ORAL ARGUMENT SCHEDULED FOR MAY 7, 2007

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5208

HAWAI'I ORCHID GROWERS ASSOCIATION,

APPELLANT,

v.

MICHAEL JOHANNS, SECRETARY OF AGRICULTURE, ET AL.,

APPELLEES.

Appeal from the United States District Court for the District of Columbia (No. 05cv01182)

Final Reply Brief of Appellant Hawai`i Orchid Growers Association

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March 28th, 2007

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to CIR. R. 28(a)(1) Appellant HOGA certifies:

A. Parties and Amici. The parties who have appeared before the District Court and the persons who are parties in this Court are HOGA, the United States Department of Agriculture, the United States Department of Interior, the named Federal officers of the United States Department of Agriculture, and the named Federal officers of the United States Department of Interior. There were no intervenors or *Amici* who appeared before the District Court. Pursuant to FED. R. APP. P. 29(a) and CIR. R. 29(b) the State of Hawai`i Department of Agriculture (HDOA) on January 8th, 2007 withdrew its notice of intention to file an *Amicus Curiae* brief for Appellant HOGA.

B. Rulings under Review. The Ruling at issue in this Court is the Memorandum Opinion issued by Royce C. Lamberth, United States District Judge on June 29th, 2006. The official citation of this Memorandum Opinion is *Hawai`i Orchid Growers Association v. United States Department of Agriculture, et al.*, Civil Action No. 05-1182 (RCL), 436 F. Supp. 2d 45, *2006 U.S. Dist. LEXIS 44019*, June 29th, 2006.

C. Related Cases. The Civil Action on review in this Court was previously before the United States District Court for the District of Columbia in *Hawai`i Orchid Growers Association v. United States Department of Agriculture, et al.*, *2005 U.S. Dist.*

LEXIS 4548 (D. D.C. 2005), March 24th, 2005. The United States District Court for the District of Columbia there dismissed for want of jurisdiction the Endangered Species Act claims that are the subject of the Civil Action now before this Court. *Id.*, *2005 U.S. Dist. LEXIS 4548 *8*. There are no related cases currently pending in this Court or in any other Court in the District of Columbia of which counsel is aware.

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GLOSSARY

A	=	Deferred Appendix.
APHIS	=	United States Department of Agriculture's Animal and Plant Health Inspection Service.
ESA	=	Endangered Species Act.
FWS	=	United States Department of Interior's Fish and Wildlife Service.
HDOA	=	State of Hawai`i Department of Agriculture.
HOGA	=	Hawai`i Orchid Growers Association.
NMFS	=	United States Department of Interior's National Marine Fisheries Service.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in a separate Addendum that is bound with this Principal Brief.

SUMMARY OF THE ARGUMENT

These informal APHIS/FWS ESA consultations ignored an inconvenient fact: in formal ESA consultations FWS had previously imposed at Kahului Airport explicit

state-of-the-art alien species interdiction features to preclude the invasion of alien species, an invasion, even though unlikely, which will have practically irreversible and catastrophic consequences for Federally-listed or proposed Endangered or Threatened species or their habitat.

The question in these informal APHIS/FWS ESA consultations whether or not a 0.6 mm screen mesh size would be adequate to prevent infestations of greenhouses in Taiwan needed to be reviewed against the risk of an invasion of alien species, and not just against the potential of an infestation of alien plant pests. Likewise not considered in these informal ESA consultations (and it should have been) was the difference between an assessment of the potential of alien plant pest infestation through entry of specific plant hosts, i.e., *Phalaenopsis* spp. orchid plants, and an assessment of the risk of alien species invasion through introduction of breeding habitats contaminated with alien species, here the pots filled with sphagnum moss in which mature *Phalaenopsis* spp. orchid plants will enter from Taiwan.

That these were only informal ESA consultations does not excuse a violation of Section 7(a)(2) of the ESA, the duty to use the best scientific and commercial data available. Nor are these informal ESA consultations an excuse to elevate economic concerns about promoting international trade from Taiwan in plants-in-growing-

media above the statutory duty to "insure" that such action is not likely to jeopardize continued existence of any Endangered or Threatened species or to result in destruction or adverse modification of species habitat.

The absence of any administrative notice-and-comment requirement for informal ESA consultations compels action Agencies, as APHIS here, to take particular care that there is a fulsome disclosure in ESA consultations, this because there is no opportunity in informal ESA consultations for Commenters to remedy action Agency misstatements, or for Commenters to provide available scientific and commercial data which otherwise would be overlooked.

ARGUMENT

I. These Informal ESA Consultations Omitted an Important Aspect of the Problem; Supplementation of the Administrative Record Was Required.

The question before the District Court was compliance or not with Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), the requirement to "use the best scientific and commercial data available." And it is important that this question was before the District Court under the Citizen suit provision of the ESA, 16 U.S.C. § 1540(g), and was therefore a *procedural* challenge governed by Section 706 of the

Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 417 (1971).

The Federal Appellees would have the Court resolve this Case on the familiar rubric that the District Court properly confined its review to the existing Administrative Record, Federal Appellee's Brief at 43, this because "the substantive soundness of the agency's decision is under scrutiny," citing *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989).

But that is not this Case.

This Case is a *procedural* challenge, not a *substantive* challenge. *Esch* recognizes that supplementation of an existing Administrative Record is often appropriate in procedural challenges where the issue is whether all relevant factors were considered, whether there was "at least an effort to get both sides of the story," whether a party got its "procedural just due." *Esch*, 876 F.2d at 993.

Here HOGA proferred to the District Court part of a 1997 Biological Assessment prepared for an action Agency as required by 16 U.S.C. § 1536(c)(1), this followed by a 1997 Biological Opinion by FWS, both prepared as a result of formal ESA consultations under 50 C.F.R. § 402.14(a) in connection with a project to modify Runway 2/20 at Kahului Airport on the island of Maui, State of Hawai`i.

The action Agency's Biological Assessment and the FWS Biological Opinion are both exhaustive evaluations of the risk of invasion by alien species and the potential effects of the project at Kahului Airport on Federally-listed or proposed Endangered or Threatened species and their habitats.

The action Agency's Biological Assessment focuses on the risk of invasion by alien species through introduction of contaminated breeding habitats, and not, as in the informal APHIS/FWS ESA consultations here, on the potential of an infestation by alien plant pests which might result from lawful and routine entry of specific plant hosts, here the pots filled with sphagnum moss in which mature *Phalaenopsis* spp. orchid plants will enter from Taiwan. A0032.

The emphasis of the FWS Biological Opinion is on the Kahului Airport project's most serious risk—the invasion of alien species—and on the catastrophic consequences of such an invasion on Federally-listed or proposed Endangered or Threatened species or their habitats, these including direct effects such as predation, herbivory parasitism, and competition, and indirect effects such as promoting habitat disturbances including fire, or a change of nutrient regimes, or promoting the spread of other alien species. A0047, 0063, 0065.

Most important for these informal APHIS/FWS ESA consultations is the ultimate conclusion of the FWS Biological Opinion, *viz*. that invasion by an alien species, even though unlikely, would be both practically irreversible and catastrophic for one or more Federally-listed or proposed Endangered or Threatened species or their habitat. A0070.

The Federal Appellees forget that the action Agency's Biological Assessment for the project at Kahului Airport was in fact raised during the administrative notice-and-comment period for the Final Rule here at issue. Federal Appellee's Brief at 42. They forget that the action Agency's Biological Assessment for the project at Kahului Airport was disclosed (and was reproduced) in six pages of Comments from HDOA on the proposed Rule of 2003. A0523-0525, 0537-0539.

APHIS, the action Agency here, did not provide these Comments from HDOA, or, indeed, any other Comments received by APHIS, to FWS during these informal ESA consultations. Whether or not these HDOA Comments should have been provided by APHIS to FWS is properly analyzed by looking to case law on supplementation of an Administrative Record.

Supplementation of an Administrative Record is required when action Agencies exclude adverse information from an Administrative Record, i.e., adverse informa-

tion which should not be excluded from ESA consultations. The scientific and commercial data which must be added or considered must be shown: (1) to have been known to the Agencies at the time of the challenged Agency action, (2) to be directly related to the challenged Agency action, and (3) must be adverse to the challenged Agency action. *The Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 198 (D. D.C. 2005).

The action Agency's 1997 Biological Assessment and the FWS Biological Opinion of 1997 for the project at Kahului Airport are contemporaneous with the Government of Taiwan's 1997 importation request and with the APHIS Pest Risk Assessment of 1997. The action Agency's Biological Assessment and the FWS Biological Opinion for the project at Kahului Airport were known to both APHIS and FWS.

APHIS knew about the action Agency's Biological Assessment because pages from this document were provided to APHIS in HDOA's Comments on the proposed Rule of 2003, and yet APHIS did not disclose these HDOA Comments to FWS during informal ESA consultations. FWS knew about the Biological Opinion for the project at Kahului Airport because this Biological Opinion was created by FWS. *The Fund for Animals*, 391 F. Supp. 2d, at 198. And the FWS Biological

Opinion results from the action Agency's Biological Assessment, this as required by 16 U.S.C. § 1536(c)(1) and 50 C.F.R. § 402.14(a).

Yet the Federal Appellees would have this Court decide that the action Agency's Biological Assessment and the FWS Biological Opinion for the project at Kahului Airport were properly excluded by the District Court, and thus were properly omitted from the informal APHIS/FWS ESA consultations, this because the Federal Appellees suppose that neither of these documents is directly related, or adverse, to the Final Rule here. Federal Appellee's Brief at 44-45.

A fatal flaw in this argument is that omission of the action Agency's Biological Assessment and the FWS Biological Opinion for the project at Kahului Airport skews this Administrative Record, and thus invalidates these informal APHIS/FWS ESA consultations, because both documents are facially of great pertinence, and are directly adverse, to the Final Rule here. *The Fund for Animals*, 391 F. Supp. 2d, at 199, *citing Environmental Defense Fund v. Blum*, 458 F. Supp. 650, 661 (D. D.C. 1978).

Why is the action Agency's Biological Assessment and the FWS Biological Opinion adverse to the Final Rule? Precisely because the action Agency's Biological Assessment and the FWS Biological Opinion are both thorough, formal analyses of

the problems/risks arising from entry of breeding habitats contaminated with invasive alien species, whereas the informal APHIS/FWS ESA consultations here concerned only potential infestations of alien plant pests which might be introduced by international trade in plants-in-growing-media, and they did not concern the risk of invasive alien species.

Both of these documents teach that an important aspect of an ESA consultation for the Final Rule here should have been consideration of the difficulties inherent in visual examinations of mature, potted *Phalaenopsis* spp. orchid plants for the presence of invasive alien species.

Who can say that invasion of alien species need not have been considered along with potential infestations of alien plant pests, or that invasive alien species were not "an important aspect of the problem"? *Motor Vehicle Manufacturers Asso. of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 436 U.S. 29, 43 (1983).

With the omission of any consideration in these informal ESA consultations of invasive alien species, alien species which are far more numerous and pervasive than alien plant pests, and with the omission of any consideration in these informal ESA consultations of the difficulties inherent in visual examinations of mature,

potted *Phalaenopsis* spp. orchid plants for the presence of invasive alien species, were these informal APHIS/FWS ESA consultations made on "the best scientific and commercial data available" as required by 16 U.S.C. § 1536(a)(2)?

Certainly this is a judgment for the Court, not for APHIS/FWS alone. *Ad Hoc Metals Coalition v. Whitman*, 227 F. Supp. 2d. 134, 138-39 (D. D.C. 2002) (extra-record materials which reflected adverse scientific views, were directly related to the issue decided in the final rule, and were known to the Agency are properly admitted for Administrative Procedure Act judicial review, 5 U.S.C. §§ 702, 706(2)-(A)); *Public Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D. D.C. 1986) (documents known to the Agency at the time of the decisionmaking, documents directly related to the decision made, and documents adverse to the Agency's position properly admitted for judicial review).

These informal APHIS/FWS ESA consultations were incomplete: (1) because there was no effort to "get both sides of the story," (2) because consideration in these informal ESA consultations of only the potential of a possible infestation of alien plant pests on specific plant hosts does not even begin to encompass consideration of the risk of invasive alien species to Federally-listed or proposed Threatened or Endangered species or their habitat, and (3) because there was in these in-

formal ESA consultations no consideration at all of important aspects of the risk to Federally-listed or proposed Threatened or Endangered species or their habitat which is inherent in routine, daily entry of breeding habitats contaminated with invasive alien species.

II. It Makes A Difference That These Were Informal ESA Consultations, Not Formal ESA Consultations.

There is a difference between informal, as opposed to formal, ESA consultations. Federal Agencies which propose to take an action, i.e., action Agencies, are required by statute to "insure" that any such action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . ." 16 U.S.C. § 1536(a)(2).

Action Agencies discharge this statutory imperative by first asking the Secretary of Interior (the FWS for terrestrial species, and the NMFS for oceanic species) whether or not any Federally-listed or proposed to be Federally-listed Endangered or Threatened species or the habitat of such species will be affected by the proposed Agency action. 16 U.S.C. § 1536(c)(1).

If there may be such an affect, then the action Agency must prepare a Biological Assessment and present this Biological Assessment to the FWS, else to the NMFS.

16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.13(a). This is the commencement of ESA consultations, and these are informal ESA consultations.

If the action Agency's Biological Assessment concludes that the proposed Agency action is not likely to adversely affect listed species or critical habitat, and if the Secretary of Interior (through FWS or NMFS) concurs with the action Agency's Biological Assessment, then the matter is terminated and no further ESA review is required. *Idaho Public Utilities Commission v. Interstate Commerce Commission*, 35 F.3d 585, 596-97 (D.C. Cir. 1994).

If the action Agency's Biological Assessment concludes that the proposed Agency action may adversely affect listed species or critical habitat, then formal ESA consultations are required. 50 C.F.R. § 402.14(a); *Id.*, 35 F.3d, at 597.

Formal ESA consultations require action Agencies to "provide any applicant with the opportunity to submit information for consideration during the consultation." 50 C.F.R. § 402.14(d). In formal ESA consultations, the Secretary of Interior (through FWS else NMFS) must prepare a Biological Opinion as to whether the proposed Agency action, together with its cumulative effects, is likely to jeopardize the continued existence of listed species or to result in destruction or adverse modification of critical habitat. 50 C.F.R. § 402.14(g)(4); *Id.*

Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), the requirement that action Agencies engaged in ESA consultations "shall use the best scientific and commercial data available" is insensible to the distinction between formal and informal ESA consultations.

But this distinction makes a difference nonetheless.

The Federal Appellees suppose that this requirement to "use the best scientific and commercial data available" finds its force only in formal ESA consultations, and it is on this basis that the Federal Appellees would distinguish *Resources Limited, Inc. v. Robertson*, 35 F.3d 1300, 1304-05 (9th Cir. 1994). Federal Appellees Brief at 28.

And it is on this basis that the Federal Appellees think that neither the action Agency's Biological Assessment nor the FWS Biological Opinion for Kahului Airport was directly related, or adverse, to the Final Rule here, Federal Appellees Brief at 44, ergo was not required for consideration in these informal APHIS/FWS ESA consultations.

But this argument of the Federal Appellees forgets that it is only in formal ESA consultations that action Agencies are required to provide "an opportunity to submit information for consideration during the consultation."

This administrative notice-and-comment requirement for formal ESA consultations diminishes the risk that an action Agency may fail to "insure" that its actions are "not likely to jeopardize" Endangered or Threatened species or habitat—this administrative notice-and-comment requirement offers an opportunity for affected parties, Commenters, to ventilate directly-related scientific and commercial data during the formal ESA consultation process, to identify important aspects of the problem perhaps, that may have been overlooked during informal ESA consultations.

Had HODA here had the opportunity to ventilate during formal ESA consultations HODA's concerns which are built upon the action Agency's Biological Assessment for the Kahului Airport project, then it would not be an issue that APHIS failed to disclose these HODA concerns to FWS during informal ESA consultations, this by simply providing HODA's Comments to FWS.

The truth is that it is only in *informal* ESA consultations that an action Agency must take particular care that there is a fulsome disclosure of "the best scientific and commercial data available." And that is this Case.

Because there was not here a fulsome disclosure by APHIS to FWS, the information provided by APHIS to FWS was not "the best scientific and commercial data available" as required by 16 U.S.C. § 1536(a)(2).

Resources Limited, 35 F.3d, at 1304-05 and *National Resources Defense Council, Inc. v. Evans*, 364 F. Supp. 2d 1083, 1131-32 (D. N.D. Cal. 2003) are fully applicable and cannot be distinguished even though both these cases arise from formal, not informal, ESA consultations.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For all these reasons, Hawai`i Orchid Growers Association again requests that this Court reverse the District Court, and that this Court remand this Civil Action to the District Court with direction that the District Court compels the named Federal officers of the United States Department of Agriculture to set-aside the Final Rule.

Respectfully submitted,

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ADDENDUM

STATUTES

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein

(1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or

(2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consulta-

tion as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. § 1536(a)(2)

To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agen-

cy, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

16 U.S.C. § 1536(c)(1)

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)-(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)

(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)

(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

16 U.S.C. § 1540(g)

REGULATIONS

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agen-

cy in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

50 C.F.R. § 402.13(a)

Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultations if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

50 C.F.R. § 402.14(a)

The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that

an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

50 C.F.R. § 402.14(d)

Service responsibilities during formal consultation are as follows:

. . . .

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.14(g)(4)

PROOF OF SERVICE

Pursuant to FED. R. APP. P. 25(d)(1)(B), the undersigned hereby certifies, under the penalty of perjury, that on Wednesday, March 28th, 2007 he caused to be sent, by Overnight Delivery, expenses prepaid, two copies of the foregoing Final Reply Brief of Appellant Hawai`i Orchid Growers Association to counsel for the United States at the following address:

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/s/ Cyrus E. Phillips, IV

Cyrus E. Phillips, IV

Pursuant to FED. R. APP. P. 25(d)(1)(B), the undersigned hereby certifies, under the penalty of perjury, that on Wednesday, March 28th, 2007 he caused to be sent, by Overnight Delivery, expenses prepaid, two copies of the foregoing Final Reply Brief of Appellant Hawai`i Orchid Growers Association to counsel for the State of Hawai`i Department of Agriculture at the following address:

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/s/ Cyrus E. Phillips, IV

_____
Cyrus E. Phillips, IV

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7) and Cir. R. 32(a) the undersigned hereby certifies, under the penalty of perjury, that this Final Reply Brief is set in Adobe's Minion® Pro Opticals, a proportionally-spaced Garalde Oldstyle face; that this Final Reply Brief is set in face 14-point or larger; and that this Final Reply Brief contains no more than 7,000 words, *viz.*, that exclusive of the Certificate required by Cir. R. 28(a)(1), the Table of Contents, the Table of Authorities, the Glossary, and the Addendum, FED. R. APP. P. 32(a)(7)(B)(iii) and CIR. R. 32(a)(2), this Final Reply Brief contains 5,702 words out of 507 lines and 23,064 characters. I make this representation based on "Word Count," as presented in the "Tools" menu in Microsoft® Office Word 2003 (11.8125.8122) SP2.

/s/ Cyrus E. Phillips, IV

Cyrus E. Phillips, IV