



Animal and Plant
Health Inspection
Service

December 27, 2017

Wildlife Services

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Ms. Adkins,

This letter is in response to your November 2, 2017 Notice of Intent to Sue (NOI) under Section 11(g) of the Endangered Species Act (ESA) (16 U.S.C. 1540(g)), in which you allege that the United States Department of Agriculture, Animal and Plant Health Inspection Service, Wildlife Services (APHIS-WS) is in violation of the ESA. Specifically, you allege that APHIS-WS is violating Section 7 of the ESA (16 U.S.C. 1536) and the ESA's consultation regulations (50 C.F.R. Part 402) by (1) failing to ensure that its aquatic mammal damage management activities in Oregon are not likely to jeopardize the continued existence of endangered fish and wildlife; (2) failing to initiate, reinstate and/or complete consultation with the U.S. Fish and Wildlife Services (USFWS) and the National Marine Fisheries Service (NMFS) regarding the impacts of its aquatic mammal damage management activities in Oregon on endangered fish and wildlife; and (3) continued authorization and approval of activities that may irreversibly and irretrievably commit resources and may foreclose the formulation or implementation of reasonable and prudent alternatives prior to completing consultation with USFWS and NMFS regarding the impacts of its aquatic mammal damage management activities in Oregon on endangered fish and wildlife.

With respect to the allegations related to consulting with USFWS, your letter alleges that APHIS-WS did not consult with USFWS regarding how its aquatic mammal damage management activities in Oregon impacted Warner Sucker (*Catostomus warnerensis*), Bull Trout (*Salvelinus confluentus*), Lahontan Cutthroat Trout (*Oncorhynchus clarkii henshawi*), and the Oregon Spotted Frog (*Rana pretiosa*). APHIS-WS consulted with USFWS under Section 7 of the ESA (16 U.S.C. 1536) regarding its integrated wildlife damage management activities to protect livestock, property, human health and safety, and natural resources in the state of Oregon. APHIS-WS' integrated wildlife damage management activities in Oregon include aquatic mammal damage management and the four species named above were included in the consultation. USFWS issued a letter of concurrence agreeing with APHIS-WS' "may affect, not likely to adversely affect" determination for the Warner Sucker, Bull Trout, Lahontan Cutthroat Trout, and Oregon Spotted Frog. Enclosed with this letter is a copy of APHIS-WS' consultation initiation letter, Biological Assessment, and USFWS' letter of concurrence.

With respect to the allegations related to consulting with NMFS, your letter alleges that APHIS-WS did not consult with NMFS regarding how its aquatic mammal damage management activities in Oregon impacted 11 salmonid species. APHIS-WS has requested consultation under Section 7 of the ESA (15 U.S.C. 1536) with NMFS on its aquatic mammal damage management activities in Oregon. Enclosed with this letter is a copy of the consultation request letter.

During the pendency of the specified consultation, APHIS-WS will operate in compliance with Section 7(d) of the ESA (16 U.S.C. 1536(d)). Section 7(d) does not prohibit each and every commitment of resources, only those that are irreversible or irretrievable that would have the effect of foreclosing the formulation or implementation of reasonable and prudent alternative measures. To that end, APHIS-WS has ceased all aquatic mammal damage management activities in Oregon related to damage caused by beaver, river otter, muskrat, and mink out of an abundance of caution to ensure compliance with Section 7(d). To the extent that unique factual circumstances arise with respect to damage caused by these species and WS-Oregon determines that a particular activity can be done in compliance with Section 7(d), we will notify you beforehand. However, APHIS-WS intends to continue limited aquatic mammal damage management activities in Oregon related to damage caused by nutria because it finds that such activities do not make any irreversible or irretrievable commitment of resources that have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures for the protection of threatened or endangered salmonids in accordance with Section 7(d) of the ESA (16 U.S.C. 1536(d)). APHIS-WS has made this determination because its limited aquatic mammal damage management activities in Oregon related to damage caused by nutria will have no impact on threatened or endangered salmonids and are therefore consistent with the restrictions in 16 U.S.C. 1536(d).

Nutria, a non-native and invasive species in the United States, are classified as a prohibited species and unprotected mammal in Oregon under Oregon Administrative Rules 635-056-0050(1)(a)(J)(xii) and 635-050-0050(9), respectively. Nutria causing damage on private property are also classified as predatory animals per Oregon Revised Statute 610.002 and Oregon Administrative Rules 635-050-0050(9) and 635-435-0005(8). Nutria can cause damage to wetland ecosystems by eating native plants and vegetation and competing with native species. In large numbers, they can cause extensive damage to plant communities and open waterways by consuming and uprooting plants. This herbivory, burrowing, and uprooting of plants by nutria can cause soil erosion, which is a primary concern in the Northwest. Soil erosion can occur to both public and private property owners along waterways and structures in or adjacent to waterways. Soil erosion can impact irrigation channels and water control structures, and can also weaken dikes and impoundments. More specifically, burrowing by nutria can weaken flood control structures and result in the collapse of roadways and levees, which is a threat to human safety. Burrowing by nutria can also cause increased water turbidity and soil erosion that could potentially result in the degradation of habitat for native fish species. Nutria do not create habitat beneficial for any ESA-listed species in Oregon.

WS-Oregon will only use cage traps and firearms to manage damage caused by nutria. Nutria can be selectively removed using cage traps on land or cage traps on floats over water. Cage traps are highly selective and any non-target species captured can be released with minimal to no adverse impact. Cage traps set out of the water would preclude any capture or harm to ESA-listed fish. Shooting with firearms could also be used to remove nutria. Shooting is virtually 100% selective for the target species because the identity of the animal is confirmed before the shot is taken. WS-Oregon will retrieve nutria carcasses, unless that is not feasible. Use of these tools in this manner for selectively removing nutria will have no impact on any ESA-listed fish.

Your letter also alleges that APHIS-WS has violated the National Environmental Policy Act (NEPA) and the Administrative Procedure Act by failing to analyze the environmental impacts of its aquatic mammal damage management activities in Oregon. APHIS-WS has ceased its aquatic mammal damage management activities in Oregon related to damage caused by beaver, river otter, muskrat, and mink until such time as it has reviewed and evaluated, as applicable, its obligations under NEPA. As discussed above, APHIS-WS is continuing with limited aquatic mammal damage management activities related to damage caused by nutria. Such activities are considered "routine measures" under APHIS' NEPA Implementing Procedures (7 C.F.R. 372.5(c)(1)) and are categorically excluded from further analysis under NEPA. Enclosed with this letter is a copy of WS-Oregon's Categorical Exclusion Record for nutria damage management in Western Oregon.

APHIS-WS takes its ESA and NEPA obligations, as well as public input, very seriously. I see that you have stated that your client and Northwest Environmental Advocates are contemplating filing a lawsuit. I hope that this letter will convince you otherwise. If your client or Northwest Environmental Advocates wish to discuss this matter further they may contact me.

Sincerely,



David Williams
State Director

Cc: Nina Bell
Andrew Hawley

Enclosures



United States Department of Agriculture

Animal and Plant
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December 22, 2017

Wildlife Services

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Dr. Kim Kratz, Assistant Regional Administrator
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Re: Consultation Request

Dr. Kratz,

The United States Department of Agriculture, Animal and Plant Health Inspection Service, Wildlife Services program in Oregon (WS-Oregon) is requesting consultation pursuant to Section 7 of the Endangered Species Act for those threatened and endangered species found in the State of Oregon under the jurisdiction of the National Oceanic and Atmospheric Administration (NOAA) that may be affected by WS-Oregon's statewide aquatic mammal damage management activities. WS-Oregon is preparing a Biological Assessment for its work activities related to aquatic mammal damage management in the State of Oregon and anticipates providing it to you by February 28, 2018. Please let me know who from NOAA's National Marine Fisheries Service will be assisting us in this consultation process and would be able to answer some preliminary questions.

Sincerely,

A handwritten signature in cursive script that reads "David Williams".

David Williams
State Director