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October 14, 2008

Public Comment Processing, Attention: 1018-AT50  
Division of Policy and Directives Management  
U.S. Fish and Wildlife Service  
4401 North Fairfax Drive, Suite 222  
Arlington, VA 22203.

Re: Proposed Rule Limiting Interagency Consultation Under The Endangered Species Act

Dear Sir or Madam:

On behalf of the National Audubon Society, including its state offices and more than one million members and supporters, we are writing to oppose the changes in the regulations implementing Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. 1536., regarding the interagency consultation process, proposed jointly by the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS"). 73 Fed. Reg. 47,868 (Aug. 15, 2008). The ESA has been called the safety net for our nation's wildlife, fish, and plants that are at risk of extinction, and the interagency consultation process is at its core. Because the proposed rule would virtually gut that process, the purpose and effect of which has been to protect species at risk, we urge FWS and NMFS to withdraw the proposed rule.

### **Audubon's Interest In Wildlife Protected Under The ESA**

The National Audubon Society is a not-for-profit corporation organized under the laws of the State of New York, with its principal office at 225 Varick Street, 7<sup>th</sup> Floor, New York, New York 10014. Audubon has many state offices and a presence in all 50 states through more than 450 certified chapters, nature centers, sanctuaries, and education and science programs. Audubon's mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity. We carry out that mission through a variety of activities including education, habitat conservation and public policy advocacy. Because of our focus on birds and their habitats, almost all of the following discussion relates to the FWS.

## **Overview and Summary**

The ESA interagency consultation process has been extremely successful for both imperiled species and proponents of projects that implicate these species. Section 7 consultations (informal and formal) almost always result in projects going forward, sometimes with modifications to minimize impacts. The perception (on which the proposed rule is based) that projects are often denied approval or delayed as the result of Section 7 consultations is not borne out by the FWS data. In fact, the FWS data demonstrate that the consultation process results in timely decision-making.

The consultation process serves the important function of avoiding jeopardy opinions because the agencies work with applicants to modify projects where appropriate by including conservation measures into their project plans during informal consultations. When necessary, modifications are made during the formal process through terms and conditions as well as conservation recommendations that the FWS adds to the Incidental Take Statement that accompanies the Biological Opinion. These are intended to minimize the impacts of the project as well as offset impacts by providing conservation benefits to species. Jeopardy opinions are very rare, and, if issued, the FWS works with the applicant to formulate an alternative project description that would avoid jeopardizing species.

The FWS input is critical because biological assessments (i.e., project proposals and assessments of impacts to listed species submitted by the applicant agency) typically underestimate the direct impacts of their projects and limit their focus to short-term and site-specific effects of their projects. The FWS consultations frequently expand the focus to long-term effects and effects on adjacent or nearby habitat because the extent of the action area is often underestimated. Without the FWS consultation, this broader focus and the conservation measures that are required as a result would be lost. Currently the FWS has the final say when deciding whether a project will or will not adversely affect species, which is crucial because the FWS very often disagrees with the action agency with regard to “may affect” determinations. The proposed changes are based on false assumptions, unsupported by data, and are otherwise fatally flawed. They will harm species and cause delay. Therefore, the proposed rule must be withdrawn.

### **I. The ESA inter-agency consultation process has been effective and should be maintained.**

#### **A. The ESA consultation process has resulted in the recovery of species.**

For over 30 years, the ESA has been the single most important law protecting species at risk, and its success stories are testaments to its value. For example, in recent years, it has led to delisting of the Bald Eagle and Peregrine Falcon. Protection of these birds resulted from the Section 7 consultation process, which steered communication towers away from nesting territories, required the marking of power lines to prevent strikes, and changed the timing of timber sales and other natural resource projects so that they were completed outside of nesting seasons, among other safeguards.

Data compiled by the FWS under the Government Performance Review Act (“GPRA”) for the ESA program (“ESGPRA”) document the success of the program.<sup>1</sup> A chart of selected GPRA data is included as an attachment to these comments. For 2006, the FWS reported 1,351 total United States species listed under the Act, of which 1,084 species (80 percent) had approved recovery plans, and 188 species were covered by approved Habitat Conservation Plans (“HCPs”).<sup>2</sup> For 2007, the numbers are almost identical, with a total of 1,310 total United States listed species under the Act, of which 1,085 species (80 percent) had approved recovery plans and 185 species were covered by approved HCPs. As the result of these efforts, for 2006, 522 listed species were stable or improving, and for 2007, the comparable number was even higher, with 572 listed species stable or improving. Thus, it cannot be seriously questioned that the ESA consultation process has been a success story for wildlife that might otherwise have vanished from the planet.

### **B. The consultation process is almost always resolved at the informal level.**

Measured in terms of the speed, efficiency, and outcomes for project proponents and action agencies, GPRA data compiled by the FWS dramatically document the success of the program. As shown by the attached chart, almost all Section 7 consultations are resolved at the informal consultation phase, some with negotiated minimization of impacts. For 2006, there were 65,519 requests for technical assistance and informal consultations, of which 36,438 (56 percent) resulted in the initiation of informal consultation and only 1,861 (less than 3 percent) became formal consultations. For 2007, there were 46,906 requests for technical assistance and informal consultations, of which 23,098 (49 percent) resulted in the initiation of informal consultation and only 1,914 (4 percent) became formal consultations.

Thus, for the two years reported, almost half (47 percent) of all requests for FWS assistance were resolved without even the initiation of informal consultation; slightly over half (53 percent) resulted in the initiation of consultation; and less than 4 percent of the total became formal consultations.

Informal consultations are negotiations between the action agency and the FWS, resulting in the inclusion of conservation measures into the action agency’s biological assessment. It is rare when an action agency and the FWS come to an impasse. Instead, the consultation process ensures that consideration is given to threatened and endangered species in the project’s design and implementation, ensuring that the project proponent’s and action agency’s needs can be met, while taking into consideration the protection of listed species.

In Montana, for example, where almost all consultations are informal, consultations involving the NMFS have protected such species as the endangered pallid sturgeon from having their fry

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<sup>1</sup> Although the FWS has been collecting data required by GPRA for years, it changed its format beginning fiscal year 2006, making data for prior years difficult to assess.

<sup>2</sup> See the FWS website at [http://www.fws.gov/endangered/bulletin/2007/2006\\_highlights.pdf](http://www.fws.gov/endangered/bulletin/2007/2006_highlights.pdf) (at p. 56) and [http://www.fws.gov/endangered/bulletin/2007/2007\\_highlights.pdf](http://www.fws.gov/endangered/bulletin/2007/2007_highlights.pdf) (at p. 56) for the total number of listed species for 2006 and 2007.

destroyed by irrigation projects. As a result of these informal consultations, changes in design allowed the projects to move forward in a timely manner.

In Maine, the FWS Field Office completes over 1,000 consultations annually (including requests for technical assistance). For the period 2006-2007, all consultations were resolved without a single formal consultation according to the FWS GPRA data.<sup>3</sup>

**C. More than 85 percent of all the FWS informal consultations are completed in a timely manner.**

As the FWS data show, 85 percent of informal consultations occur in a timely manner, allowing projects to proceed. For 2006, an astounding 85.4 percent of informal consultations were completed within 30 days. For 2007, the FWS did even better, when 85.8 percent of informal consultations were completed within 30 days.<sup>4</sup>

Thus for the two years reported, more than 85 percent of informal consultations were completed within 30 days.

**D. More than 99.9 percent of the projects on which the FWS is consulted go forward; only in rare cases are projects denied approval.**

Once again, the FWS data tell a success story. In 2006, FWS received 65,519 requests for technical assistance or informal consultations, for which FWS initiated the informal consultation process for 36,438 projects. Of these, only 30 resulted in adverse modifications or jeopardy opinions, which constitute 0.05 percent of the 65,519 total and 0.08 percent of the total for which informal consultation was initiated. In 2007, FWS received 46,906 requests for technical assistance or informal consultations, for which FWS initiated informal consultations for 23,098 projects. Of these, only 25 resulted in adverse modifications or jeopardy opinions, which is 0.05 percent of the 46,906 total and 0.11 percent of the total for which informal consultation was initiated.

Thus, for the two years reported, less than 0.1 percent of all requests for technical assistance to FWS resulted in adverse modifications or jeopardy opinions. And in the few cases where formal

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<sup>3</sup> For years prior to those reflected in the GPRA data from the FWS, a study published in 1994 by a private conservation organization showed similarly impressive results. The study, conducted by the World Wildlife Fund (“WWF”), documented that during the six-year period covered by the study, a total of 96,832 Section 7 consultations were undertaken between the FWS and other federal agencies. Of these, 94,113 (over 97 percent) were informal contacts, which were handled by phone calls and resulted in no delay or modification of a project. Williams, Christopher, “For Conserving Listed Species, Talk Is Cheaper Than We Think: The Consultation Process Under the Endangered Species Act” (WWF, 1994).

<sup>4</sup> For formal consultations during 2006 and 2007, the percentage of those consultations completed within the statutory timeframe, or agreed-upon timeframe, was 82 percent and 78.5 percent, respectively. See attached chart.

consultation was initiated, less than 2 percent of that number resulted in adverse modifications or jeopardy opinions.

In sum, the documented record of expeditious and efficacious consultations, as displayed by the FWS data, is admirable and commendable.<sup>5</sup> The system is not broken, and it does not need fixing.

**E. The FWS has been modifying and streamlining the consultation process without abdicating its responsibilities to protect species.**

The FWS has been working for some time to tailor and streamline the consultation process. One successful mechanism has been the use of programmatic consultations. With this tool, action agencies and the FWS identify criteria for projects that would not require individual consultations if the action agency incorporates a required list of conservation terms and conditions into proposed projects. A novel and otherwise uncommon project may receive an individual consultation, but the action agency benefits because the majority of projects of a similar size and scope are expedited. The FWS benefits because the action agency often agrees to greater protections than they might otherwise accept in exchange for the benefits of streamlining. The result is expedited consultation with benefits to-- rather than at the expense of -- endangered species. While not all situations lend themselves to a programmatic approach, the FWS has been working to implement programmatic consultations where appropriate, in an attempt to be responsive to requests to streamline the consultation process. This programmatic approach has been used successfully in New Jersey for informal consultations with the United States Army Corps of Engineers on shoreline-hardening projects to include nourishment, re-nourishment, and dune restoration.

In Montana, the Forest Service and the Bureau of Land Management conducted a Section 7 programmatic consultation with the FWS relating to coal-bed methane permitting. The programmatic approach includes restrictions on how water is managed and project timing so that affected species are not impacted during their breeding/nesting season, a prohibition of surface occupancy in black-tailed prairie dog towns, and a requirement that utility lines are run underground. This programmatic approach saves resources and time.

The FWS Maine Field Office has also taken steps to streamline the permitting process. FWS biologists at the Maine Field Office have developed protocols with the Maine Department of Transportation (“MDOT”) that allow projects that do not harm listed species to go forward much

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<sup>5</sup> The World Wildlife Fund six-year study published in 1994 reported similar results. A total of 2,719 formal consultations occurred in that six-year period, of which 2,367 (87 percent) resulted in “no jeopardy” opinions. For that six-year period, 352 “jeopardy” opinions were issued, resulting in the termination of 54 proposed projects. Thus, for that period, 0.4 percent of the 96,832 consultations resulted in “jeopardy” opinions, and the vast majority of these projects were able to proceed after adopting “reasonable and prudent alternatives” identified by the FWS in its Biological Opinion. See also Houck, “Reflections on the Endangered Species Act”, 25 *Envtl. L.* 689, 692 (1995) and Houck, “The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce”, 64 *U. Colo. L. Rev.* 277, 326 (1993).

faster. Using the protocols, the MDOT is able to access the biological data and assess whether or not a project has the potential to harm any endangered species. This allows the MDOT to identify areas of potential concern ahead of time and bypass separate consultations with the FWS on the hundreds of projects that will not impact any listed species. If the pre-screening process identifies a project that could harm a listed species, the FWS biologists work with the MDOT staff to avoid and minimize impacts at the earliest stages of planning. Similar protocols are being developed in Maine with the Natural Resources Conservation Service.

**F. Biologists at wildlife agencies provide critical expertise on ways to assess and minimize impacts.**

The wildlife agencies have the expertise needed to minimize the impacts of development on listed species. For example, when species are added to the ESA list, it is critically important to have dedicated professionals determine what conservation measures (including mitigation) are needed to protect these new species. An illustration from Montana is instructive. There, expert input has allowed insect-dependent species, like the Mountain Plover, to have the benefit of greater protection during pesticide applications aimed at reducing grasshoppers for the benefit of agricultural operations. When the Animal and Plant Health Inspection Service (“APHIS”) wanted to apply pesticides, it consulted with the FWS. As a result of that consultation, the APHIS agreed to modify its pesticide application process -- which became a win-win situation for the birds and agricultural operations.

Furthermore, project modifications as the result of input from the FWS have benefits beyond those for listed species. For example, because of Section 7 consultation between the Federal Highway Administration (“FHWA”) and the FWS regarding impacts of highway construction on bull trout, roads in Montana are now being built to protect bull trout as well as the long-term health of streams. Bridges are now designed to be longer and with fewer piers -- which allow streams to maintain their natural processes. When bridges are constructed too narrowly, streambanks are lined with riprap and other bank stabilization structures; as more bank stabilization structures are built, rivers and streams are channelized, floodplains narrow or disappear, natural stream migration is prevented, and ultimately riparian vegetation does not regenerate, causing deteriorating stream health. These potentially adverse impacts have been averted due to the creative input of the FWS biologists.

**II. The proposed rule is deeply flawed and based on unsubstantiated assumptions.**

**A. The proposed rule would replace collaboration with divisive confrontation.**

The proposed rule would replace a successful collaborative model that brings all affected interests into the process with a confrontational model, which invariably leads to disputes, enforcement actions by those unsatisfied with the outcome, and delays. Thus, it would not accomplish the stated purposes for which the rule is being proposed.

The value for species protection of the current, collaborative process is that the FWS secures the inclusion of conservation measures in the design of projects so that they will not result in the “take” of species. Action agencies benefit from the certainty that their projects will not be

delayed or have to be redesigned as the result of formal consultation or possible litigation by aggrieved parties. Instead, this rule would replace the current collaborative model with a confrontational process that would leave the FWS or private parties potentially stopping projects in the middle of implementation and tying them up in enforcement or compliance actions. If this proposed rule is adopted, we will see more projects move forward without the conservation measures typically negotiated during the consultation process. Because the proposed rule necessitates reliance on enforcement, significant resources will need to be invested in enforcement actions, and projects that could have proceeded with modifications will instead be delayed with legal challenges and potentially required to be removed after the damage has been done. Thus, the proposal would result in more litigation, more expensive enforcement, fewer cooperative conservation actions, and ultimately, greater loss of threatened and endangered species and their habitats.

**B. There is no basis for turning over the role of species protector to action agencies.**

Section 7(a) (2) of the Act clearly states that agencies, while fulfilling the requirements of consultation, must use “the best scientific and commercial data available.” 16 U.S.C. 1536(a)(2). With regard to federally listed species, the FWS is generally the repository of the best available data or knows where to gather these data. There is no basis on which to believe action agencies have the resources, expertise, commitment, or mission to take over the role of protecting species, especially based on prior history. The list of federal agencies that participate in the Section 7 consultation is long, including: the Bureau of Reclamation, Bureau of Indian Affairs, Indian Health Service, Army Corps of Engineers, Rural Utility Service, U.S. Dept of Agriculture, Natural Resources Conservation Service, Farm Services Agency, Department of Energy, Department of State, Department of Defense, Bureau of Land Management, Minerals Management Service, Forest Service, Environmental Protection Agency, Federal Aviation Administration, Federal Communications Commission, Federal Energy Regulatory Commission, and Department of Transportation. Most do not have the expertise or resources to protect species, and few have any reference to species conservation included in their mission statement. Indeed, their performance is measured by the accomplishment of projects that support their own mission.

In Maine, for example, at least 50 percent of the FWS consultations are done with the United States Army Corps of Engineers, an agency without a sufficient staff of biologists. It would be wasteful and inefficient to try to recreate the biological experience and expertise needed at the Corps to address the impacts of Corps-approved projects on listed species.

Furthermore, action agencies’ biological assessments are notorious for both underestimating the direct impacts of their projects as well as limiting their focus to the short-term and site specific effects of their projects. FWS consultations frequently expand the focus to long-term effects and effects on adjacent or nearby habitat, as required under the ESA. Without FWS consultation, this broader focus and the conservation measures that are required as a result would be lost. Currently the FWS makes the final determination on whether a project will or will not adversely affect species, which is crucial because the FWS very often disagrees with the action agency with regard to “may affect” determinations.

Action agency bias in favor of approving projects as proposed is demonstrated by the following illustration from Florida. In 2000, developers applied for state and federal permits to build a golf course community called Mirasol in southwest Florida on 600 acres of wetlands in Cocohatchee Slough, adjacent to the nation's largest Wood Stork rookery at Audubon's Corkscrew Swamp Sanctuary. The Army Corps (in their review of the project before issuing a Clean Water Act Section 404 permit) determined the Mirasol project "may affect" the endangered Florida panther, the endangered Wood Stork, the endangered Red-cockaded Woodpecker, and the threatened eastern indigo snake. The Corps provided a listed species analysis and a revised determination that the project "may affect, but is not likely to adversely affect" the Florida panther, the Wood Stork, the Red-cockaded Woodpecker, and the eastern indigo snake. The Service did not concur with these determinations. After reviewing information received from the Corps and the applicant's agent, the Service provided the Corps with a letter concurring with the Corps' revised determination of "may affect, but is not likely to adversely affect" for the Red-cockaded Woodpecker and eastern indigo snake but not concurring with the Corps' revised determination of "may affect, but not likely to adversely affect" for the Wood Stork or the Florida panther. Some of the conservation measures resulting from this consultation have included: the removal of the golf course from the project, increased size of the mitigation property, and the mandatory purchase of credits in Panther Island Mitigation Bank. Under the new proposed rule, the Corps initial "may affect" determination would have stood and the project would likely have been built in its original, more harmful conformation.

Another example from Florida concerns Gulf Islands National Seashore in Pensacola, located on a dynamic barrier island that lost several stretches of its access road in Hurricane Ivan. Initially, the Federal Highway Administration ("FHWA") required the National Seashore to rebuild a more durable, very expensive road, or funding would be withheld. To meet this condition, the National Park Service ("NPS") proposed subsurface coastal armoring to protect the road from future erosion and storm events. This is critical wintering habitat for federally threatened Piping Plovers and nesting habitat for several species of federally listed sea turtles and an imperiled beach mouse, and these species are all dependent on the dynamics of a coastal system. The NPS concluded with a "not likely to adversely affect" determination in its biological assessment. This determination overlooked the fact that washovers (which are valuable foraging and roosting habitat for wintering piping plovers) would be impacted by the road reconstruction and the subsurface armoring would possibly prevent future washovers from forming and possibly impede nesting of federally listed sea turtles. Further, armoring in such a dynamic system tends to lead to increased erosion seaward of the stabilizing feature, leading to further loss of habitat and also necessitating further armoring to protect the structure. During the consultation process, the FWS provided the NPS support in negotiating with the FHWA to approve funding for the road, thereby protecting a coastal habitat and its dynamic processes as well as providing substantial savings to the taxpayers for a less costly road. The plans for reconstruction are to follow a meandering route to better accommodate the highest value habitat areas for Piping Plovers and other declining shorebirds. This would not be the case had the NPS not requested a concurrence letter from the FWS.

In yet another example from Florida, Eglin Air Force Base is undertaking a dune nourishment project to protect structures on their barrier island base in the Florida Panhandle from storm surge and coastal erosion. The "dunes" and beach fill they propose to build includes a several-

mile long escarpment 13 feet above sea level. Eglin engineers maintain that this is necessary for their military mission and that impacts to listed species will be limited. They too, made a “not likely to adversely affect” determination with regard to piping plover habitat impacts. The FWS made a “may affect” determination and went through the formal consultation process with Eglin for piping plovers and sea turtles. Because of the consultation process, FWS is working with the Air Force on design modifications with the intent of allowing some overwash at intervals along the escarpment for the benefit of Piping Plovers and is providing other requirements to minimize impacts to sea turtles. None of these benefits would have been obtained without the initial informal consultation because the Air Force did not have the same estimation of the impact of these proposed activities as did the FWS.

Throughout Florida, beach nourishment projects often have direct impacts on federally listed bird species (wintering, prey base, mostly) as well as listed marine turtle summer nesting and listed beach mouse survival (year-round habitat). The Corps of Engineers’ biological assessments frequently make “likely to adversely affect” determinations for sea turtle impacts but generally find their actions are “not likely to adversely affect” listed shorebirds and their habitats. FWS consultation on these projects regularly succeeds in the modification of project design to make them less harmful. Through the formal consultation process, the FWS is working with the Corps and local sponsors to address the needs of tourism-based communities and the shorebirds’ need for habitat. Some conservation benefits include funding of conservation work on neighboring public lands (as part of the Action Area) to benefit the species and their habitats as well as limitations on beach raking on re-nourished beaches in Piping Plover habitat to preserve the wrack line/food source. These conservation benefits would not be obtained without FWS consultation.

Another example comes from Arizona, where the story of the Mexican Spotted Owl highlights the need for FWS consultation. When the Forest Service submitted biological assessments of “no expected impact” for planned projects within Mexican Spotted Owl habitat, the FWS did not concur and upgraded the assessment to “may affect” or “will affect” during the consultation process. Ultimately, the Arizona Cattlemen’s Association unsuccessfully sued to have Mexican Spotted Owl critical habitat designation removed from 8.6 million acres of federal land. The result of this disputatious process was delay, which harmed both the species and the cattlemen.

In South Carolina, a similar the story is told. There, the FWS has often disagreed with the Army Corps of Engineers’ findings of “no effect” in regard to permitting under Section 404 of the Clean Water Act. For example, in July of this year, the Corps submitted a permit to excavate accumulated sediments from two intake canals on a tributary of the Savannah River. The Corps determined that there would be “no effect” to threatened or endangered species as the result of this project, but failed to submit information about the chemical quality of dredged sediments, details of the outlet/overflow structures, and information about the landfill that would be used for the disposal of the dredged material. This information, in the FWS’s view, was necessary to determine likely effects on the federally endangered Wood Stork. As a result, the project permit was recommended to be held in abeyance until further information was supplied.

In June of this year, the Corps wanted to undertake a beach stabilization project to protect a section of shoreline in DeBordieu County, South Carolina. When consulted, the FWS cited a

lack of data and demonstrated need for the project as well as a failure to comply with state statutory requirements. In addition, the FWS noted that the Corps had failed to consider effects on the loggerhead sea turtle's habitat in its determination. The FWS also disagreed with the Corps' decision that the Piping Plover that winters south of the project area would not be affected by the project. Thus, input from the FWS was necessary in the review of this project because of the Corps' failure to address the impacts on a federally threatened species (the loggerhead sea turtle) and inadequate protection of Piping Plover habitat.

**C. Proposed restrictions to limit consideration of impacts to those that meet an undefined "essential cause" test by "clear and convincing evidence" are arbitrary and not based on science.**

"Essential cause" is not a scientific term and cannot be used as a regulatory standard for evaluating the "cause" of impacts. In science, causality is expressed in terms of association and probabilities. Science does not "prove" or "disprove" cause and effect to the certainty that the proposed regulation would require. Similarly, science cannot prove that "an action is indispensable to the effect." If the proposed rule's standard of proof were adopted, it would undermine the Act by upsetting the process designed to ensure a balancing of interests between development and species protection, and it would put a thumb on the scale in favor of development. The result would be contrary to the intent and purpose of the ESA. These types of insidious changes designed to gut the Act have been tried before – in prior Congresses – and have been defeated, as they should be yet again.

On the other hand, we do not disagree with the statement that "if an effect would occur whether or not the action takes place, the action is not a cause of the direct or indirect effect." What is important is that the regulations recognize the importance of considering a wide range of potential impacts of proposed projects and ensure input from the wildlife experts.

**D. The regulatory definition of cumulative impacts under the ESA should be the same as under NEPA.**

The proposal states: "We propose to amend the current regulatory definition of cumulative effects to clarify that the definition of 'cumulative effects' under section 7 of the Act is not the same as the use of 'cumulative impacts' in the National Environmental Policy Act." To the contrary, the two definitions should be the same. There is no legal prohibition on the FWS adopting the NEPA regulatory definition for purposes of the ESA. In fact, a narrower definition of cumulative effects under the ESA, as compared to the definition of cumulative impacts under NEPA, would not be sufficiently protective of listed species.

Similarly, the proposal states: "We also intend to emphasize that 'reasonably certain to occur' is not the equivalent of NEPA's reasonably foreseeable standard. It is a narrower standard." Again, the two standards should be synonymous. This would harmonize the two sets of requirements, reduce misunderstandings and confusion, and further the purposes of the ESA by properly protecting listed species.

**E. The proposed deadline for informal consultations is arbitrary and counter-productive.**

The proposed deadline for informal consultations is based on an unsupported and invalid assumption that delays are caused by the FWS and not by the action agency or the applicant. Inserting an arbitrary deadline for the FWS to respond may induce development interests to draw out the process by providing incomplete information, which could leave the FWS with insufficient time to consult informally on a proposed project. The result would likely be harm to species and delay due to litigation, which are counter-productive.

**Conclusion**

The purpose of the ESA, as well as the mission of all wildlife agencies, is to protect species and not to allow development projects to be rubberstamped with approval. When proposed projects may adversely affect listed species or habitat, the ESA provides that all of a project's effects -- direct, indirect, and cumulative -- must be considered. Action agencies -- which undertake and approve projects -- do not have the resources and expertise to make those evaluations. Therefore, before approving projects, action agencies must consult with the wildlife agencies, as currently required by law. The proposed rule, which would gut the current safeguards for the benefit of developers and to the detriment of species protection, is ill-conceived and must be withdrawn.

Respectfully submitted,



**National Audubon Society**

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cc: Secretary Kempthorne  
Secretary Gutierrez  
Mr. Lyle Laverty  
Mr. James Lecky  
Chairwoman Boxer  
Chairwoman Feinstein  
Chairman Rahall  
Chairman Dicks

Attachment A

## **AUDUBON STATE OFFICES ENDORSING THESE COMMENTS**

Audubon Alaska  
Audubon Arizona  
Audubon Arkansas  
Audubon California  
Audubon Colorado  
Audubon Connecticut  
Audubon Dakota  
Audubon of Florida  
Audubon's Louisiana Gulf Coast Initiative  
Audubon Minnesota  
Audubon Missouri  
Audubon New Mexico  
Audubon New York  
Audubon North Carolina  
Audubon Ohio  
Audubon Pennsylvania  
Audubon South Carolina  
Audubon Vermont  
Audubon Washington  
Audubon Wyoming  
Maine Audubon  
Montana Audubon

**SELECTED DATA FROM USFWS REPORTS PURSUANT TO  
GOVERNMENT PERFORMANCE REPORTING ACT (GPRA)  
FOR ENDANGERED SPECIES (ESGPRA)**

<b>USFWS Actions (nationwide)</b>	<b>TOTAL 2006</b>	<b>TOTAL 2007</b>
Requests for technical assistance or informal consultations received by USFWS	<b>65,519</b>	<b>46,906</b>
Number of informal consultations initiated	<b>36,438</b>	<b>23,098</b>
<i>Percent</i> of Informal consultations completed in a “timely manner” (within 30 days).	<b>85.4</b>	<b>85.9</b>
Number of agency requests for formal consultations initiated	<b>1,861</b>	<b>1,914</b>
<i>Percent</i> of formal consultations completed within the statutory time frame or agreed upon time frame	<b>82</b>	<b>78.5</b>
Number of “jeopardy” and/or adverse modifications biological opinions issued	<b>30</b>	<b>25</b>
Number of listed species covered by approved Habitat Conservation Plans (HCPs)	<b>188</b>	<b>185</b>
Number of candidate/at risk species covered by approved HCPs	<b>452</b>	<b>598</b>
Number of candidate/at risk species not listed due to conservation efforts	<b>2</b>	<b>3</b>
Number of species listed 2.5 years or longer with approved recovery plans (cumulative)	<b>1,084</b>	<b>1,085</b>
Number of listed species that are stable or improving (cumulative)	<b>522</b>	<b>572</b>