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TO: Colleagues

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RE: Bush Administration's Plans to Weaken Endangered Species Act

We recently obtained a leaked copy of changes to Endangered Species Act (ESA) regulations that the Bush Administration intends to propose in the coming weeks (attached). If adopted, these changes would seriously weaken the safety net of habitat protections that we have relied upon to protect and recover endangered fish, wildlife and plants for the past 35 years.

Background

For the past dozen years, industries regulated by the ESA, such as logging, mining, ranching and real estate developers, have lobbied aggressively to weaken the ESA's habitat protections because such protections sometimes cause delays and require projects to be adjusted to address the needs of wildlife. For most of this time, these efforts were led by Rep. Richard Pombo (R-CA). However, Rep. Pombo was voted out of office in 2006 in part due to his attacks on bedrock environmental laws such as the ESA.

These industries also have lobbied the Bush Administration to weaken the ESA through regulatory changes. For example, at behest of industry groups, in 2003 and 2004 the Administration enacted changes to regulations governing ESA § 7 that would enable chemical manufacturers to avoid ESA scrutiny of pesticide registrations and that would allow logging companies to avoid scrutiny of projects under the National Fire Plan. The pesticide regulations were subsequently overturned in litigation filed by National Wildlife Federation and other conservation groups. Washington Toxics Coalition v. U.S. Dept. of Interior, 457 F. Supp. 2d 1158 (W.D. Wa. 2006).

Throughout this 12-year time, large majorities of the American people have repeatedly stated in polls that they want to maintain or strengthen the ESA, and Congress has repeatedly rejected efforts to weaken the law. Despite this, the Bush Administration is moving forward in its waning months to weaken the law's key safeguards for species and habitats. The proposed changes are largely identical to those that industry groups and

their allies in Congress and the Administration have unsuccessfully promoted in the past. With striking arrogance, the Administration apparently believes that it can succeed now with this discredited agenda because the American people and Congress are distracted by a presidential campaign and other pressing business. Conservationists must mobilize to prevent the Administration from succeeding with this stealth attack on America's most important wildlife law.

Summary of Proposed Changes

The Administration proposes to change ESA § 7 regulations in several ways, all of which are designed to enable federal projects to escape the scrutiny of the expert biologists at the U.S. Fish and Wildlife Service and National Marine Fisheries Service (referred to here collectively as "the Service"). This memo highlights the most important proposed changes.

1. Elimination of Informal Consultations and Reduction of Formal Consultations

ESA § 7 requires federal agencies seeking to carry out, fund or permit an action to consult with the Service regarding the impacts of that action on species listed as threatened or endangered. This provision is the main safety net for species in the ESA, covering a wide array of activities from logging and mining to filling of wetlands for subdivisions. If an agency project proponent (known as the "action agency") finds that its project will have no effect on listed species, the current regulations state that the action agency need not consult with the Service. However, if there is any effect whatsoever, the action agency must engage in either informal or formal consultation.

If as a result of informal consultation, the action agency and the Service concur that the project is not likely to have an adverse effect on listed species, then the project may go forward. Most (probably over 90 percent) of ESA consultations conclude at this informal stage, oftentimes after the action agency agrees to modify the project for the benefit of listed species. The proposed changes would largely *eliminate* this crucial feature of the ESA. In essence, the Administration would allow proponents of federal projects to decide unilaterally whether those projects have adverse effects on listed species and would eliminate the ability of the Service to review projects and employ its expert judgment about what is needed to protect species and habitats. The only exception would be when the action agency voluntarily requests informal consultation.

The proposed changes would also significantly reduce the number of formal consultations. These are the in-depth reviews that lead to the preparation of a biological opinion, in which the Service determines whether a project will jeopardize listed species or adversely modify critical habitat and, if so, how the project must be modified to avoid harming wildlife. The Administration's proposed changes eliminate the requirement for formal consultation any time that an action agency unilaterally determines that a project will have no adverse effect on listed species.

The Administration attempts to rationalize this radical change to the ESA by claiming that the action agency will err on the side of protecting listed species in making its judgment about adverse effects. This is contrary to the 35 years of history of the ESA, where action agencies have often resisted the Service's efforts in the consultation process to protect species and have often understated the harmful impacts of their projects. The Administration itself alludes to this history by citing to a 2004 GAO report finding that the action agencies dislike ESA consultations because they find them "burdensome." Action agencies find ESA consultations burdensome because they inhibit the agencies from moving forward on their primary objective, getting the proposed project completed as quickly as possible at the least possible expense, which is often in conflict with the best interests of listed species.

2. New Justifications for Avoiding or Minimizing ESA Consultations Based on "Lack of Causation" Arguments

The proposed regulations would provide a host of new arguments to action agencies for avoiding ESA consultations or reducing their scope. These arguments all center around the idea that projects that could cause some harm to listed species should nonetheless escape ESA scrutiny because the causal link between the project and the anticipated harm is not sufficient. Thus, for example, the proposed regulations state that projects with a "marginal" contribution to the harm will be outside the scope of the ESA – despite the fact that the cumulative effect of "marginal," piecemeal insults to habitat quantity and quality is one of the main causes of species decline and extinction. The proposed changes would encourage action agencies to move forward with multiple, small-scale actions, each with "marginal" impacts, and thus avoid a thorough review of the cumulative harm to listed species.

Similarly, the Administration states that if an effect of the project would occur even without the project, it will now escape ESA scrutiny under the proposed regulations. This new approach ignores that habitat destruction and degradation often result from multiple causes. If a habitat area is at risk of degradation from both a subdivision and an invasive exotic plant, for example, it makes no sense to remove the subdivision from the ESA's scrutiny simply because a solution has not yet been devised for the invasive species problem.

The proposed regulations also state that an action agency need consult only on the part of the action that is causing the harm rather the entire action. This limitation on the scope of consultation is contrary to decades of ESA law, which makes clear that consultation on the entire action is needed to get a comprehensive look at the challenges facing the species and the potential solutions. The proposed changes would limit the Service's ability to craft recommendations to eliminate adverse effects.

The Administration attempts to justify its weakening of the current rules governing causation analysis on the ground that global warming presents new challenges to the consultation process. However, the changes do not create a framework for addressing the impacts global warming impacts on listed species, even though the global warming is

emerging as a top threat to the future of wildlife. Instead, the Administration casually mentions the global warming issue in a matter of a few sentences and then proposes nothing less than a broad-scale rollback of the ESA. If the Administration were serious about addressing the interplay between the ESA and global warming, it certainly would not propose weakening the ESA's most basic safety net features. As the science of climate change makes clear, conservation laws such as the ESA will need to be strengthened substantially to address the harmful effects of global warming on species and habitats.

The Administration has a responsibility to ensure that the Services and action agencies are incorporating the science of climate change's impacts on species and habitats into its consultations as well as every other aspect of ESA implementation. John Kostyack & Dan Rohlf, *Conserving Endangered Species in an Era of Global Warming*, 38 Envtl. L. Rep. 10203 (2008). The Administration's attempt to package these changes as a response to global warming simply adds insult to the injury that climate change already causes to endangered species.

3. Arbitrary Deadline Used to Enable Even the Most Harmful Projects to Escape ESA Scrutiny

Finally, the Administration proposes to impose a 60-day deadline on the Service to respond to the action agency's request for consultation and, if this deadline is not met, to allow the project to go forward regardless of the impacts of the project on listed species. In contrast, if the consultation deadlines imposed on the Service under the current regulations are not met, the action agency has no authority to move forward with the project. Presumably, even a project that causes the certain extinction of a species would go forward under this new rule. Considering that most delays in the consultation process are due to lack of adequate funding of the ESA program, this proposal to shift the risk of delays to listed species and habitats cannot be justified and undermines the basic principles of the ESA.