



# United States Department of the Interior

FISH AND WILDLIFE SERVICE  
Washington, D.C. 20240



In Response Reply To:  
FWS/AES/DCHRS/ESO-00039082

MAR 7 2013

Dr. Dominick A. DellaSala, President  
North America Section, Society for Conservation Biology  
1017 O Street NW  
Washington, DC 20001-4229

Dear Dr. DellaSala:

The U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the Services) received your petition of June 12, 2012, filed pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e) and implementing rules in 43 CFR Part 14. You petitioned the Services to change the implementing regulations at 50 CFR Part 402 governing consultations on Federal agency actions under section 7(a)(2) of the Endangered Species Act of 1973, as amended (16 U.S.C. § 1536(a)(2)) (ESA).

In the petition, you request the scope of the section 7 consultation requirements be extended to foreign nations. Specifically, you request the text “or in foreign nations” be included in 50 CFR §§ 402.01 and 402.02, for jurisdictional scope and definition of action, respectively. The Services have reviewed the substance of the petition and have decided, as explained below, not to proceed with the petitioned action.

We agree that Congress intended the ESA to extend certain protection to species that are imperiled in foreign nations. Section 4 of the ESA allows for species to be listed in foreign nations. *See* 16 U.S.C. § 1533. Section 8 provides for financial assistance to foreign nations and engagement in bilateral or multilateral agreements with foreign nations to conserve listed species. *See* 16 U.S.C. § 1537. Section 9 prohibits engaging in foreign commerce of listed species. Section 11 provides for forfeiture of listed species illegally exported or imported. *See* 16 U.S.C. § 1538.

However, Section 7 is silent on extending consultation requirements for agency actions within foreign territories. *See* 16 U.S.C. § 1536(a)(2). Congress specifically limited the ESA’s section 9(a) prohibition on taking listed species to takes that occur within the United States and U.S. territorial seas or the high seas; it did not prohibit take in foreign territory. *See* 16 U.S.C. § 1538(a). When considered in light of section 7(o)’s exemption of prohibited take for actions covered by an incidental take statement after consultation, the extension of the take prohibition to no further than the high seas supports a conclusion that Congress intended to extend section 7 to the high seas, but no further. *See* 16 U.S.C. § 1536(o).

Finally, you raise the issue of whether the Services have been consistent in their consideration of impacts to listed species in foreign nations for actions that primarily occur within the United States or on the high seas. The Services will fully evaluate current practices, policies, and guidance related to analyzing effects that occur to listed species in foreign nations as a result of actions that occur within U.S. territory and on the high seas.

Thank you for your interest in the Endangered Species Program. If you have any questions, please contact Mr. Rick Sayers, Chief, Division of Consultation, HCPs, Recovery, and State Grants at (703) 358-2442.

Sincerely,



Gary Frazer  
Assistant Director for  
Endangered Species