

# National Endangered Species Act Reform Coalition

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Chip Murray  
American Forest & Paper  
Association  
Chairman

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June 6, 2007

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Nancy Macan McNally  
Executive Director

Chairman Nick J. Rahall III  
U.S. House of Representatives  
Committee on Natural Resources  
1324 Longworth House Office Building  
Washington, DC 20515

Dear Chairman Rahall:

The National Endangered Species Act Reform Coalition (“NESARC”) wishes to express its concerns with respect to those provisions within H.R. 2337 addressing impacts on wildlife from wind energy projects and climate change. NESARC understands that an amendment in the nature of a substitute to H.R. 2337 (dated June 4, 2007) has been publicly circulated. NESARC is particularly concerned that H.R. 2337 or the Substitute amendment could unnecessarily complicate the effective protection of threatened and endangered species under the Endangered Species Act (“ESA”). Simply put, ***any legislation addressing the effects of energy development, climate change or other resource activities implicated under H.R. 2337 or its Substitute must not create duplicative review processes, contradictory standards or otherwise complicate the effective implementation of the ESA or the federal, State or private programs and measures already in place for the protection and recovery of such species.***

The ESA provides for specific procedures and programs for the protection of endangered and threatened species, including: prohibitions against “take” (ESA, Secs. 4(d) and 9); review and consultation on the effects of federal agency actions on endangered and threatened species as well as designated critical habitat (ESA, Sec. 7); development of recovery plans (ESA, Sec. 4(f)) and the adoption of measures, including habitat conservation plans, to avoid and minimize the “take” of species (ESA, Sec. 10). These statutory provisions and their implementing regulations already provide for surveys, biological assessment of impacts, protection of species and critical habitat, minimization and mitigation of impacts on species and habitat as well as implementation of conservation plans and other programs to recover species.

### **Necessary Modifications to Title II, Subpart D (Wind Energy Provisions):**

As introduced, Section 231 of H.R. 2337 clearly interfered with the effective administration of the ESA by imposing upon wind energy projects a competing set of standards for surveys, protective measures, monitoring and mitigation of impacts and compliance penalties related to such projects' effects on endangered and threatened species or their habitat. NESARC opposes any such efforts to establish a disparate set of standards. In the June 4<sup>th</sup> Substitute, most of the explicit references to endangered and threatened species or designated critical habitat were removed. However, the concern remains—any application of standards to wind energy projects cannot establish conflicting standards or otherwise interfere with implementation of the ESA.

NESARC is similarly concerned with the continuation of broadly worded requirements under H.R. 2337 and the proposed Substitute which require the establishment of substantive standards for wind energy projects so as to avoid impacts on birds, bats, and other wildlife as well as “ecologically sensitive areas.” Such language could be misinterpreted to dictate the adoption of standards requiring avoidance of siting of wind projects within critical habitat—as an “ecologically sensitive area” —regardless of the project’s potential impact on the critical habitat or whether such effect has already been addressed through the existing protections of the ESA. No measure of benefit is provided through implementing broad and vaguely worded requirements which will likely lead to the establishment of contradictory or conflicting standards.

In order to avoid such conflicts, *NESARC urges the Committee to adopt specific language for incorporation to Title II, Subpart D making clear that the development and implementation of any standards for the siting, construction and operation of wind energy projects does not supersede and shall not impair the effective implementation of the ESA.* In this regard, the proposed language in H.R. 2337, Section 234 as well as the alternative formulation under Section 234 of the Substitute is inadequate and must be strengthened.

### **Necessary Modifications to Title IV, Subpart D (National Climate Change Strategy):**

A second concern that NESARC wishes to raise is the potential that the proposed “national strategy” for effects of climate change on wildlife and habitat under Title IV, Subpart D of H.R. 2337 and the proposed Substitute will usurp or co-opt the implementation of the ESA. H.R. 2337 or its Substitute must be clarified to ensure that the development of such a national strategy does not undermine or conflict with future or existing measures for the protection of endangered and threatened species as well as designated critical habitat adopted under ESA Sections 7 and/or 10. Under Section 7(a)(2) of the ESA, a federal agency must ensure that its actions do not jeopardize the continued existence of an endangered or threatened species or adversely modify the designated critical habitat of such species. Pursuant to these requirements, federal agency actions—including measures addressing the planning and management of Federal lands—have been the subject of so-called Section 7 consultation review and the management of such federal lands has been specifically conditioned or modified to include measures protecting endangered and threatened species as well as any designated critical habitat. In a similar vein, ESA Section 10 provides for the development of measures to protect endangered or threatened species and

their habitat through the development of habitat conservation plans and other agreements that minimize and mitigate the effects of resource activities on such species and/or habitat.

H.R. 2337 (under proposed Section 444 as introduced and proposed Section 454 in the Substitute) could interfere with, or require modification of, carefully crafted protective measures already adopted pursuant to ESA, Sections 7 and 10. Further, the proposed implementation provisions would severely disrupt the orderly management of federal lands and ongoing conservation efforts for endangered and threatened species. Since the ESA and other federal laws already require the examination of impacts and threats to endangered and threatened species, the development of a redundant program to “implement” measures protecting these species will only serve to increase red tape and disrupt ongoing protective efforts.

***In order to avoid such unnecessary complications, NESARC urges the Committee to amend H.R. 2337 (or the Substitute) to clarify that any implementation measures under a national climate change strategy that are intended to apply to an endangered or threatened species or the habitat of such species must be consistent with, and not conflict with or supersede, the ESA and its implementing regulations. Further, protections must be put in place to ensure that, in no event, should climate change implementation measures hinder, disrupt or delay the implementation of measures adopted under ESA Section 7 or habitat conservation plans and other agreements or measures approved under ESA, Section 10.***

## **Conclusion**

NESARC has long supported the need to update and improve the ESA to provide for better coordinated and effective implementation of the Act. For that reason, NESARC is greatly concerned with the approach taken under Title II, subpart D and Title IV, subpart D of H.R. 2337 and the Substitute. As presently drafted, H.R. 2337 and the Substitute, propose incomplete and vague measures that will ultimately complicate—and could thwart—ongoing and future efforts to protect and recover threatened and endangered species and their habitat. We urge the Committee to take the necessary actions identified above to ensure that any such proposed legislation is consistent with, and does not usurp or conflict with the statutory provisions of the ESA.

Sincerely,

A handwritten signature in black ink, appearing to read "Chip Murray". The signature is fluid and cursive, with the first name "Chip" being more prominent and the last name "Murray" following in a similar style.

Chip Murray  
Chairman

Cc: Natural Resources Committee Membership