excluding the application of the incidental take rules to activities that take place outside the current range of the species. As a matter of overwhelming scientific evidence, however, loss and degradation of polar bears' habitat is driven by comes from activities outside their current range, in the form of massive habitat degradation and loss. In its responses to public comments, USFWS noted that it had issued guidance concerning consultation requirements in relation to greenhouse gas emissions. This 14 May 2008 policy memorandum, entitled *Expectations for Consultations on Actions that Would Emit Greenhouse Gases*, "clarifies that, while direct impacts from oil and gas development operations would undergo consultation, the future indirect impacts of individual GHG emitters cannot be shown to result in 'take' based on the best available science at this time," and that "the Service does not anticipate that the mere fact that a Federal agency authorizes a project that is likely to emit GHG will require the initiation of section 7 consultation." Thus, the special rule constrains scientific analysis of activities outside the current

range of the polar bear that are likely to cause harm.

The laudable decision to withdraw the Final Recovery Plan for the Northern Spotted Owl (13 May 2008) was a significant step in reaffirming the scientific integrity of the Department of the Interior. We hope that the Department of the Interior and the Department of Commerce will take additional steps by revoking the interagency cooperation rule, counterpart regulations, and special rule for the polar bear.

Sincerely,

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