



June 12, 2012

By Certified Mail: 7012-1010-0000-6031-3599

The Honorable John E. Bryson  
Secretary  
U.S. Department of Commerce  
1401 Constitution Ave., N.W.  
Washington, DC 20230

The Honorable Kenneth Salazar  
Secretary  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240.

**RE: Petition for Rulemaking to Restore the Global Scope of Interagency Consultations  
Under Section 7 of the Endangered Species Act.**

Dear Secretary Bryson and Secretary Salazar,

The Society for Conservation Biology<sup>1</sup> (SCB) under the Administrative Procedure Act<sup>2</sup> and Department of the Interior's (DOI) regulations at 43 C.F.R. Part 14, hereby petitions the Secretary of the Department of Interior, through the U.S. Fish and Wildlife Service (FWS), and the Secretary of the Department of Commerce (DOC), through the National Oceanic and Atmospheric Administration (NOAA) (collectively the "Services"), to revise 50 C.F.R. § 402 to restore the full geographic scope of the Services' implementation of the Endangered Species Act (ESA or Act) with respect to consultations under Section 7 of the Act. This change would restore the original requirement that all U.S. Federal agencies consult with the Services to ensure that any of their actions that may affect U.S. listed threatened and endangered species beyond the borders of the United States will not jeopardize the existence of those species. Implementing SCB's recommended changes to the ESA's regulations will allow the Services to better fulfill the stated purpose of the Act: "to provide a means whereby ecosystems upon which endangered species and threatened species depend may be conserved," and "to provide a program for the conservation of such endangered species and threatened species."<sup>3</sup>

<sup>1</sup> SCB is an international professional organization whose mission is to advance the science and practice of conserving the Earth's biological diversity, support dissemination of conservation science, and increase application of science to management and policy. The Society's 5,000 members include resource managers, educators, students, government and private conservation workers in over 140 countries.

<sup>2</sup> The Administrative Procedures Act provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e).

<sup>3</sup> 16 U.S.C. § 1531(b).



## INTRODUCTION

The Endangered Species Act is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation”<sup>4</sup> and has been successful in preventing hundreds of species from going extinct since its enactment in 1973. However, the goal of the ESA is not merely to prevent the extinction of species, but also to “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered and threatened species,” as well as to implement at least six international treaties to conserve endangered species, including the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere and the Convention on International Trade in Endangered Species of Wild Fauna and Flora.<sup>5</sup> The ESA expressly states that achieving the goals and objectives of those treaties and conventions is the policy underlying the Act and contains provisions to aid in the recovery of species overseas, such as Section 8’s provision of funding, technical assistance and investigations to help with other countries’ recovery efforts. Thus the ESA envisions an integrated program of conservation both within and beyond the territorial jurisdiction of the United States.

Since the passage of the ESA in 1973, our scientific understanding of biodiversity, ecosystem functions, and the threats posed by human activities to biodiversity has grown substantially. We are now aware of the threats to global biodiversity that were not even considered at the time of the passage of the ESA, including the full impacts of invasive species, the challenges of climate change, and other complex processes that may impact biodiversity. Although powerful, this 39-year old statute has not been significantly revised since 1988, and the regulations that implement the ESA have mostly stood unchanged since 1986. Unfortunately, in 1986 one of the few changes made to the ESA’s regulations was to end the practice of interagency consultation concerning the impact of United States agency action on U.S.-listed species that are found in other countries. This regulatory change was found to be inconsistent with the plain meaning of the ESA, and was struck down by the Eight Circuit Court of Appeals.<sup>6</sup> But, in a sharply divided ruling, the Supreme Court reversed the Eight Circuit on procedural grounds, thereby reinstating the 1986 regulation.<sup>7</sup> Given the increasing number of major developments, from permit applications for proposed trans-boundary oil-sands pipelines to the construction of border fences, and continued funding of international development projects, reinstating the original global geographic scope of the Section 7 consultation requirement remains one the most overdue changes to ESA’s implementing regulations. This change would result in meaningful gains to biodiversity, both within the United States and around the world.

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<sup>4</sup> *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

<sup>5</sup> 16 U.S.C. § 1531(a)(4) & (b).

<sup>6</sup> *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8<sup>th</sup> Cir. 1990).

<sup>7</sup> *Defenders of Wildlife v. Lujan*, 504 U.S. 555 (1992).



## I. The Purpose and Need for Section 7 Consultations on Agency Actions Affecting Species Beyond U.S. Jurisdiction and the High Seas.

As was famously explained by the Supreme Court regarding the ESA, the “plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.”<sup>8</sup> Reversing the trend towards species extinction is not limited to domestic species found only within the United States. Instead, a species may be protected under the ESA wherever it is found throughout the world. Section 4, which governs the listing of new species under the ESA clearly envisions the listing of foreign species, since it requires the FWS to consider “those efforts, if any, being made by any State or foreign nation...to protect such species” and to consider those species “designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement” as well as those species “identified as in danger of extinction...by any agency of a foreign nation.”<sup>9</sup> Congress’ concern for preservation of endangered wildlife worldwide is demonstrated in several locations in the ESA, including Section 8(b) of the Act, which requires the FWS to “encourage [] foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species.”<sup>10</sup> Section 9 of the ESA prohibits the import and export of endangered species, and bars sales of such animals “in interstate or foreign commerce.”<sup>11</sup> Meanwhile, Section 11 of the ESA provides for forfeiture of listed species illegally “exported or imported” and provides for condemnation of vessels carrying such poached animals.<sup>12</sup> Thus, it is clear that Congress constructed the Act to provide a global response to the disappearance of wildlife.

One of the most powerful tools in preventing species extinction is through the consultation requirement in Section 7 of the Act. Section 7(a)(2) states that each federal agency shall “insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence” of an endangered species or “result in the destruction or modification of [critical] habitat of such species....”<sup>13</sup> This language contains no exceptions or limits to the geographic scope of the consultation requirement.

Shortly after passage of the ESA in 1973, the Department of the Interior and other federal agencies began a series of discussions designed to outline the requirements Section 7 imposed on federal agencies and departments. These efforts cumulated in the publication of *Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973* in 1976, and a Notice of Proposed Rulemaking in 1977 to codify the consultation procedures in the Guidelines.<sup>14</sup> Both the Guidelines and the proposed rulemaking explicitly stated that the consultation provisions of Section 7 applied to agency “activities and programs in the United

<sup>8</sup> *Tennessee Valley Authority*, 437 U.S. at 184 (emphasis added).

<sup>9</sup> 16 U.S.C. § 1533(b)(1).

<sup>10</sup> 16 U.S.C. § 1537(b).

<sup>11</sup> 16 U.S.C. § 1538.

<sup>12</sup> 16 U.S.C. § 1540(e)(4) and (5).

<sup>13</sup> 16 U.S.C. § 1536(a)(2).

<sup>14</sup> 42 Fed. Reg. 4,868 (1977)



States, upon the high seas, and in foreign countries” to insure that the agencies would not jeopardize the existence of any listed species.<sup>15</sup> The proposed rule received extensive comments from both the public, as well as from other Federal agencies throughout the U.S. government. The consultation regulations were finalized on January 4, 1978, and requiring agencies to consult with the Services on discretionary actions beyond U.S. territorial jurisdiction or the open seas.<sup>16</sup>

In the fall of 1978, Congress amended the ESA, providing detailed procedures for the consultation process in the revised Section 7 of the Act, with the specific intent of restating the existing law on Section 7 consultation requirements, including the regulations comprising the 1978 rule.<sup>17</sup> Despite this clear evidence of Congressional agreement that the scope of consultations should not be limited geographically, in 1983, the Department of Interior issued a notice of proposed rulemaking to revise the 1978 rule.<sup>18</sup> The 1986 rule rescinded that portion of the 1978 rule that applied the consultation requirements of Section 7 to federal agency actions that may affect species in foreign nations. No justification was provided to explain this change in policy. Shortly thereafter, Congress noted its disapproval of the revised consultation rule. The House Committee on Appropriations included in the 1987 appropriations bill for the Department of the Interior, a funding instruction that it “expects the Service to continue to provide consultation on endangered species to United States agencies dispensing foreign assistance.”<sup>19</sup> The Senate Committee on Environment and Public Works, in reporting out the Endangered Species Act Amendments of 1987 (S. 675), stated:

To the extent that [the 1986] regulations attempt to restrict the Act's requirements that each federal agency consult with the Secretary to ensure that its actions are not likely to jeopardize the continued existence and recovery of any listed species, the regulations have no statutory basis, are contrary to congressional intent, and are contrary to the law.<sup>20</sup>

The 1986 regulations were challenged by a coalition of non-governmental organization as violating the plain meaning of the ESA. In 1990, the Eight Circuit Court of Appeals held that the 1986 regulations violated the ESA by limiting consultations to the United States and high seas only.<sup>21</sup> The Eight Circuit held:

Reduced to its simplest form, the statute clearly states that *each* federal agency must consult with the Secretary regarding *any* action to insure that such action is not likely to jeopardize the existence of *any* endangered species. We recognize, however, that the use of all-inclusive language in this particular section of the Act is not determinative of the issue....We must search the Act

<sup>15</sup> 42 Fed. Reg. 4,871 (1977)

<sup>16</sup> 43 Fed. Reg. 870 (1978)

<sup>17</sup> H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978)

<sup>18</sup> 48 Fed. Reg. 29,990 (1983).

<sup>19</sup> H.R. Rep. No. 714, 99th Cong., 2d Sess. 19 (1986). See also H.R. Rep. No. 171, 100th Cong., 1st Sess. 15 (1987); H.R. Rep. No. 713, 100th Cong., 2d Sess. 15 (1988).

<sup>20</sup> S. Rep. No. 240, 100th Cong., 1st Sess. 6-7 (1988)

<sup>21</sup> *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8<sup>th</sup> Cir. 1990).





further for clear expression of congressional intent.

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We are convinced that evidence of such intent is found both in the words of the Act and in its legislative history as previously set forth. This evidence leaves us with the belief that Congress intended for the consultation obligation to extend to all agency actions affecting endangered species, whether within the United States or abroad.<sup>22</sup>

The Eight Circuit struck down the 1986 regulation that exempted activities of Federal agencies in foreign countries from the consultation requirement of Section 7. This decision was reversed by the Supreme Court on procedural grounds.<sup>23</sup> The Supreme Court held that the plaintiff NGOs did not have standing to challenge the validity of this regulation; the Court did not reach the substantive merits of the plaintiffs' case.

The reasoning of the Eight Circuit remains sound. Congress did not intend, and the plain language of the ESA makes clear, that the Section 7 consultation mandate is not limited geographically to the United States. Congressman Dingell, chairing the House hearings on the 1973 Act, made clear that it was aimed at protecting species worldwide by stating, "this country wants a management program that is going to maintain these populations around the world."<sup>24</sup> When the DOI began to develop its initial guidelines for how consultations would proceed, the Council on Environmental Quality, the DOI's Solicitor's Office, and the General Council's Office of the National Oceanic and Atmospheric Administration took the position that the ESA's requirement that federal agency actions not jeopardize the existence of listed species was applicable to listed species abroad.<sup>25</sup>

The application of the ESA to agency actions that occur in foreign nations and those actions that have impacts in foreign nations does not conflict with the basic statutory rule that U.S. laws normally do not have an extraterritorial effect. Applying the Section 7 consultation requirements to federal agency actions that may affect listed species in another country does not present a extraterritoriality problem because agency actions have no impact on the sovereign powers of foreign governments or their exercise of those powers. The direct impact of applying Section 7 to agency actions affecting species overseas will be on the planning processes of United States agencies, *which occurs primarily in this country in Washington D.C.* In fact, the main United States' overseas development agency regularly conducts environmental studies in connection with their overseas activities. The U.S. Agency for International Development (USAID) has codified extensive Agency Environmental Procedures, which include an assessment of the impacts of a proposed project on endangered species.<sup>26</sup> In essence USAID

<sup>22</sup> *Id.* at 122, 125 (emphasis added).

<sup>23</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>24</sup> Hearings on Endangered Species Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 93rd Cong., 1st Sess. 349 (1973).

<sup>25</sup> 42 Fed. Reg. 4,869.

<sup>26</sup> 22 C.F.R. Part 216. The endangered species compliance review is found at 22 C.F.R. § 216.5



complies with the National Environmental Policy Act, and partially complies with the Endangered Species Act already. Therefore, requiring consultations when its actions may impact U.S. listed species should not present a significant burden to the agency, but would ensure that the expert wildlife agencies do bring their expertise to bear in a timely manner.

Likewise, applying the Section 7 consultations requirement to federal agency actions that may affect listed species in other nations will not restrict the ability of foreign sovereigns to plan their own development strategies or wildlife conservation programs, and will in fact provide them with valuable scientific information. While a Section 7 consultation might result in the withdrawal of United States participation in some specific development project, this does not represent an instance of the U.S. impinging on another nation's sovereignty. As the Eight Circuit stated, "the Act is directed at the actions of federal agencies, and not at the actions of sovereign nations. Congress may decide that its concern for foreign relations outweighs its concern for foreign wildlife; we, however, will not make such a decision on its behalf."<sup>27</sup>

Currently, there are 607 foreign species on the list of threatened and endangered species.<sup>28</sup> If a Federal agency action occurs outside of the United States, the current regulations do not require the action agency to engage in consultations with the FWS or NMFS *even if that action were to lead directly to the extinction of a foreign species listed under the ESA*. Most Federal agency actions, even those that occur in foreign countries, are decided upon or directed in Washington, D.C. and thus, one could argue, should fall within the scope of the current regulation, if the regulations were applied with the benefit of doubt given to the species affected. Since numerous U.S. agency actions affect listed species overseas, it is vital to restore the duty that the original regulations clearly imposed. For example, the U.S. Export-Import Bank and the U.S. Overseas Private Investment Corporation do not have the staff expertise or practices necessary to ensure that the investment guarantees for mineral or energy extraction, will not contribute to the extinction of any of the U.S. listed species that occur in whole or in part in foreign nations. Allowing detrimental impacts to these ESA-protected species would appear to be a poor way for the FWS to meet its obligations in Section 8 to encourage foreign nations to conserve their wildlife and plant biodiversity, or to ensure that the U.S. meets its obligations under the several treaties that the ESA implements. In effect, the current regulation has greatly reduced the level of protection that would otherwise be provided to endangered species overseas. Recent studies of recovery rates of listed species show numerous instances in which U.S. populations of species are recovering much faster than populations of the same species where they occur in other countries, many of which are affected by US-funded and permitted actions on a regular basis.<sup>29</sup>

Moreover, as the regulations currently stand, the Services are not even required to consider the impacts to threatened and endangered species that occur in foreign nations even to species that spend part of their life cycle *within* the United States. SCB is aware of at least 40

<sup>27</sup> *Defenders of Wildlife v. Lujan*, 911 F.2d at 125.

<sup>28</sup> FWS Endangered Species Database. [http://ecos.fws.gov/tess\\_public/pub/Boxscore.do](http://ecos.fws.gov/tess_public/pub/Boxscore.do)

<sup>29</sup> Suckling, K., Greenwald, N., Curry, T., On Time, On Target – How the Endangered Species Act is Saving America's Wildlife, Center for Biological Diversity (May 2012).



migratory species that are currently protected by the ESA, which spend at least part of their life cycle inside the United States and part of their life cycle outside the United States.<sup>30</sup> In some cases, an agency action outside the United States could impact one of these species in their foreign range. According to the current regulations, the action agency would not be required to consult on its activities because they would occur outside the U.S. jurisdiction covered by Section 7, even if impacts do occur and those impacts are realized within the United States. A similar problem arises if an agency activity does occur within the United States and causes direct or indirect impacts beyond U.S. jurisdiction. In this situation, the action agency would be required to consult on the impacts that occurred within the United States to listed species, but impacts that occurred beyond the U.S. jurisdiction would not be subject to consultation.

An excellent example of how the current regulations violate the plain meaning of the ESA and intent of the Congress for the FWS and NMFS to engage in consultations without arbitrary geographic limitations is the recent assessment of the impacts to the endangered Whooping Crane (*Grus americana*) from the approval of the Keystone XL pipeline project. The Whooping Crane is the most endangered bird in North America. The only wild flock of Whooping Crane on Earth numbers approximately 245 individuals, which includes approximately seventy-four breeding pairs.<sup>31</sup> This flock migrates from their wintering grounds around Aransas National Wildlife Refuge through Texas, Oklahoma, Kansas, Nebraska, South Dakota, North Dakota, eastern Montana, and eastern Manitoba before reaching Wood Buffalo National Park in northern Alberta.

In 2008, the State Department began a review of TransCanada's application to construct the 1700-mile Keystone XL pipeline from the tar sands in northern Alberta to Port Arthur Texas. Because the project required a permit from the State Department to cross the international border, the State Department was required to consult on the impacts to threatened and endangered species. The proposed route of the pipeline overlaps the *entire* migration route of the Whooping Crane. However, the FWS *only* analyzed the potential impacts of the pipeline on the

<sup>30</sup> Those species include: Short-tailed Albatross (*Phoebastria albatrus*), Whooping Crane (*Grus americana*), Spectacled Eider (*Somateria fischeri*), Steller's Eider (*Polysticta stelleri*), Southwestern Willow Flycatcher (*Empidonax traillii extimus*), California Gnatcatcher (*Poliophtila californica californica*), Marbled Murrelet (*Brachyramphus marmoratus*), Mexican Spotted-owl (*Strix occidentalis lucida*), Roseate Tern (*Sterna dougallii dougallii*), Black-capped Vireo (*Vireo atricapilla*), Kirtland's Warbler (*Dendroica kirtlandii*), Least Bell's Vireo (*Vireo bellii pusillus*), Golden-cheeked Warbler (*Dendroica chrysoparia*), Lesser Long-nosed Bat (*Leptonycteris curasoae yerbabuenae*), Polar Bear (*Ursus maritimus*), Woodland Caribou (*Rangifer tarandus caribou*), Jaguar (*Panthera onca*), Gulf Coast Jaguarundi (*Felis yagouaroundi cacomitli*), Canada Lynx (*Lynx canadensis*), West Indian Manatee (*Trichechus manatus*), Ocelot (*Felis pardalis*), Sonoran Pronghorn (*Antilocapra americana sonoriensis*), Guadalupe Fur Seal (*Arctocephalus townsendi*), Blue Whale (*Balaenoptera musculus*), Finback Whale (*Balaenoptera physalus*), Bowhead Whale (*Balaena mysticetus*), Humpback Whale (*Megaptera novaeangliae*), North Atlantic Right Whale (*Eubalaena glacialis*), Sei Whale (*Balaenoptera borealis*), Sperm Whale (*Physeter catodon macrocephalus*), American Crocodile (*Crocodylus acutus*), Green Sea Turtle (*Chelonia mydas*), Hawksbill Sea Turtle (*Eretmochelys imbricata*), Loggerhead Sea Turtle (*Caretta caretta*), Kemp's Ridley Sea Turtle, (*Lepidochelys kempi*), and Leatherback Sea Turtle (*Dermochelys coriacea*).

<sup>31</sup> FWS Whooping Crane Population Estimate. <http://whoopingcrane.com/aransas-refuge-estimates-245-whooping-cranes/> (Accessed on February 15, 2011).





United States side of the border.<sup>32</sup> Furthermore, despite the clear casual link, the FWS did not consider whether the approval of the pipeline would lead to an expansion of tar sands development, which also threatens the Whooping Crane. A consultation that was not limited arbitrarily to the United States side of the border may have identified additional mitigation and precautionary measures that TransCanada could have been required to undertake to ensure that the Whooping Crane's existence was not jeopardized by this project on either side of the border.

As a result, the FWS concluded that the proposed project would not adversely affect the Whooping Crane.<sup>33</sup> However, all consideration of potential impacts on the Canadian side of the border were not analyzed at all. The extent of the oil sands mining—its destruction of wetlands, the length of time of mining; and the poisonous tailing ponds, are but a few of issues that may adversely affect the Whooping Crane in its northern Canadian habitat—was not considered. Without such analysis the Department cannot have a true and complete picture of the threats to the Whooping Crane. Ensuring the consultations utilize the best available science requires that consultations not be limited by arbitrary geographic constraints. The permit applicant recently resubmitted an application that includes a modified route through Nebraska, which poses less risk to the Ogallala Aquifer. However, if FWS reinitiates consultations on the Keystone XL pipeline, it will still not be required to consider the possible impacts of expanded and accelerated oils sands developments, and the risks to the Whooping Crane that this expansion may represent.

It is important to note that as currently written, the regulations do not forbid the Services from considering impacts beyond the United States of agency actions that primarily occur within the United States. In fact, on occasion, the FWS has required agencies to consider the impacts of actions that occur within the United States on endangered species that live outside of the United States. For example, in *Defenders of Wildlife v. Norton*,<sup>34</sup> the Bureau of Reclamation (BOR) entered into consultations with the Services regarding a long-term Multi-Species Conservation Plan regarding its routine, ongoing operations of dams along the lower Colorado. The BOR initially defined the action area for its lower Colorado River operations as extending from Lake Mead to the U.S.-Mexico International Border and analyzed the effect of its operations on protected species within that action area over the next five years. In response to the draft Biological Assessment, the FWS directed the BOR to analyze impacts on Mexican populations of the Yuma Clapper Rail, the Southwestern Willow Flycatcher, the Desert Pupfish, and to consult with NMFS regarding the possible impacts to two species found in the Gulf of California, the Totoaba Bass and the Vaquita Harbor Porpoise. The BOR complied with this directive and concluded that their discretionary operations would have no effect on the Vaquita,

<sup>32</sup> The State Department defined the Proposed Project as the corridor surrounding the 1383 mile pipeline from the Canadian border to the Gulf of Mexico. It did not include the 327 miles of pipeline in Canada or the potential expanded tar sands mining operations in Canada which would result from approval of the Keystone XL pipeline in the scope of the consultation. See Biological Opinion at 13 and Appendix A, *available at*: <http://keystonepipeline-xl.state.gov/documents/organization/181189.pdf>

<sup>33</sup> FWS Biological Assessment on Keystone XL pipeline, page 3-12. Available at <http://keystonepipeline-xl.state.gov/documents/organization/182363.pdf>

<sup>34</sup> 275 F.Supp.2d 53 (D.D.C. 2003).





Desert Pupfish, or the Yuma Clapper Rail.<sup>35</sup> BOR then concluded that its discretionary operations might impact the Totoaba Bass and Southwestern Willow Flycatcher. NMFS then concluded that no formal consultation was required on the Totoaba Bass, because the BOR has no authority or discretion over the flow of water to the Colorado River delta as a result of the Mexican Water Treaty of 1944. FWS required the BOR to protect approximately 1400 acres of riparian lands to offset any damage to Southwest Willow Flycatcher habitat as a result of their operations. The agency conclusions were upheld by the Court.<sup>36</sup>

This example shows that the FWS has on rare occasions required that agencies consider their impacts to endangered species beyond U.S. territorial jurisdiction. However, this practice appears to be rare and inconsistent in its application. And, there remain many current examples of where agencies should consider the impacts of their actions beyond U.S. jurisdiction. For example, the BOR and the National Park Service (NPS) are beginning the process of developing an Environmental Impact Statement for the Long-Term Experimental and Management Plan for Glen Canyon Dam on the Colorado River.<sup>37</sup> While operations of the dam may rarely directly impact species south of the U.S.-Mexico border, unless the FWS requires the BOR and NPS to consider the impacts to endangered species in the Colorado River delta in Mexico, no one will ever know if there could have been simple actions that could have benefited these species. Similarly, on April 1<sup>st</sup>, 2012, the United States, Mexico, and Canada pledged to create work towards an integrated, continental energy grid.<sup>38</sup> The development of such a grid would involve multiple federal agencies, and would by definition, have an effect beyond the borders of the United States. The building and siting of transmission lines requires consultations with the FWS within the United States. There is no reason that portions of any international projects such as a bi or tri-national energy grid should be exempt from the consultation process simply because their effects on listed species might occur in Canada or Mexico.

To ensure that all agencies of the Federal government fully meet their statutory duties under the ESA to protect foreign and domestic listed species by consulting on the effects of their actions with FWS and NMFS, the following regulatory changes below are required.

## **II. Under 50 C.F.R. Part 402, the Scope of Consultations Must Apply Globally.**

- A. 50 CFR § 402.01(a) should be revised by the reinsertion of the phrase (underlined and bolded) that was removed by the 1986 regulatory change:

This part interprets and implements sections 7(a)–(d) [16 U.S.C. 1536(a)–(d)] of the Endangered Species Act of 1973, as amended (“Act”). Section 7(a) grants authority to and imposes requirements upon Federal agencies regarding endangered or threatened species of fish, wildlife, or plants (“listed species”) and habitat of such species that has been

<sup>35</sup> *Id.* at 60.

<sup>36</sup> *Id.* At 69.

<sup>37</sup> Long-Term Experimental and Management Plan for Glen Canyon Dam. <http://itempeis.anl.gov/>

<sup>38</sup> Joint Statement by North American Leaders, April 2<sup>nd</sup> 2012.

<http://www.whitehouse.gov/the-press-office/2012/04/02/joint-statement-north-american-leaders>



designated as critical (“critical habitat”). Section 7(a)(1) of the Act directs Federal agencies, in consultation with and with the assistance of the Secretary of the Interior or of Commerce, as appropriate, to utilize their authorities to further the purposes of the Act by carrying out conservation programs for listed species. Such affirmative conservation programs must comply with applicable permit requirements (50 CFR parts 17, 220, 222, and 227) for listed species and should be coordinated with the appropriate Secretary. Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out in the United States, upon the high seas, **or in foreign nations** is not likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habitat. Section 7(a)(3) of the Act authorizes a prospective permit or license applicant to request the issuing Federal agency to enter into early consultation with the Service on a proposed action to determine whether such action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Section 7(a)(4) of the Act requires Federal agencies to confer with the Secretary on any action that is likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat. Section 7(b) of the Act requires the Secretary, after the conclusion of early or formal consultation, to issue a written statement setting forth the Secretary’s opinion detailing how the agency action affects listed species or critical habitat. Biological assessments are required under section 7(c) of the Act if listed species or critical habitat may be present in the area affected by any major construction activity as defined in § 404.02. Section 7(d) of the Act prohibits Federal agencies and applicants from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. Section 7(e)–(o)(1) of the Act provide procedures for granting exemptions from the requirements of section 7(a)(2). Regulations governing the submission of exemption applications are found at 50 CFR part 451, and regulations governing the exemption process are found at 50 CFR parts 450, 452, and 453.

B. 50 CFR § 402.02 should be revised as follows:

*Action* means all activities or programs of any kind authorized, funded, or carried out, in whole or in part by Federal agencies in the United States, upon the high seas, **or in foreign nations**. Examples include, but are not limited to:

- (a) actions intended to conserve listed species or their habitat;
- (b) the promulgation of regulations;
- (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
- (d) actions directly or indirectly causing modifications to the land, water, or air.



## C. Explanation of Proposed Revisions

The above two changes make explicit that the consultation duties of all federal agencies extends to discretionary activities that occur in the United States, on the high seas or in foreign nations. These changes would effectively restore the pre-1986 scope of Section 7 consultations by insuring that all federal agencies do not jeopardize the existence of any species protected under the ESA whether they occur only in foreign jurisdictions or spend only part of their life cycles in foreign jurisdictions. These would leave fully intact and available the automatic exemptions available in disaster areas, or upon request to the Secretary of Defense and the exemptions available at the request of any department or agency, governor or permit or license applicant through the “exemption” committee process of Section 7(e).

## CONCLUSION

Consultations under Section 7 of the ESA are one of the most important tools that the FWS and NMFS have to ensure that the Federal government does not negatively affect listed species and does use its authorities to enhance the survival and recovery of threatened and endangered species. In order for this tool to be fully effective and indeed to be used in a manner that complies with the minimum requirements of the Act, the above recommended changes to the regulations implementing the ESA are urgently needed. We appreciate your consideration of this petition, and would appreciate a substantive response within ninety days of receipt of this petition.

Respectfully submitted on behalf of SCB, and its North America and Marine Sections, and ourselves as individuals,

  
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