



Endangered Species At Risk

Bush Administration's Eleventh Hour ESA Proposal Eliminates Important Checks and Balances Protecting Imperiled Species

The Bush Administration has proposed an eleventh-hour rulemaking that would limit the ability of experts at the U.S. Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to review actions of federal agencies that could harm endangered and threatened species.

The Section 7 consultation requirements are the heart of the protections of the Endangered Species Act. By requiring federal agencies to work with the FWS and NMFS to insure that an agency's actions do not jeopardize the existence of a species or adversely change or destroy its habitat, the Act's consultation requirement provides a critical safety net for wildlife that other environmental reviews simply cannot match.

After years of failed attempts to roll back endangered species protections in Congress, industry lobbyists have long urged the Bush Administration to weaken the ESA through regulatory changes. The Bush Administration's last ditch proposal mirrors key elements of failed industry-backed legislation and attempts to achieve through regulation what could not be won through legislation. A summary of the proposed changes follows:

Removes Crucial Safeguard for Imperiled Wildlife and Habitat

The proposal allows federal agencies to decide unilaterally that consultation is not necessary because take of a threatened or endangered species is not likely to occur. Actions that the sponsoring agency determines on its own will have inconsequential, uncertain, unlikely or beneficial effects would not require any consultation. Current rules allow agencies to make such determinations, but they require FWS and NMFS to sign off. Under the Administration proposal, independent experts at the FWS and NMFS would not review such agency determinations at all. While the action agency would theoretically still be liable if take occurs, it would take a citizen suit against the agency to impose that liability. Citizens and courts would be forced to provide the independent checks and balances now provided by FWS and NMFS experts.

In 2003, the Bush Administration imposed similar rules allowing agencies to approve new pesticides and projects to reduce wildfire risks without asking the government's expert scientists whether threatened or endangered species and habitats might be affected. The pesticide rule was later overturned in court. *Washington Toxics Coalition v. U.S. Dep't of the Interior*, 457 F. Supp. 2d 1158 (W.D. Wash. 2006). The rule governing wildfire protection is currently being reviewed in federal court, but internal reviews by FWS and NMFS concluded that nearly half the unilateral evaluations by the Forest Service and Bureau of Land Management that found such projects were unlikely to harm protected species were not legally or scientifically valid.

In recent years, roughly 70,000 federal actions/year have triggered formal or informal consultation. On average, more than 95 percent are resolved through informal consultation. Informal consultation allows the action agency, with concurrence from the wildlife agencies, to determine that a project will not likely affect a species or its habitat and to proceed with the project. Even informal consultations, however, can lead to recommendations for project modifications, providing a crucial safeguard for listed species. Absent a process for FWS and NMFS review and concurrence, few of these project modifications would likely occur.

Bush Administration Proposal Puts Species At Risk

Even where an agency requests that FWS or NMFS concur, the Bush administration proposal places an arbitrary 60 day limit (subject to a possible extension of 60 days) on completion of informal consultations; otherwise, the project can move forward regardless of the impacts on listed species. This proposal will increase the likelihood that harmful agency actions could slip through, again necessitating more citizen suits.

Eliminates Most Protections From the Impacts of Greenhouse Gas Pollution for Polar Bears and Other Wildlife Threatened by Climate Change

The administration proposal narrowly defines what effects of an action are subject to review under the ESA. Specifically, the definition of “effects of the action” in the proposed rule limits application of section 7 consultation to those federal agency actions that are an “essential cause” of the effects and for which there is “clear and substantial information” that they “are reasonably certain to occur.” The proposal’s new concept of essential causation would eliminate consultation for federal actions that contribute to an effect on a species, perhaps even substantially, if the effect would otherwise occur to some extent without the federal action. Consideration of global warming impacts on species is thus simplified to the point of absurdity: Actions that contribute to the extent, duration or severity of global warming would escape review entirely under the ESA as long as global warming would otherwise occur to some extent.

Indeed, the preamble to the rule singles out greenhouse gas emissions as an example of an effect that would not be evaluated under section 7 because, in the Bush administration’s view, (1) there is not clear and substantial information that the effects of the emissions are an essential cause of effects to polar bears by polar ice cap melting, and (2) even if it is an effect covered by section 7, the proposal states that the section 7 consultation requirements do not apply if the “effects are not capable of being meaningfully identified or detected in a manner that permits evaluation.” The preamble asserts that this is the case with greenhouse gas pollution.

In announcing the proposal, Interior Secretary Dirk Kempthorne made clear that these changes were intended to put off limits any consideration of the impacts of greenhouse gas emissions on polar bears or other wildlife affected by global warming. These changes, however, go well beyond global warming. They will affect all listed species and critical habitat from being protected from a host of indirect effects resulting from federal actions, permits, or funding decisions.

Circumvents Careful Legislative Decision Making

The Bush Administration’s eleventh-hour proposal with barely 160 days remaining in the administration is clearly an effort to secure dramatic changes to the ESA that the administration and its industry allies have been unable to achieve through legislation. The concepts of self-consultation and deadlines that place the burden of delay on listed species protection were both key elements of a bill by former Rep. Richard Pombo (D-Calif.) that the Senate refused to consider. This proposed rule attempts to eviscerate one of the most important provisions of the ESA without adequate public debate or consideration by Congress.

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