



April 1, 2009

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**VIA EXPRESS MAIL**

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

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The Honorable Gary Locke  
Secretary, Department of Commerce  
1401 Constitution Avenue, N.W.  
Washington, DC 20230

Re: Regulations Governing Interagency Cooperation Under the  
Endangered Species Act

Dear Secretary Salazar and Secretary Locke:

We write on behalf of the Center for Progressive Reform (CPR) to urge you to withdraw the Bush Administration's regulations governing interagency cooperation under Section 7(a)(2) of the Endangered Species Act (ESA) (the "Revised Regulations").<sup>1</sup> CPR is a nonprofit research and educational organization of Member Scholars dedicated to protecting health, safety, and the environment through analysis and commentary. In October, we submitted comments to the U.S. Fish and Wildlife Service and National Marine Fisheries Service detailing the reasons why the agencies should have withdrawn the proposed regulations.<sup>2</sup>

The Revised Regulations represent the worst kind of midnight rulemaking – they are poorly considered, unjustified by any evidence, and were patently intended to impose the Bush Administration's hostile stamp on implementation of the nation's flagship conservation law. Most importantly, if implemented, the Revised Regulations will result in weakened protections for endangered and threatened species.

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<sup>1</sup> 73 Fed. Reg. 76272 (Dec. 16, 2008).

<sup>2</sup> Available at

[http://www.progressivereform.org/Comments\\_on\\_ESA\\_Interagency\\_Coop\\_101008.pdf](http://www.progressivereform.org/Comments_on_ESA_Interagency_Coop_101008.pdf).


The Honorable Ken Salazar  
The Honorable Gary Locke  
April 1, 2009  
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We have been pleased with actions taken by the executive and legislative branches in the months since the Revised Regulations were issued, which recognize the negative consequences their implementation would create. On January 15, Rep. Nick J. Rahall (Chairman of the Committee on Natural Resources, U.S. House of Representatives) introduced H.J. Res. 18, which provides for congressional disapproval of the Revised Regulations under the Congressional Review Act. On March 3, President Obama issued a Memorandum directing that federal agencies follow the prior longstanding consultation practices pending a review by your offices to determine whether to undertake new rulemaking procedures with respect to consultation that will promote the purposes of the ESA. On March 11, President Obama signed into law an omnibus appropriations bill (P.L. 111-08) that includes a section providing you 60 days in which to withdraw or reissue the Revised Regulations without proceeding through the usual rulemaking requirements.

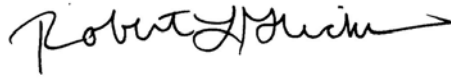
While each of these developments is a step in the right direction, until your offices take further action, the Revised Regulations remain on the books. The President's Memorandum provides an important short term assurance that federal agency actions are subjected to appropriate scrutiny under tried-and-true consultation procedures. However, it is explicitly not enforceable by the courts. Over the long term, mission-oriented agencies may well opt to follow the letter of the Revised Regulations rather than the President's Memorandum, and will be able to do so knowing that their actions would be upheld in court. Whether you ultimately decide to develop entirely new regulations governing interagency cooperation under Section 7(a)(2) of the ESA or return to the prior regulations, protection of species is best served in the meantime by reinstating the prior regulatory requirements for consultation.

We therefore urge you to exercise your time-limited authority to issue an expedited withdrawal of the Revised Regulations. We enclose the testimony of the undersigned Professor Holly Doremus, one of the witnesses invited to testify at a hearing planned on Chairman Rahall's H.J. Res. 18 (which was postponed pending developments related to the authority granted in the omnibus appropriations bill). For the same reasons Professor Doremus's testimony urges Congress to pass H.J. Res. 18, we urge you to withdraw the Revised Regulations pursuant to the authority granted in P.L. 111-08.

Sincerely,




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Professor of Law, UC Berkeley and Davis  
Co-Faculty Director, Center for Law, Energy and Environment, UC Berkeley



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Enclosure

**TESTIMONY OF  
HOLLY DOREMUS**

**PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW AND  
CO-FACULTY DIRECTOR, CENTER FOR LAW, ENERGY AND ENVIRONMENT  
PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, DAVIS, SCHOOL OF LAW  
MEMBER SCHOLAR, CENTER FOR PROGRESSIVE REFORM**

**BEFORE  
THE COMMITTEE ON NATURAL RESOURCES  
U.S. HOUSE OF REPRESENTATIVES**

**HEARING ON H.J. RES. 18, A RESOLUTION PROVIDING FOR CONGRESSIONAL DISAPPROVAL OF  
THE RULE SUBMITTED BY THE DEPARTMENT OF THE INTERIOR AND THE DEPARTMENT OF  
COMMERCE, RELATING TO INTERAGENCY COOPERATION UNDER  
THE ENDANGERED SPECIES ACT OF 1973**

*(Prepared for the Hearing Planned for March 4, 2009)*

Chairman Rahall, Ranking Member Hastings, and Members of the Committee, thank you for the opportunity to testify before you today. My name is Holly Doremus. I hold a joint appointment as Professor of Law at the University of California (UC) Berkeley School of Law, where I also serve as the Co-Faculty Director of the Center for Law, Energy and Environment, and at the UC Davis School of Law. I hold a J.D. from Berkeley Law, and a Ph.D. in Botany from Cornell University. My expertise is in environmental law, natural resources law, and the intersection of law and science. I am also a Member Scholar at the Center for Progressive Reform (CPR). CPR is a nonprofit research and educational organization of academics specializing in the legal, economic, and scientific issues that surround federal regulation. CPR's network of Member Scholars across the nation is dedicated to protecting health, safety, and the environment through analysis and commentary.

I congratulate the Chairman for introducing – and the Committee for considering – House Joint Resolution 18 (H.J. Res. 18), providing for congressional disapproval of the revised Endangered Species Act (ESA) consultation regulations issued on December 16, 2008 (the “Revised Regulations”). The Revised Regulations govern interagency consultation under ESA section 7(a)(2), which requires that all federal agencies, in consultation with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, “the Services”) insure that actions they take, fund, or authorize do not jeopardize the continued survival and recovery of listed species. The consultation process is essential to the ESA's ability to achieve its conservation goals, and the Revised Regulations undermine that process.

My testimony today will focus on four principal reasons why Congress should pass H.J. Res. 18 and void the Revised Regulations. First, the Revised Regulations represent the worst kind of midnight rulemaking – they are poorly considered, unjustified by any evidence, and were patently intended to impose the Bush Administration's hostile stamp on implementation of the nation's flagship conservation law. Second, the regulations represent wholesale abdication by

the Services of their consultation responsibilities under the ESA. Third, in the greatly reduced number of cases in which consultation will still take place, the Revised Regulations impose new limits on its scope, requiring that in order for effects on species to be considered, the federal action must be their “essential cause.” Fourth, the Revised Regulations effectively shift to those seeking to protect species the burden of proving by “clear and substantial information” that effects of a federal action are reasonably certain to occur. In short, the Revised Regulations will result in weakened protections for endangered and threatened species, and will inject new opportunities for discord and delay into the consultation process.

In addition to being poorly considered and an impediment to achievement of the ESA’s conservation goals, the Revised Regulations are unlawful. They have been challenged by at least 9 states and 24 conservation organizations, and will surely be overturned by the courts. Litigation, however, is slow. Congress can eliminate the Revised Regulations far more quickly than the courts can.

### ***Midnight Rulemaking: Revisions Without Review***

The Revised Regulations, issued at the very end of the outgoing Bush Administration, represent the worst sort of midnight rulemaking. They were developed hastily in response to the May 2008 listing of the polar bear. The Services provided no compelling justification for the revisions, they made no attempt to gather evidence about how well or poorly the consultation process was working, and they did not consider revisions that might improve conservation outcomes.

The Services justified the revisions primarily on the grounds that:

With the exception of two section 7 counterpart regulations for specific types of consultations, there have been no comprehensive revisions to the implementing section 7 regulations since 1986. Since those regulations were issued, much has happened: The Services have gained considerable experience in implementing the Act, as have other Federal agencies, States, and property owners; there have been many judicial decisions regarding almost every aspect of section 7 of the Act and its implementing regulations; and the Government Accountability Office has completed reviews of section 7 implementation.

73 Fed. Reg. 47868.

The mere fact that much time has passed since the consultation rules were last comprehensively revised does not necessarily justify any regulatory revisions. While a comprehensive review might well identify changes that would improve both the efficiency and conservation effectiveness of the consultation process, the Services failed to undertake any such review. They cited only to a 2004 report by the General Accounting Office (GAO), which noted that action agencies consider the consultation process burdensome and recommended clarifying when consultation is required. The chief finding of that report, however, was that due to the lack of complete and reliable data,

federal managers and congressional decision makers cannot have an accurate picture of how long the process takes to complete, how much it costs, and whether resources are adequate to meet workload demands. In addition, the Services cannot confirm or deny complaints about the lengthiness of the entire consultation process or know where the most significant problems arise.

GAO Report No. 04-93 at 3 (Mar. 19, 2004).

In other words, there was not enough data available to tell whether consultation was being demanded unnecessarily or taking too long. Moreover, in subsequent testimony to Congress, the GAO reported that FWS and NMFS “did not believe that disagreements about the consultation process require additional steps.” The 2004 GAO report is hardly a convincing ground for hurriedly launching wholesale changes four years later, without any attempt to better understand the contours of any problem.

A comprehensive evaluation of the consultation rules would begin with a clear and thorough analysis of the problem. There is little information available about how the consultation process operates, the level of resources the wildlife and action agencies devote to it, the effects it has on federal projects, or the extent to which it effectively protects listed species. The data currently available, while certainly limited and in some cases dated, do not support the claim that action agencies are unnecessarily forced to go through a burdensome consultation process. See, for example, *Endangered Species Act: Review of the Consultation Process Required by Section 7: Hearing before the Subcommittee on Fisheries, Wildlife, and Water of the Senate Committee on Environment and Public Works*, 108<sup>th</sup> Cong., 94 (2003); Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993); General Accounting Office, *Endangered Species Act: Types and Number of Implementing Actions* (GAO/RCED-92-131BR) (1992).

FWS and NMFS did not discuss those studies, nor did they make any effort to collect more up-to-date information. They did not consider the possibility that the 1986 regulations might be *under-* rather than *over-* protective in some respects. The brief period they allowed for comment on the revisions made it very difficult for stakeholders to supply data that might have been helpful, and the speed with which the comments were reviewed, together with the minimal responses in the preamble to the final rule, demonstrate that the Services were not genuinely interested in information others might provide. The Revised Regulations are not a careful comprehensive revision of the consultation rules. They are instead a grab bag of the outgoing administration’s wish list of ways to undermine the ESA.

The Services also claimed that revisions were needed because they face “new challenges . . . with regard to global warming and climate change.” Undoubtedly, there are challenges to applying the ESA to greenhouse gas (GHG) emissions. But in proposing and issuing the Revised Regulations, FWS and NMFS made no effort to grapple with those challenges. Instead, they sought to escape any responsibility for dealing with the problems that GHG emissions pose for endangered and threatened species. That reaction is inconsistent with both the purposes and the text of the ESA.

As the United States Supreme Court observed in the seminal case of *TVA v. Hill*, the ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” 437 U.S. 153, 180 (1978). It is deliberately framed to protect species against the full range of threats they face, from habitat modification as well as direct exploitation. *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 699 (1995). Climate change, which is already modifying habitats in many ways, is undoubtedly now a leading threat to biodiversity, and may be the single most important threat.

The Services should be carefully considering the ways in which the ESA may be useful in addressing this immense threat to biodiversity. They could, for example, look for scientific tools that would allow them to take into account the GHG emissions produced by at least some federal actions. The Services could also consider whether section 7(a)(1), which requires all federal agencies to affirmatively implement programs for the conservation of endangered species, might prove a useful tool for understanding and reducing GHG emissions with a federal nexus. They could attempt to engage EPA in the development of interagency procedures that might allow parties to satisfy GHG-related requirements of both the ESA and the Clean Air Act.

Instead, under an administration openly hostile to taking any regulatory action against GHG emissions, the Services simply asserted that they need not consider those emissions. ESA section 7, which requires that federal agencies insure that their actions will not jeopardize listed species, does not permit that blanket assertion. If the agencies need relief from the “burden” of implementing the ESA against the threats climate change poses for species, they must seek that relief from Congress.

### ***Wholesale Abdication of Consultation Responsibility***

The shortcomings of the Revised Regulations go well beyond the Services’ refusal to grapple with the problems posed by GHG emissions. Most critically, the Revised Regulations will allow federal agencies to decide for themselves, without review by FWS or NMFS, that broad new categories of actions do not require consultation. This change is unlawful.

The ESA requires that all federal agencies “in consultation with and with the assistance of” the Services, “insure” that their actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat. 16 U.S.C. § 1536(a)(2). “To facilitate compliance with” that provision, the statute requires that federal agencies considering actions ask FWS and NMFS whether any listed species may be present within the action area. 16 U.S.C. § 1536(c)(1). If so, the action agency must complete a biological assessment “for the purpose of identifying any endangered species or threatened species which is likely to be affected.” The 1986 regulations required that the action agency submit its biological assessment to FWS or NMFS for review, and initiate formal consultation *unless the wildlife agency concurred in writing that the action was not likely to adversely affect any listed species*. 50 C.F.R. §§ 402.12(j); 402.13(a); 402.14(b)(1).

In contrast, the Revised Regulations allow the action agency to avoid consultation without seeking the concurrence of FWS or NMFS if the action agency, on its own, determines that the action will not cause take of a listed species and that:

- the action has no effect on a listed species or critical habitat; or
- the effects of the action are manifested through global processes and: cannot be reliably predicted or measured at the scale of a listed species' current range; would result at most in an extremely small, insignificant impact on a listed species or critical habitat; or are such that the potential risk of harm to a listed species or critical habitat is remote; or
- the effects of the action on a listed species or critical habitat are not capable of being measured or detected in a manner that permits meaningful evaluation or are wholly beneficial.

73 Fed. Reg. at 76287, to be codified at 50 C.F.R. § 402.03(b). Although those sound like narrow categories, there is enough uncertainty about the needs of and effects on listed species that action agencies, driven by their own mission orientations, could be tempted to apply them quite broadly. The Revised Regulations could effectively eliminate the consultation required by the ESA, a cornerstone of the statute's strategy for protecting endangered species, for a broad swath of actions by any federal agency. That cannot be done by administrative fiat.

When it enacted the ESA, Congress gave protection of endangered species priority over the primary missions of all federal agencies. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978). Congress understood that action agencies might resist that reordering of priorities. It therefore did not leave implementation of the Act to action agencies alone. Instead, it explicitly required in Section 7 that action agencies fulfill their ESA responsibilities "in consultation with and with the assistance of" FWS and NMFS, agencies with expertise in conservation and a core conservation mission. 16 U.S.C. § 1536(a)(2). Congress intentionally set up Section 7 to require a dialogue between action agencies and wildlife agencies. The Services may not abdicate their role on a wholesale basis, delegating to the action agencies final authority for determining whether any dialogue is required.

Although the Services did not acknowledge it in the proposed regulations, and barely touched on it in issuing the final regulations, they have some experience with this sort of delegation. In 2003, the Services adopted "joint counterpart regulations" authorizing public land management agencies to determine for themselves whether consultation was required for projects authorized under the National Fire Plan. 68 Fed. Reg. 68254 (Dec. 8, 2003), codified at 50 C.F.R. §§ 402.30-402.34. In 2004, the Services issued similar joint counterpart consultation regulations allowing EPA to determine whether consultation is required for actions implementing the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). 69 Fed. Reg. 47732 (Aug. 5, 2004), codified at 50 C.F.R. §§ 402.40-402.48. In both cases, the action agencies were required to enter into "Alternative Consultation Agreements" with the wildlife agencies. Those Agreements set out staff training procedures, standards for determining that actions would not adversely affect listed species, and programs for recordkeeping and periodic evaluation. The Services retained oversight authority and responsibility.



These experiments have met with mixed reactions from the judiciary. A federal district court struck down the FIFRA joint counterpart regulations, ruling that the ESA does not permit action agencies alone “to make the critical section 7(a)(2) determination” that consultation is not required. *Washington Toxics Coalition v. Dep’t of Interior*, 457 F. Supp. 2d 1158, 1179 (W.D. Wash. 2006). That court also found that the Services had failed to fulfill their own duties to insure that their actions are not likely to jeopardize listed species by delegating decisionmaking authority to EPA without any evidence that EPA would make those decisions properly. A different district court upheld the Fire Plan joint counterpart regulations, but only because it concluded that the Services could fulfill their statutory role in the consultation process through the Alternative Consultation Agreements and their retained oversight authority. *Defenders of Wildlife v. Kempthorne*, 2006 WL 2844232, slip op. at 18-19 (D.D.C.).

The sweeping delegations made in the Revised Regulations would fail judicial review under the standards articulated in either of these cases. Even if one agrees with the *Defenders v. Kempthorne* court that the ESA does not categorically prohibit this sort of delegation, the Revised Regulations lack any oversight provisions or continuing role for the Services. Furthermore, as in *Washington Toxics*, the delegation decision itself appears to violate Section 7’s requirement that the Services insure that their own actions do not cause jeopardy or adverse modification of critical habitat. In proposing and issuing the Revised Regulations, the Services cited absolutely no evidence that *any* action agencies, let alone the full range of federal agencies, will use scientifically appropriate procedures in implementing their new responsibilities.

Allowing action agencies to evaluate their own compliance with Endangered Species Act provisions would be one thing if it had a proven record of working, but history shows it does not. The Services’ own evaluation of experience under the National Fire Plan joint counterpart regulations demonstrates the problems with delegation. In January 2008, the Services issued a report reviewing the performance of the Forest Service and Bureau of Land Management (BLM) under those regulations. The report confirms Congress’s wisdom in mandating that action agencies consult with the more expert Services. This should have been the best case for delegation. Both BLM and the Forest Service have years of experience with consultation. Under the applicable Alternative Consultation Agreements, their personnel had undergone training regimens approved by the Services. The Services had examined and approved the action agencies’ planned approach to reviewing their actions. And the action agencies knew that their efforts were subject to ongoing review. Yet they still failed to meet basic standards for careful assessment of their actions. NMFS concluded that not one of the 10 evaluations performed for species under its jurisdiction adequately identified the effects of the action, properly noted the listed species that might be affected, or used the best available scientific information. FWS found that 31 of 50 evaluations by the land management agencies did not meet all six review criteria, and 8 of the 50 did not meet any of the criteria.

Given the evidence that action agencies do not properly evaluate the effects of their actions on listed species even under a carefully tailored program (with trained personnel and ongoing review), the broad and unfettered delegation made by the Revised Regulations, to all action agencies with respect to all of their actions, is not legally supportable.

In addition, the Revised Regulations provide a 60-day time limit (with the possibility of one 60-day extension) for the Services to make a determination of whether they concur or not. If the Services cannot meet the time limit (or if they simply duck the issue), the action agency's consultation responsibilities are deemed satisfied. That provision would allow actions to go ahead no matter how great or how direct a threat they pose to listed species if the Services are too understaffed to review a "not likely to adversely affect" determination, or not willing to take the political heat for rejecting such a determination. The Services should respond to action agency submissions in a reasonably timely manner, but the species should not bear the risk of inaction, at least not without strong assurances that the Services will have the resources they need to meet those deadlines.

### ***Limiting the Scope of Consultation***

Where consultation does occur, the Revised Regulations impose new constraints on its scope. The most problematic is the exclusion from consideration of indirect effects for which the action cannot be identified as the "essential cause." 73 Fed. Reg. at 76287 (to be codified at 50 C.F.R. § 402.02). This change is inconsistent with the ESA. Even if it were lawful, it would be undesirable because it will increase confusion and limit conservation. It will subject listed species to death by a thousand cuts.

The vast majority of listed species are threatened by a combination of many different types of activities. Actors connected with various threats are already prone to finger-pointing and blame-shifting. Consider, for example, the many endangered and threatened runs of Pacific salmon species. Logging, fishing, irrigation, development, and hydroelectric power interests have spent years blaming each other for the plight of the salmon. But until now, they have all had to submit to consultation when their actions had a federal nexus. Consultation should ensure that all who contribute to extinction threats play a role in finding a solution. The Revised Regulations will have just the opposite effect, fragmenting responsibility and encouraging claims that undeniably harmful effects should escape review.

The Services explain that the Revised Regulations merely clarify the requirement in the 1986 regulations that indirect effects be "caused by" the proposed federal action. "The addition of the term 'essential,'" the Services explain, "is meant to emphasize and reaffirm that the effects analysis is limited to those effects for which it is appropriate to hold the Federal agency responsible because there is a close causal connection between the Federal action under consultation and the effects on the species in question." 73 Fed. Reg. at 76277.

While framed as a mere clarification of terms "in order to capture the appropriate practice of the Services to require a close causal connection," the Revised Regulations could drastically alter the established law of consultation. It has long been established, for example, that consultation on a federally-funded highway project must include consideration of the residential and commercial development that can be expected to follow highway construction. *National Wildlife Fed'n v. Coleman*, 529 F.2d 359, 373-74 (5th Cir. 1976). Yet under the Services' formulation, highway construction does not appear to be the "essential cause" of subsequent development. Several intervening factors must occur for development to follow highway construction, and independent action by several other parties must take place: landowners must

decide to develop; developers must seek development permits from local permitting agencies, and those agencies must approve the development. To the extent the Revised Regulations allow agencies to avoid consultation on such reasonably foreseeable indirect effects of their actions, they are inconsistent with the ESA. Section 7 requires that action agencies, in consultation with the Services, insure that their actions are not likely to cause jeopardy or adverse modification of critical habitat. Willful blindness to wholly foreseeable indirect effects is inconsistent with that duty.

It is possible to read the Revised Regulations in ways that would be even more harmful to listed species. The Services' explanation of what it means for an action to be the "essential cause" of an effect can be read to foreclose consultation on any actions, no matter how harmful, if the species is already in jeopardy due to the effect of other actions. That is not the law. "Even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm." *National Wildlife Fed'n v. National Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008).

Nor should it be the law. By definition, listed species are "in danger of extinction" or likely to become so in the foreseeable future. 16 U.S.C. § 1532(6), 1532(20). It will often be difficult or impossible to show that a listed species would be safe if not for a single proposed action. Paradoxically, these regulatory changes could suggest that the more dire the condition of a species, and the greater the number of threats to which it is exposed, the more limited the scope of consultation becomes. The Minerals Management Service, for example, might argue that it need not consult on the direct effects of arctic oil and gas leasing on the polar bear because the species is doomed by global warming in any case. That surely is not what Congress intended when it enacted Section 7. While consultation on arctic oil development cannot wholly solve the problem of global warming, it can make a difference to the probability of polar bear extinction and the speed with which extinction might arrive.

### ***Shifting the Burden of Proof***

The Revised Regulations exacerbate the effect of the "essential cause" limitation by restricting consultation to those effects which can be shown by "clear and substantial information" to be reasonably certain to occur. 73 Fed. Reg. at 76287, to be codified at 50 C.F.R. § 402.02 (definition of "Effects of the action"). This change is inconsistent with the ESA, which requires that agencies use the best available scientific information in fulfilling their duties under Section 7 – not just information that rises to the level of "clear and substantial." 16 U.S.C. § 1536(a)(2). Further, this change effectively reverses the historic, and court-endorsed, practice of giving the benefit of the doubt to protected species.

The Services explain that the Revised Regulations adopt the "clear and substantial" standard

to reemphasize that there must be a firm basis, based on best available scientific and commercial data, for believing that a future activity is reasonably certain to occur before its effects should be viewed as caused by the Federal action under consultation. The information need not be dispositive, free from all uncertainty,

or immune from disagreement to meet this standard. However, there must be a clear and substantial basis to support the conclusion.

73 Fed. Reg. at 76278.

“Clear and substantial” is a new turn of phrase, and the Services’ explanation fails to clarify just what level of proof it requires. What is clear, however, is that the Services intend this language to increase the evidentiary standard for requiring consultation, essentially putting the burden of proof on the species. That is inconsistent with ESA section 7, which deliberately puts the burden on the action agency to “insure” that its actions do not pose an unacceptable threat to listed species.

In its first look at section 7 in 1978, the Supreme Court noted that Congress had deliberately adopted a strategy of “institutionalized caution.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). At the time, section 7 required that action agencies insure that their actions “will not jeopardize” listed species. Congress slightly revised that language in 1979, changing the text of Section 7(a)(2) from “will not jeopardize” to the current “is not likely to jeopardize.” In explaining that change, Congress took care to reiterate that the Act, as amended, “continues to give the benefit of the doubt to the species,” and “to place the burden on the action agency to demonstrate to the consulting agency that its action will not violate Section 7(a)(2).” H.R. CONF. REP. 96-697, reprinted in 1979 U.S.C.C.A.N. 2572, 2576 (1979). The federal courts have continued to read the ESA as requiring that species be given the benefit of the doubt in the consultation process. See, e.g., *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988); *Natural Res. Def. Council v. Kempthorne*, 506 F. Supp.2d 322, 361-2 (E.D. Cal. 2007); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp.2d 1115, 1127, 1135 (N.D. Cal. 2006); *Rio Grande Silvery Minnow v. Keys*, 356 F. Supp.2d 1222, 1233 (D.N.M. 2002).

In addition to ensuring that ignorance does not work against conservation, this interpretation provides an important incentive for action agencies and applicants to develop and divulge information within their control. See Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE L.J. 1619 (2004).

Adding a requirement that, to be considered in Section 7 consultations, effects must be shown by “clear and substantial information” to be reasonably certain to occur reverses the precautionary approach mandated by the ESA. Indeed, the Services in the preamble to the Revised Regulations explicitly disavowed the longstanding “benefit of the doubt” standard. Conservation proponents will now be required to prove to some unspecified but apparently high degree of certainty that an effect will occur before it may be considered in consultation. If the Revised Regulations are allowed to stand, the impacts of that new interpretation will reverberate beyond the consultation process to affect listing, which until now has similarly been thought to require that species be given the benefit of the doubt.

## *Conclusion*

The Services are correct that much has happened in the 35 years since the ESA was enacted, and in the 23 years since the interagency consultation rules were last comprehensively revised. The growing recognition that climate change is the major challenge for the future calls for a fresh look at our conservation goals and how we approach them. However, the Revised Regulations fail even to attempt to reconcile the difficulties inherent in grappling with this leading threat to biodiversity with the text of the ESA. Instead, their principal effect will be to roll back existing protections for endangered species from a wide variety of traditional threats.

The Services' broad delegation of authority to action agencies and administrative abdication of their consultation role violates the ESA, and is likely to increase risks to listed species. The new limitations on which effects can be considered in the reduced number of cases that will require consultation will inject new opportunities for discord and delay into the consultation process. In those cases that proceed to formal consultation, fewer effects will be included in jeopardy analysis and a jeopardy opinion will be less likely to result. Jeopardy opinions are accompanied, whenever possible, by "reasonable and prudent alternatives"—ways the federal action may proceed while avoiding the likelihood of jeopardizing the continued existence of listed species. Thus, the new limitations will ultimately result in federal actions proceeding without incorporating measures to mitigate harmful effects on listed species and critical habitat.

For these reasons, the Revised Regulations—initiated in the eleventh hour of an outgoing administration with no clear justification and only the barest opportunity for public input—violate both the letter and the spirit of the ESA. I urge the Committee, and ultimately Congress, to pass H.J. Res. 18 and void the regulations.