



## **New Endangered Species Act Rules Leave Science Behind**

On August 11, 2008, Department of the Interior Secretary Dirk Kempthorne announced proposed changes that would permit any federal agency to decide for itself whether protected species would be threatened by agency projects. Many of these agencies do not have significant biological expertise and often have clear conflicts of interest with the protection of species.

### **Biologists cut out of the process**

Under Section 7 the Endangered Species Act, federal agencies that fund or execute projects such as dam and road building, water management, oil and minerals exploration, and logging (“action agencies”) have to first consult with biologists at either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (“the Services”) to ensure that the proposed action won’t harm a species federally listed as threatened or endangered. These “informal” consultations typically lead to minor adjustments being made to the planned action to lessen the anticipated impacts, and also help identify projects with particularly severe or complicated impacts which then receive a thorough “formal” consultation. Between 1998 and 2002, the Services conducted over 300,000 consultations.

The new proposed regulations:

- Transfer much analysis away from the scientists at the Services and instead give the action agencies enormous discretion to determine whether or not their own project will affect imperiled species.
- Make action agencies the gatekeepers to the consultation process, effectively transferring decision-making based solidly in science to agencies that severely lack the biological expertise to make them.
- Impose an arbitrary deadline of 60 days for the Services to respond to a consultation request from action agencies. If the Services do not reply in 60 days, the action agency is free to move forward with their desired action.

These proposed changes fundamentally undermine the intent of the consultation process. Ensuring the recovery of endangered species is the mission of the Services. The scientists at the Services represent our nation’s collective scientific knowledge about the 1,353 federally listed species, and their expertise is critical in ensuring that federal actions don’t hinder or prevent species recovery. Allowing action agencies, whose primary directives often come into direct conflict with the needs of imperiled species, to oversee their own actions will seriously weaken the Endangered Species Act’s effectiveness.

### **Redefining as a way out of climate change mitigation**

When listing the polar bear as threatened earlier this year, Department of Interior Secretary Dirk Kempthorne made it clear he intended to prevent the Endangered Species Act from being used as a tool to take action on climate change. The proposed regulations take a giant leap towards his goal and, in the process, cause collateral damage to the way that the future and cumulative impacts of federal actions will be assessed in consultation.

Through a series of narrow redefinitions, the regulations limit consultation to actions which are an “essential cause” of the impacts on a species, and these effects must have “clear and substantial information” supporting that they “are reasonably certain to occur.” Besides removing any actions contributing to climate change from review, these broad exemptions will likely apply countless other federal actions which cumulatively have significant negative impacts on the recovery of imperiled species.

### **The public cut out of the process**

The administration drafted these regulations behind closed doors, and is only allowing Congress and the public a short period of time to comment on them. Once the rules are finalized, the administration would be free to use the new process for a flurry of new federal projects with no biological oversight. The *Associated Press* reported that the proposed regulations were written by attorneys in the Departments of Commerce and Interior, and that the experts at the Services did not see the new regulations until the week before they were released.

When the proposed regulations were announced on August 15, 2008 after they had been leaked to the press four days earlier, the public comment period was shortened from 60 days to 30 days. Such a short comment period is extremely surprising given that text of the new rule acknowledges that the rule “may raise novel legal or policy issues.” To further minimize the role of the public in shaping the regulations, no public hearings are scheduled and comments will only be accepted through either traditional mail or a web form on [regulations.gov](http://regulations.gov).

### **Part of a greater story**

Rule changes like these proposed regulations have been tried before:

- In 2003, the Administration issued similar rules allowing pesticide approval and projects intended to reduce the risk of wildfire to proceed without consulting the Services. An internal review by the Services, which was never released to the public, concluded that the action agencies failed to correctly determine the likely harm to imperiled species in over half of their self-monitored decisions. This rule has also been overturned in a federal court.
- Self-consultation by action agencies also appeared as a key element in a bill proposed by Rep. Richard Pombo (D-CA) which failed in 2006 after the Senate refused to consider it. The new proposed regulations are an attempt to accomplish through regulation what the administration could not accomplish through legislation.

These changes are just one part of a last-minute attempt to restructure the way that federal agencies use scientific information. The public, Congress, and the presidential candidates must watch closely from now through January to identify other changes that will indefinitely sideline science from the policy making process.