Myths and Realities About the Proposed ESA Regulations on Consultations

Myth: The administration is violating the Endangered Species Act by changing the consultation process [*Atlanta Journal-Constitution* and others]

Reality: The Act does not define consultation or what triggers it. Congress left the crafting of the consultation process to the executive branch. The proposed regulations provide clarity to federal agencies as to when and how they are required to enter into a consultation with the U.S. Fish and Wildlife Service or NOAA Fisheries.

Myth: The proposal would end the consultation process under the Endangered Species Act. [*New York Times* and others] The proposal would virtually eliminate the independent scientific evaluation of the environmental impact of federal actions [*Time*]

Reality: Federal agencies would continue to be required to consult with the Fish and Wildlife Service and NOAA Fisheries if their intended actions are expected to harass or harm a listed species. The proposed regulations clarify that agencies do not have to consult if their actions have no effect, an insignificant effect, a beneficial effect or an indeterminable effect on a listed species or its critical habitat.

For example, if an agency decides to build a fish ladder to allow listed species to get by a dam so that they can spawn upstream, and the construction and operation of the ladder is not anticipated to result in take or have an adverse affect on critical habitat, consultation would not be necessary.

Decisions about how and when to consult have always been made by the action agencies, and they have to defend those decisions. None of that would change under this rule.

Myth: If approved, the changes would represent the biggest overhaul of endangered species regulations since 1986 and accomplish through rules what conservative Republicans have been unable to achieve in Congress. *[Associated Press*]

Reality: While the regulations on the consultation process have not been updated generally since 1986, the Clinton administration put forward significant policy and regulatory changes related to the administration of the Act, many of which were roundly criticized by environmental groups.

For example in 1994, then-Secretary Babbitt announced a ”No Surprises” policy to provide a guarantee to landowners who reach agreement with the government on a Habitat Conservation Plan to develop their land while protecting listed species. The policy stated that landowners would not be required to take additional conservation actions to protect species in the future, even if circumstances changed. Many environmental groups were strongly critical of Secretary Babbitt for the policy, which now has been generally accepted as benefiting listed species by promoting conservation on private lands.

Myth: The new rules would use administrative powers to make broad changes in the law that Congress resisted for years. [*Washington Post*]

Reality: Only Congress can change the law. Since Congress delegated to the executive branch the responsibility for crafting the consultation process and defining when it would be triggered, this administration is doing exactly what the Act instructs it to do.

Myth: The administration of U.S. President George W. Bush has proposed revisions to the Endangered Species Act so that the law cannot be used to regulate emissions of greenhouse gases. [*AFP*]

Reality: Congress never intended for the Act to be a backdoor process for regulating greenhouse gases, but the rules do not prevent agencies from consulting on projects that emit greenhouse gases. Instead it gives agencies the option not to consult if they believe the project will not harm a listed species.

The rule is consistent with current Fish and Wildlife Service policies that conclude it is not possible to draw a direct causal link between specific greenhouse gas emissions from a particular federal action and remote impacts to species from climate change.

In listing the polar bear, for example, the Service concluded that melting sea ice associated with a changing climate will reduce bear habitat in the foreseeable future to an extent that threatens the bear's survival. Though the Service drew that conclusion, at the same time its scientists said it is not possible to establish a causal connection between a particular emission—say from an individual power plant—and loss of sea ice or harm to bears.

The Bush administration has acknowledged climate change as a serious problem. However, efforts to address climate change should occur through the proper forums including Congress, not through Endangered Species Act regulations.

Myth: The new regulations are essentially allowing the fox to guard the henhouse by letting federal agencies that want to proceed with projects such as highways and dams effectively ignore the Endangered Species Act. [*Salt Lake City Tribune* and others]

Reality: The Act contains provisions that create a huge incentive for federal agencies to make the correct determination. If an action results in harm or harassment of a listed species – what is known in the law as "take" -- the agency and its officials could be subject to civil and criminal penalties. Additionally, the Act's citizen suit provision creates a very real incentive for agencies to act in accord with the law.

Federal action agencies are well aware that taking a listed species is not lawful without an incidental take statement that can only be obtained from the U.S. Fish and Wildlife Service or NOAA Fisheries through formal consultation. Agencies are unlikely to engage in activities they know will take listed species without this legal protection.