

A Retrospective in Support of Amending the Endangered Species Act
Consultation Requirements

By

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A major paper submitted to the faculty of Virginia Polytechnic Institute and State University in
partial fulfillment of the requirements for the degree of
Master of Natural Resources

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February 20, 2006

Falls Church, Virginia

Keywords: may affect, counterpart regulations, not likely to adversely affect, may benefit

Abstract

Congress is likely to rewrite the Endangered Species Act. The question is whether it will be reformed in a manner that will allow the U.S. Fish and Wildlife Service and National Marine Fisheries Service (jointly referred to as the “Services”), the two federal agencies charged with leading the implementation and enforcement of the ESA, to free some of the resources they currently expend on consultation. Such a reform could contribute to the Services’ ability to redirect their limited resources toward ensuring proactive efforts are made to further the recovery of species. This would be an opportune time to craft such legislation.

The ESA has two requirements for federal agencies to consult with the Services with regard to listed species: One is the requirement that in consultation with the Services, federal agencies are to insure their actions are not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat; the other requirement is that federal agencies utilize their authorities, in consultation with the Services, to establish programs that further the conservation of endangered and threatened species. Since the inception of the Act, the focus has been almost solely on meeting the requirements of the first provision with almost no emphasis placed on the second.

The ESA should be amended to focus the Section 7 consultation provisions of the ESA on avoiding adverse effects on ESA-protected species and designated critical habitat. Freeing the Services of their obligation to engage in consultation on actions that are not likely to adversely affect listed species or designated critical habitat will provide the Services additional resources to use in assisting federal agencies to establish programs that further the recovery of species.

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Introduction

Efforts have been underway for a number of years to reform the ESA in one way or another. Most such efforts focus at least in part on concerns about restrictions on the use of private property, which has been the flashpoint of ESA implementation.¹ Federal agencies are concerned, as well, about the time and other resources that must be invested in ESA consultation before federal projects can be carried out, even when those projects will benefit or are otherwise not likely to adversely affect ESA-protected species. Some also express a concern about the low number of species that have recovered since the Act's passage, particularly in view of the funds being expended.²

The ESA requires federal agencies to consult with the U.S. Fish and Wildlife Service (FWS) or the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS)³ (jointly referred to as "the Services") to ensure federal actions are not likely to jeopardize the continued existence of ESA-protected species.⁴ The Services have promulgated extensive regulations implementing this provision, and these regulations require agencies to consult any time a federal action "may affect" a protected species or designated critical habitat, regardless of whether the effect is beneficial or adverse.⁵ Though the consultation process can be time-consuming and sometimes complex, so long as the Services ultimately find that the action will not jeopardize the continued existence of the species, the consulting agency is free to take the action, though modification may be required to avoid, minimize or mitigate adverse effects on the listed species or designated critical habitat.

¹ See, for example, McClure.

² Simmons and Frost at 15 and Young, Don. 1997. Reform Of Endangered Species Act Will Benefit Species & People Roll Call, Washington, D.C., April 21, 1997, at 12.

³ NMFS is now sometimes referred to as NOAA Fisheries Service. For purposes of this paper, the agency will be referred to as NMFS.

⁴ 16 U.S.C. § 1536(a)(2).

⁵ 50 C.F.R. § 402.14.

The ESA also requires federal agencies to use their authorities, in consultation with the Services, to develop programs for the conservation of ESA-protected species.⁶ Unfortunately, the Services have promulgated no regulations specifically implementing this requirement, and there is little evidence to show that this type of consultation occurs on a regular basis. As a result, federal agencies can invest a substantial amount of time in an effort to obtain the Services' concurrence that proposed actions are not likely to adversely affect protected species or designated critical habitat, but almost no time is spent discussing how federal agencies can use their authorities to implement actions that will benefit endangered or threatened species. The time and resources spent determining whether a particular activity "may affect but is not likely to adversely affect" a species would be better spent identifying ways that federal agency authorities can be used in a coordinated effort to contribute to the recovery of listed species.⁷ To this end, the consultation provisions of the ESA should be modified to increase the opportunity for scarce federal resources to be focused not only on avoiding or modifying proposed federal actions that are likely to adversely affect protected species or damage designated critical habitat, but on identifying and implementing specific types of activities that will move the species closer to recovery.

This paper provides an overview of the current ESA consultation and recovery planning provisions, and proposes a modification to the ESA that would permit a redirection of federal resources toward the recovery of threatened and endangered species, and more fully address the ESA purposes and mandates.

⁶ 16 U.S.C. § 1536(a)(1).

⁷ IAFWA 2004 at 2.

The ESA and Its Application to Federal Agencies

The Law

The Endangered Species Act of 1973, as amended,⁸ was enacted for the purpose of providing “a means whereby the 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....”⁹ One of the specific provisions the ESA includes to achieve this purpose is to prohibit the “take” of any endangered species¹⁰ by private individuals or entities, or by federal or other governmental entities.¹¹ The term “take” is defined broadly to include actions that “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹² The ESA also prohibits the violation of any regulation established by the Secretary of the Interior or Secretary of Commerce that provides for the conservation of a threatened species¹³ and imposes an affirmative duty on federal agencies to use their authorities in a manner that contributes to the conservation of endangered and threatened species.¹⁴

One of the few exceptions to the prohibition against “take” is the provision that a take may be permitted if it is an incidental effect of a lawful activity.¹⁵ In the case of federal agencies, this permission may be obtained through a consultation process described in ESA

Section 1536 (a)(2):

⁸ 16 U.S.C. § 1531, et seq.

⁹ 16 U.S.C. § 1531(b).

¹⁰ “The term ‘endangered species’ means any species which is in danger of extinction throughout all or a significant portion of its range... [except for certain insects determined to be pests that] present an overwhelming and overriding risk to man.” (16 U.S.C. § 1532(6))

¹¹ “[A]ny person subject to the jurisdiction of the United States” (16 U.S.C. § 151538(1)).

¹² 16 U.S.C. § 1532(19).

¹³ 16 U.S.C. § 1538 (a)(1)(B) and (G). “The term ‘threatened species’ means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” (16 U.S.C. § 1532(20))

¹⁴ 16 U.S.C. § 1536(a)(1).

¹⁵ 16 U.S.C. § 1539(a)(1)(B).

“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 consultation 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

The ESA includes an additional consultation requirement, as well. It is found in Section 1536 (a)(1), and it requires agencies to take proactive steps to benefit ESA-protected species.

“...Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.”¹⁷

In addition to these provisions, Congress provided certain procedures that the consultation process must include. For example, Congress specified time frames in which the consultation is to occur,¹⁸ and requires federal agencies to conduct a biological assessment when the Services indicate that species listed or proposed for listing under the ESA may be present in the area of the proposed action and are likely to be affected by the proposed action.¹⁹ In response to the biological assessment, the Secretary of the Interior or Commerce, depending on the type of species involved, must develop a Biological Opinion.²⁰ If, in the opinion of the Secretary, jeopardy or adverse modification of designated critical habitat would occur as a result of the proposed action, the Secretary must provide reasonable and prudent alternatives that would avoid these effects.²¹

¹⁶ 16 U.S.C. § 1536(a)(2).

¹⁷ 16 U.S.C. § 1536(a)(1).

¹⁸ 16 U.S.C. § 1536(b).

¹⁹ 16 U.S.C. § 1536(c).

²⁰ 16 U.S.C. § 1536(b)(3)(A).

²¹ *Id.*

In addition to the consultation requirements and the prohibitions against take, the ESA requires the Services to develop and implement recovery plans “for the conservation and survival of endangered species and threatened species ... unless ... such a plan will not promote the conservation of the species.”²² Among other things, these recovery plans are to include, to the maximum extent practicable, “a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species....”²³

It is clear from the expressed purpose of the ESA, as well as the consultation and recovery planning provisions, that the ESA is intended not only to ensure that no harm is done to species that are nearing extinction, but also to ensure that federal agencies will undertake proactive measures to provide for the recovery of ESA-listed species so that protections are no longer required for their continued survival.²⁴

Regulations and Procedures

Consultation

To implement the ESA’s “interagency coordination” provisions, commonly referred to as the consultation requirements, the Services published joint regulations²⁵ outlining the consultation process. The regulations provide for two types of consultation -- “formal consultation” and “informal consultation.” Informal consultation is “an optional process...designed to assist the Federal agency in determining whether formal consultation...is

²² 16 U.S.C. § 1533(f)(1).

²³ 16 U.S.C. § 1533(f)(1)(B)(i).

²⁴ “[T]he term ‘conservation and management’ ... was redefined to include generally the kinds of activities that might be engaged in to improve the status of endangered and threatened species so that they would no longer require special treatment.” House Conference Report 93-740 at 23. See, also, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978) (“Congress intended endangered species to be afforded the highest of priorities.” “The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184.

²⁵ 50 C.F.R. Part 402.

required.”²⁶ Federal agencies must prepare biological assessments for “major construction activities” and to determine whether formal consultation is necessary. If no critical habitat or listed species are present, then a biological assessment need not be prepared.²⁷ Figure 1 depicts this informal consultation process and its outcomes.²⁸ “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.”²⁹ If it is determined that the action is likely to adversely affect ESA-protected species, then formal consultation is required. The procedures for formal consultation are pictured in Figure 2.³⁰

When a biological assessment is required for informal consultation, the action agency has 180 days to prepare it, after which the Services have 30 days to concur that the action is not likely to adversely affect a listed species or destroy or adversely modify designated critical habitat, or to indicate that formal consultation is required. When a biological assessment is not required, there is no applicable time frame in which informal consultation must be concluded. (See the process depicted in Figure 1.) The Services state in their consultation handbook, however, that “[a]lthough a timeframe for responding to these requests is not mandated by regulation, the Services will respond within 30 calendar days when possible.”³¹ In the case of formal consultation, the only limitation on the length of the process applies to formulation of the Services’ Biological Opinion after they determine they have received “complete” information.

²⁶ 50 C.F.R. § 402.13.

²⁷ 50 C.F.R. § 402.12(d)(1).

²⁸ U.S. Fish and Wildlife Service and National Marine Fisheries Service. March 1998. Section 7 Consultation Handbook: Procedures for Conducting Consultation and Conference Activities under the Endangered Species Act, at 3-3.

²⁹ 50 C.F.R. § 402.13(a).

³⁰ U.S. Fish and Wildlife Service and National Marine Fisheries Service. March 1998. Section 7 Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under the Endangered Species Act, at 4-3.

³¹ Final ESA Section 7 Consultation Handbook, March 1998, at 3-1, 3-2.

Figure 1: Informal Consultation Process

(Source: Final ESA Section 7 Consultation Handbook, March 1998, page 3-3)

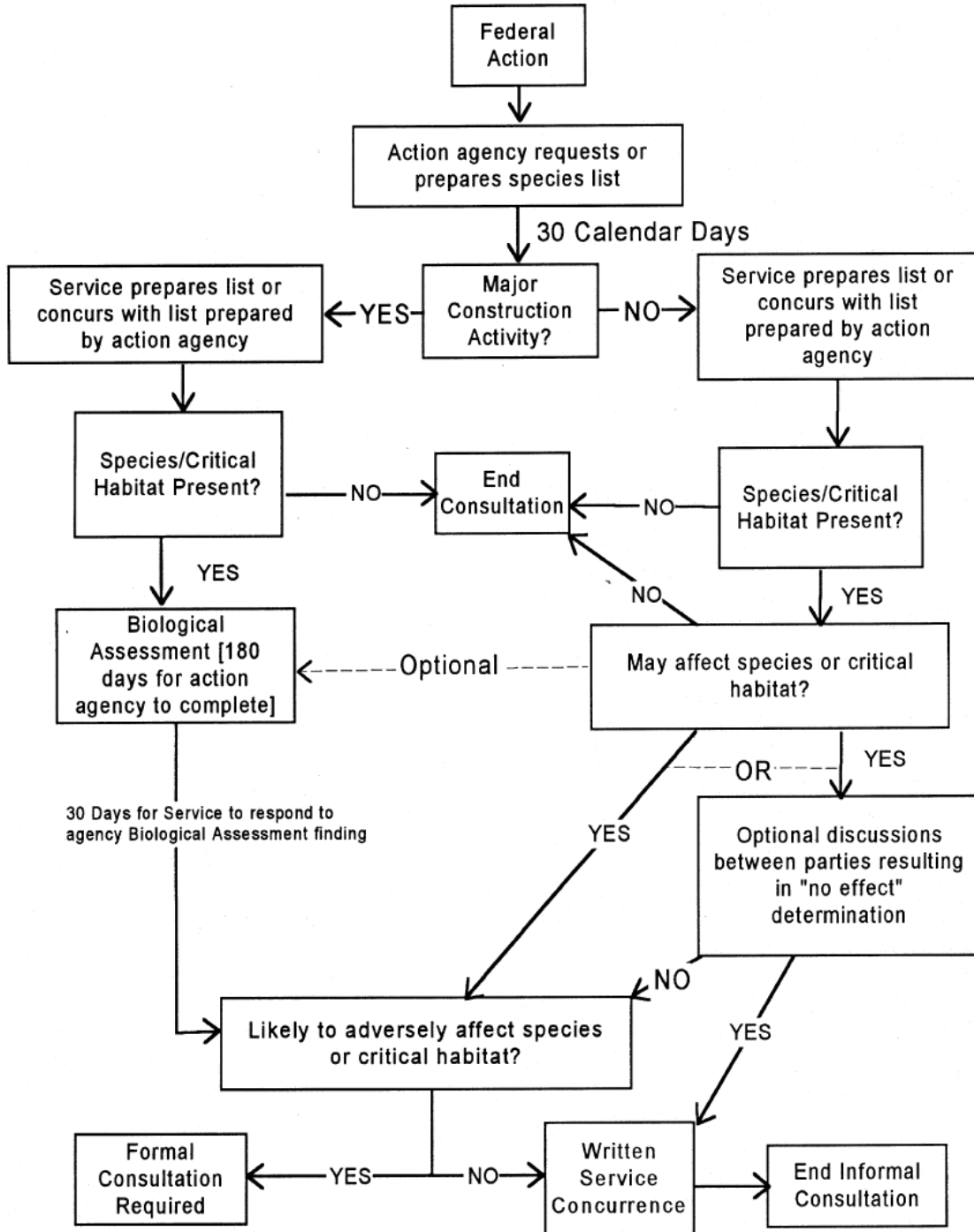
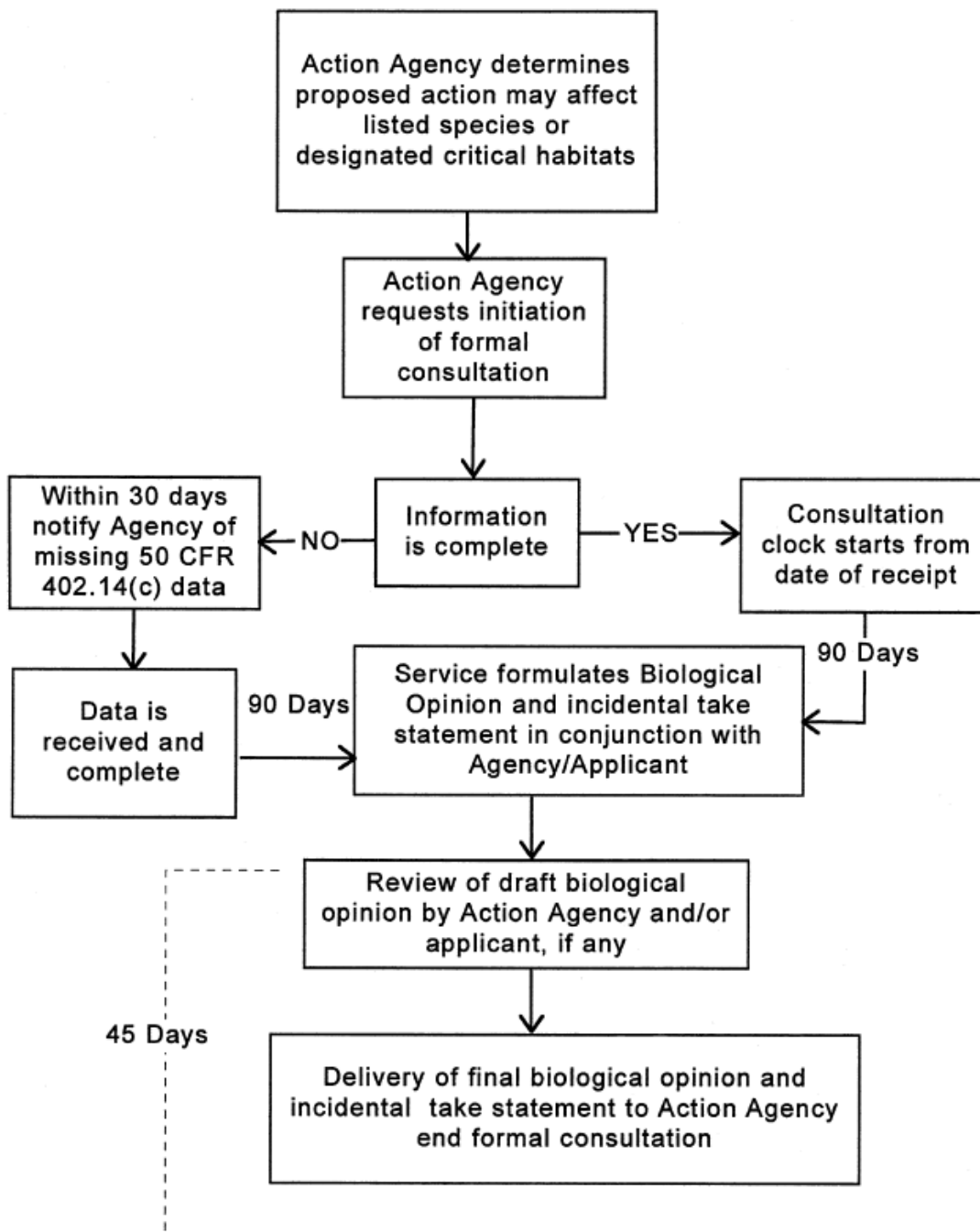


Figure 2: Formal Consultation Process

(Source: Final ESA Section 7 Consultation Handbook, March 1998, page 4-3)

Figure 4-1. Formal consultation process.



The Services' regulations also provide for joint counterpart regulations to be developed between the Services and other federal agencies to provide for flexibility to accommodate the unique missions of the various agencies. In such cases, the counterpart regulations supersede the consultation process set forth in the joint regulations.³² In December 2003, the first such regulation went into effect when a final rule was published establishing joint counterpart regulations for the FWS, Bureau of Land Management (BLM), National Park Service (NPS), Bureau of Indian Affairs (BIA), U.S. Forest Service (FS), and NMFS.³³ These procedures were established "to streamline consultation on proposed projects that support the National Fire Plan (NFP)...."³⁴ In August 2004, joint counterpart regulations were also published to establish alternative consultation procedures for regulatory actions by the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) and the Environmental Protection Agency (EPA) related to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).³⁵ Among other things, both counterpart regulations eliminated the requirement for the affected agencies to obtain the Services' concurrence with a "not likely to adversely affect" determination. The agencies now are required to consult with the Services only when the agencies determine that a proposed action covered by the counterpart regulations is likely to adversely affect a listed species or designated critical habitat.

Furthering the Recovery of Listed Species

The Services have not promulgated regulations to guide their recovery planning processes or to identify how federal, state or tribal agency actions are to use "their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of

³² 50 C.F.R. § 402.04.

³³ 68 Fed. Reg. 68254.

³⁴ Id.

³⁵ 69 Fed. Reg. 47732.

[listed] species....”³⁶ The Services do acknowledge in their policies, however, that “[c]oordination among State, Tribal or Federal agencies, academic institutions, private individuals and organizations, commercial enterprises, and other affected parties is perhaps the most essential ingredient for recovering a species.”³⁷ The Services have also put the public on notice of their policy to develop “recovery plans within 2 1/2 years after final listing of a species (18 months for draft recovery plan and a final recovery plan within an additional 12 months of the draft).”³⁸ In their consultation handbook, the Services also acknowledge the connection between the “management actions outlined in recovery plans and the consultation process.”³⁹ The only time Service personnel are encouraged by the handbook procedures to mandate any actions from the recovery plan is when “they have the effect of minimizing the impact of incidental take from the project, and are limited to minor changes.”⁴⁰ In such cases, these actions are to be included as Terms and Conditions for the issuance of an incidental take statement authorizing a limited take of species incidental to the proposed federal activity. Any other related actions that may affect habitats that the recovery plans identify “as essential for species’ survival and recovery” are to be provided only as conservation recommendations.⁴¹ There is no other requirement or direction to Service personnel instructing them about how to work with federal agencies to ensure they use their authorities to carry out programs for the conservation of ESA-listed species as they are required to do by ESA Section 7(a)(1).

³⁶ 16 U.S.C. § 1536(a)(1).

³⁷ 59 Fed. Reg. 34272 (1994).

³⁸ Id.

³⁹ Final ESA Section 7 Consultation Handbook, March 1998, at 2-2.

⁴⁰ Id.

⁴¹ Id.

Proposed ESA Revision

Federal resources must be refocused toward identifying and implementing proactive measures that conserve species and the habitats on which they depend. Some believe that Congress provides too little funding to enable the Services to focus on recovery efforts or working with other federal agencies to foster development of programs through which their resources could further the recovery of species.⁴² Amending the ESA to eliminate the requirement for federal agencies to obtain the Service's concurrence when an action agency determines that its proposed action is not likely to adversely affect an ESA-listed species would free resources and provide federal personnel the opportunity to redirect their efforts toward such proactive activities.⁴³ Though this proposed change could be implemented by the Services through a regulatory process, to date they have chosen not to take this approach. To establish a clear mandate, it is necessary for Congress to amend the ESA to ensure these changes occur.

Why Revise ESA Consultation Focus?

The ESA was formulated “to provide a means whereby species and the ecosystems on which they depend may be conserved, to provide a program for the conservation of such endangered species and threatened species...”⁴⁴ and to safeguard “for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.”⁴⁵ The NatureServe *Explorer* database lists

⁴² See, FY2005 ESA funding letter signed by representatives of 54 organizations. Endangered Species Coalition, FY2005 ESA funding letter (2004). See also, The Wildlife Society, Wildlife Policy Statement - Threatened and Endangered Species (2006) (“The funding necessary to conduct research and management programs is inadequate for many species. The lack of funding often has detrimental impacts on numerous species.”)

⁴³ The ESA requires consultation not only when an action is likely to jeopardize the continued existence of listed species, but also when an action is likely to destroy designated critical habitat. While there is controversy surrounding the need for designation of critical habitat, this paper assumes that destruction of designated critical habitat would also adversely affect listed species, and therefore is not referred to separately.

⁴⁴ 16 U.S.C. § 1531 (b).

⁴⁵ 16 U.S.C. § 1531(a)(5).

16,367 plants and animals in the U.S. that are at risk of extinction.⁴⁶ Included in this list are the 1,272 plants and animals in the U.S that were listed as threatened and endangered under the Endangered Species Act at the end of December 2005,⁴⁷ and another 283 species that are candidates for listing under the ESA.⁴⁸ (See Appendix A.)

According to the FWS Threatened and Endangered Species Database, 40 species have been delisted.⁴⁹ Of these, only about 17 were delisted because their populations actually recovered. The others were delisted either because they either went extinct or because the original data on which their listing was based was in error.⁵⁰ The low numbers of recovered species has led some to claim that the ESA, as currently constructed, is an ineffective tool for the recovery of listed species.⁵¹

It is not surprising, however, that so few species have recovered when there is no emphasis on development of federal agency programs to further the recover of species, and the Services have developed recovery plans for only about half of the listed species.⁵² “As of

⁴⁶ The author queried the NatureServe database on February 5, 2006 for all plants and animals that are in categories NH: Possibly Extirpated; N1: Critically Imperiled; N2: Imperiled; and N3: Vulnerable. Those presumed extirpated were omitted from the query. “NatureServe status ranks, and the documentation that support them, are often used ... in the identification of candidates for legal protection. Because NatureServe assessment procedures-and subsequent lists of imperiled and vulnerable species-have different criteria, evidence requirements, purposes, and taxonomic coverage than official lists of endangered and threatened species, they do not necessarily coincide.”

<http://www.natureserve.org/explorer/ranking.htm> For an explanation of the categories, see NatureServe Explorer, “NatureServe Conservation Status” at <http://www.natureserve.org/explorer/ranking.htm#global>.

⁴⁷ U.S. Fish and Wildlife Service. 2005. Summary of Listed Species Species and Recovery Plans as of 12/26/2005.

⁴⁸ See, U.S. Fish and Wildlife Service. 2005. Candidate Species Report.

⁴⁹ U.S. Fish and Wildlife Service. 2005. Delisted Species Report as of as of 12/26/2005.

⁵⁰ *Ibid.*

⁵¹ See, for example, House Committee on Resources, “H.R. 3824: The Threatened and Endangered Species Recovery Act (TESRA)” (The numbers alone serve as irrefutable evidence that the ESA is broken and in desperate need of a legislative update”) and Spain and Grader (“The problem is that the ESA as currently written does little else but keep species on emergency life support -- there is no guarantee under the ESA as currently written that any of these fish species will actually be recovered enough to generate a harvestable surplus.”).

⁵² See Appendix A, which is a copy of a report generated from the FWS Threatened and Endangered Species System on November 6, 2005 showing the numbers of species listed under the ESA, and the number of recovery plans developed. While the report shows 1,035 plans have been developed, a footnote reports that “[t]here are 550 distinct approved recovery plans. Some recovery plans cover more than one species, and a few species have separate plans covering different parts of their ranges. This count includes only plans generated by the USFWS or jointly by the

September 2004, 83 percent of the species listed by the [FWS] and 32 percent of those listed by the NMFS had recovery plans.”⁵³ In addition, only about two percent of the species for which the FWS is responsible have “achieved more than 75 percent of their recovery objectives.”⁵⁴ Despite the stated purpose of the ESA, plans specifying the “means whereby species and the ecosystems on which they depend may be conserved” are lacking, and there is no real comprehensive “program for the conservation of such endangered and threatened species.” It is more likely that species on the brink of extinction will recover if there is a plan for their recovery, and particularly if the plan is dedicated to a particular species.⁵⁵ Other factors, including lack of funding, also affect the speed at which listed species recover, but having a recovery plan is generally an important first step.

Federal agencies are uniquely situated to make major contributions toward the conservation of these species, and doing so would be entirely supportive of the Section 7(a)(1) mandate for federal agencies, in consultation with the Services, to further ESA purposes by using their authorities to carry out programs for the conservation of ESA-listed species.⁵⁶ Federal lands constitute nearly one-third of all the land in the U.S.,⁵⁷ and additional federal actions are

USFWS and NMFS, and includes only listed species that occur in the United States.” Thus, it is difficult to know precisely how many listed species have recovery plans.

⁵³ Taylor, et al. 2005, *citing* Suckling K.F. and Taylor M. 2005. Critical habitat and recovery. In Goble DD, Scott JM, Davis FW, eds. *The Endangered Species Act at Thirty: Renewing the Conservation Commitment*. Washington (DC): Island Press. Forthcoming.

⁵⁴ *Id.* at 354. *Citing*, U.S. Fish and Wildlife Service. 2004b. Threatened and Endangered Species System (TESS): Listed Species and Populations with Recovery Plans. Washington (DC): US Department of the Interior. (22 February 2005; http://ecos.fws.gov/tess_public/TESSWebpageRecovery?sort=1).

⁵⁵ Taylor, et al. 2005. (“Species with recovery plans for two or more years appeared to be more likely to be improving and less likely to be declining than species without such plans. Species with dedicated or single-species plans appeared to fare better than those with multispecies plans.”)

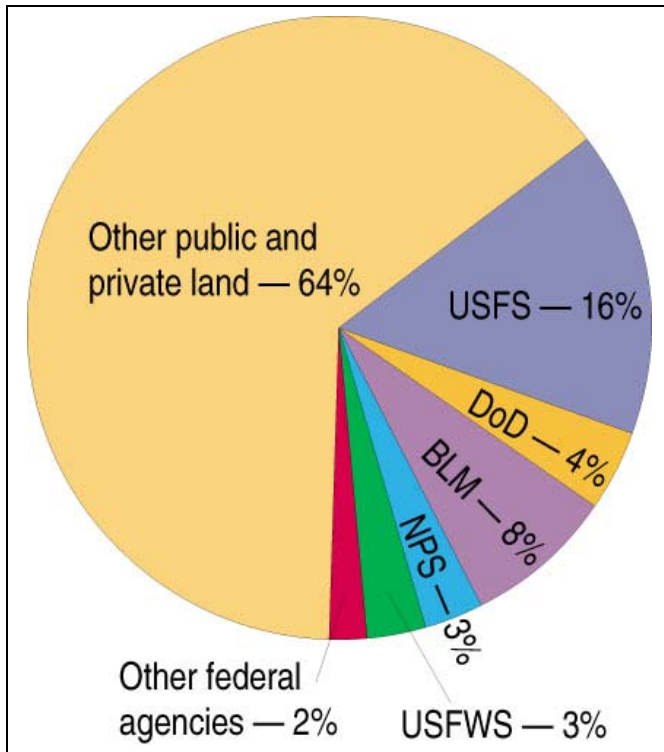
⁵⁶ 16 U.S.C. § 1536(a)(1).

⁵⁷ U.S. Department of the Interior, *Federal Lands and Indian Reservations* (2005).

carried out on state, tribal, and private lands. This is particularly true in the West, where there is a checkerboard pattern of land ownership.⁵⁸

As shown in Figure 3, nearly 40 percent of the listed species occur on federal land. Figure

Figure 3: Occurrences of Listed Species by Land Ownership Type



Source: LaRoe, et al. 1995, at 400.

4 shows the extent to which listed species occur on federal land. The fact that consultation is also required when federal actions occur on private land, such as when a landowner receives a federal permit or federal funding, merely increases the opportunity for federal agencies to play a major role in the recovery of listed species.

Despite having a prime opportunity to benefit listed species, the Services' current approach to implementing the ESA Section 7 consultation requirements

emphasizes doing no harm to ESA-listed

species and does not emphasize making proactive efforts to further the recovery of species.

Formal consultation is required when an action is likely to adversely affect a species to ensure

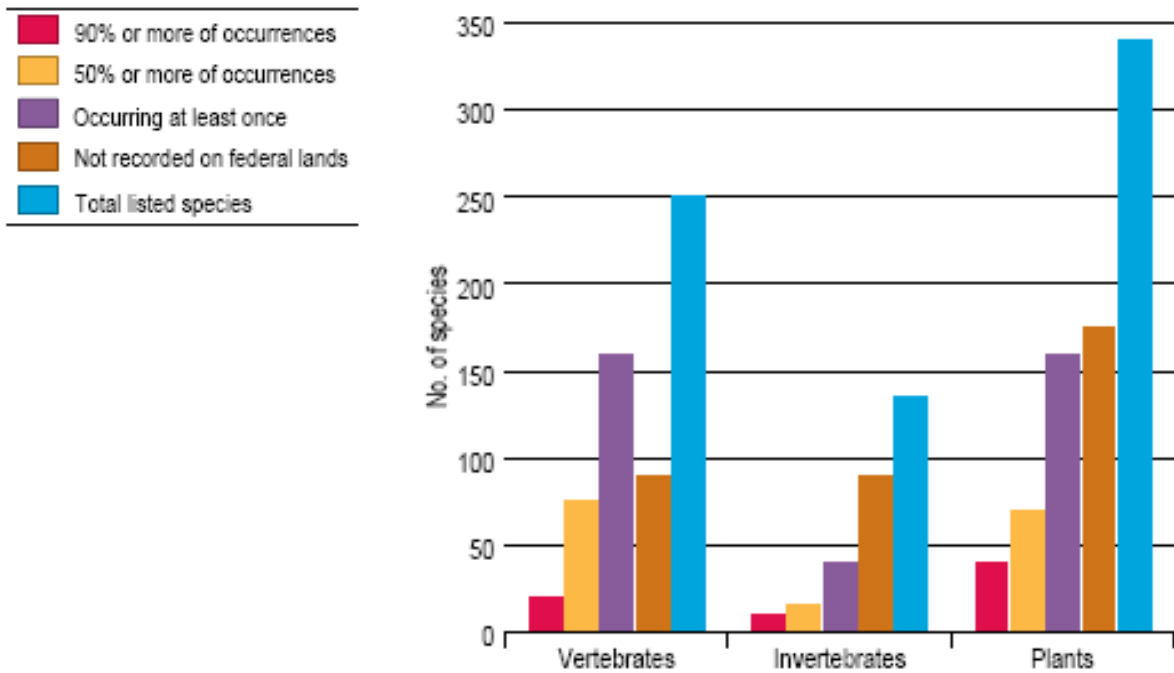
jeopardy does not occur and to minimize other adverse effects. But conservation

recommendations, as previously stated, are not mandatory. To confound the issue further,

according to Service regulations if formal consultation is to be avoided, a federal agency is

⁵⁸ See, for example, the map of "Major Public Lands in Washington State" available from the Washington Department of Natural Resources.

Figure 4: Listed Species Occurring on Federal Lands

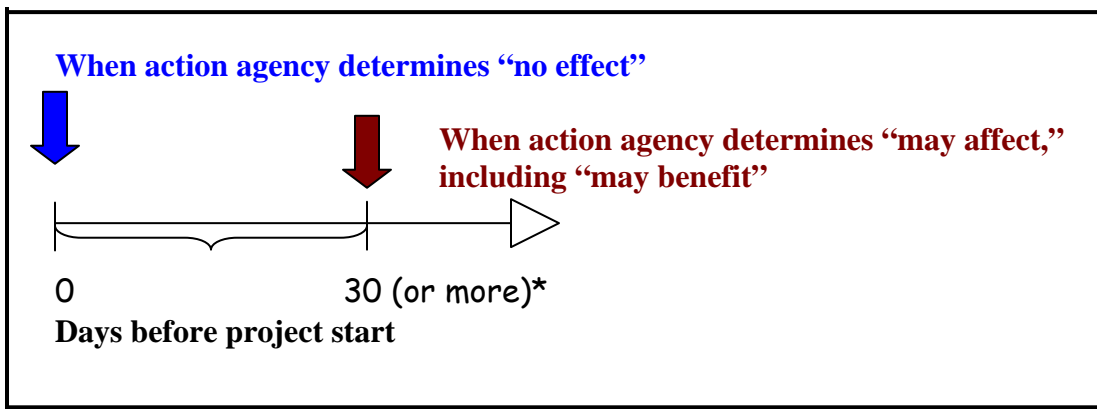


Source: LaRoe, et al. 1995, at 398.

required to undertake informal consultation anytime a federal action “may affect” a species; thus, consultation is required even when a federal agency believes a proposed action will *benefit* a listed species or designated critical habitat.⁵⁹ The result is that implementation of beneficial actions must be delayed until the appropriate documentation is developed by the action agency and the Service concurs with the agency’s “not likely to adversely affect” determination. This seems particularly strange in view of the fact that when an action agency determines its proposed activity will have no effect on listed species, even when species are present in the action area and even if consultation might result in identification of ways to modify the proposed action to benefit the species, no consultation whatsoever is required. It has long been accepted that “[i]f a Federal agency decides that its activities or programs will not affect listed species or their

⁵⁹ See Figure 1.

Figure 5: Time for Project Start in “No Effect” v. “May Benefit” Determination



* According to the Services' Consultation Handbook, there is no overall timeframe for informal consultation. The Services will respond to requests for species lists within 30 days when possible.

habitat, consultation shall not be initiated unless requested by the Service.”⁶⁰ Figure 5 illustrates the delay that occurs when a proposed project may benefit a listed species, as opposed to a project which can be carried out immediately because it has no effect at all on a listed species.

A tremendous amount of federal resources are invested in this process of consultation to ensure avoidance of adverse effects to species.⁶¹ And based on the low number of species that have actually recovered, it appears that this consultation process, as it is currently conducted, may not contribute to the recovery of species as much as it might. Given the lack of proactive efforts to benefit listed species, as opposed to simply not harming them, it should be no wonder that the Endangered Species Act is viewed as an ineffective tool for the recovery of threatened and endangered species. Prohibitions are limited to “takes” that occur when no incidental take authority has been granted, the “mandatory” section 7(a)(1) consultation requirement is not

⁶⁰ 50 C.F.R. § 402.4 (a)(2) (1981). The regulations governing consultation specifically included this language in 1981, and though the language was revised later, the premise has remained the same—action agencies have authority to make their own initial determinations about whether an action may affect or will not affect an ESA-protected species, and if they determine there is no effect, consultation is not required.

⁶¹ U.S. General Accounting Office, *Endangered Species: Despite Consultation Improvement Efforts in the Pacific Northwest, Concerns Persist about the Process* (2003) at 11.

actively pursued by the agencies charged with leading its implementation, and recovery plans have no “teeth.” While it is important to avoid adversely impacting endangered and threatened species and the habitats on which they depend, and for agencies to know what actions they must avoid, agencies also need to know what they can and should do to further the recovery of listed species. Eliminating the need for Service concurrence on actions that are not likely to adversely affect endangered and threatened species would allow the limited resources available to the Services to be focused instead on the important task of planning for the recovery of endangered and threatened species.

Redirecting federal agency resources to emphasize proactive recovery efforts, as opposed to merely avoiding adverse effects, would be consistent with the purpose of the ESA as expressed in the statute and the legislative history. Requiring federal action agencies to consult with the Services to establish their own programs for the conservation of listed species, would satisfy the Section 7(a)(1) mandate and also better position the Services to identify gaps in species recovery efforts that potentially could be filled by state, tribal and private landowners. In this way, appropriate incentives could be established to encourage non-federal landowner efforts to meet species’ needs, as well.

There may be some additional risk to species by eliminating the need for federal agencies to consult with the Services when an action may benefit listed species. The question, however, is whether the amount of risk reduction achieved through the consultation in such cases is worth the amount of resources that must be invested to carry out the consultation. Federal agencies now have substantially more biological expertise and access to biological information than they had when the ESA was initially enacted, so they are better able to make determinations that are

reasonably supported by existing scientific information.⁶² Moreover, the ESA citizen suit provisions will continue to serve as a check on future arbitrary and illegal federal actions and inaction, just as they have in the past.

Frees Resources for Recovery Efforts and Reduces Delays in Implementing “Not Likely to Adversely Affect” Activities

Any amount of time the Services no longer are required to spend reviewing agency actions that already benefit protected species is time the Services may invest in other activities, including recovery efforts. Precisely how many days it takes the Services to reach concurrence with a “may affect but not likely to adversely affect” determination has not been quantified. It is the Services’ policy that informal consultation will be completed in 30 days.⁶³ However, there is evidence this does not occur in many cases, and the Services themselves have stated that “[d]ialogue can continue as long as both parties are willing to participate and are actively working to complete the informal consultation.”⁶⁴

Concerns have increased significantly in recent years about the length of time required to complete informal consultation. In July 2001, the FS requested information from their field offices to identify the extent and causes of consultation delays.⁶⁵ Results of this exercise showed that out of 112 National Forest/Grassland units that responded, 46 reported having one or more delayed consultations. There were a total of 222 delayed consultations reported, which were

⁶² See discussion in preambles of the counterpart regulations at 68 Fed. Reg. 68254 and 69 Fed. Reg. 47732.

⁶³ Final ESA Section 7 Consultation Handbook, March 1998, at 3-1, 3-2.

⁶⁴ Id. at 3-2.

⁶⁵ Furnish, Memorandum to Regional Foresters (2001). (“Delay” characterized in questionnaire as “the consultation request package is complete, there is interagency agreement that the package is complete (a BA, BE, or other effects analysis documentation), and: (1) the request for concurrence or initiation of formal consultation has been received by the FWS/NMFS” and “more than 30 days have elapsed and a concurrence letter has not been issued” after FS made a “not likely to adversely affect” determination; or (2) “ongoing consultations with a determination of “likely to adversely affect”, but more than 135 days have elapsed (60 days, if being done under streamlining procedures in R1/R4/R5/R6), a biological opinion has not been issued and an extension was not mutually agreed-to.” Also includes situations in which “ongoing consultations...are delayed due to disagreement over whether the consultation package is complete.”)

estimated to constitute about 15 percent of all the ongoing consultations.⁶⁶ Of the 222 delayed consultations, 143 involved informal consultations, 37 were formal consultations, and “42 [were] consultations [that] had not started due to disagreement over completeness of the submitted consultation package.”⁶⁷ The principal reasons for delays in these consultations were a lack of sufficient Service personnel and disagreement over the information provided in the initial consultation package.⁶⁸ It should come as no surprise that the Services cannot always keep up with the consultation timelines; about 9000 consultations on FS activities alone are completed each year, and about 180 each week.⁶⁹ The FS estimates there are about 1,500 consultations ongoing at any given time.⁷⁰

Concerns about the workload associated with informal consultations are echoed elsewhere, as well. At Congress’ request, the General Accounting Office (GAO), now known as the Government Accountability Office, reviewed the consultations the Services have carried out with the U.S. Army Corps of Engineers (Corps), the BLM, the Bureau of Reclamation, and the FS. The review was limited to consultations conducted in Idaho, Montana, Oregon, and Washington.⁷¹ In its March 2004 report on this effort, GAO stated that

“...the Services conducted almost 1,550 consultations during fiscal years 2001 through 2003 with the four action agencies in Idaho, Montana, Oregon, and Washington. While most of these 1,550 consultations were completed within established time frames, about 40 percent of the consultations exceeded established time frames, in some cases by more than a year. However, these time frames do not capture the sometimes significant amount of preconsultation time spent discussing a project before the consultation is considered to have officially begun.”⁷²

⁶⁶ U.S. Forest Service, U.S. Fish and Wildlife Service, and National Marine Fisheries Service. August 2001. Section 7 Consultation Delays.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ U.S. General Accounting Office. Endangered Species: Federal Agencies Have Worked to Improve the Consultation Process, but More Management Attention Is Needed (2004.)

⁷² Id. at 3.

One of the chief reasons for delays is attributable to the Services' staffing shortages. The GAO report states

“Staffing shortages at the Services were the predominant concern about the consultation process among the 66 survey respondents. It was the most important concern among the Services, Corps, and Bureau of Reclamation respondents, with Forest Service and BLM respondents also identifying it among their top concerns. In addition to the survey respondents, other officials at the Services and action agencies we interviewed also expressed concerns about a lack of resources to deal with the consultation workload at the Services and at the action agencies.”⁷³

In addition to staffing shortages, delays are also attributable to the difficulties inherent in reaching agreement on effects when there is insufficient information and a lack of understanding about the project activities. One example of such a delay was referenced by a wildlife specialist at the New Mexico Department of Agriculture in his testimony before the U.S. House of Representatives Committee on Resources:

“In private conversations with Federal land management personnel (i.e., BLM and Forest Service), they complain about the amount of time it takes for the FWS to complete a consultation (sometimes years). There are also complaints the FWS is evaluating programs and dictating management without possessing any technical knowledge or experience. For example, the FWS is mandated to evaluate the impacts of livestock grazing. Yet, they have no experience or training in designing or implementing grazing strategies. On the reverse, the FWS complains Federal land management agencies do not have data to verify to its satisfaction that a particular grazing strategy will not impact a species. Therefore, they must err on the side of caution in these recommendations. This lack of trust and efficiency becomes compounded when threats of litigation are allowed to dictate the situation.”⁷⁴

These types of situations may not be typical, but there is no question that federal action agencies devote much time to obtain the applicable Service's concurrence that proposed federal activities are not likely to adversely affect an ESA-listed species or destroy or adversely modify

⁷³ Id. at 40.

⁷⁴ Moore, Testimony at Field Hearing on the Endangered Species Act before the U.S. House of Representatives Committee on Resources. Clovis, New Mexico (1998).

critical habitat. Much of the time spent on such consultations would be better spent on activities that that would more directly further the recovery of the species. A 2005 report prepared by Richard Pombo, Chairman of the House of Representatives Committee on Resources, states

“The FWS reports that the consultation workload for Fiscal Year 2004 included over 71,000 informal consultations and over 4,000 formal consultations. The consultation requirements of the ESA also significantly affect other agencies, and in cases, appear unduly burdensome. For example, among incidents reported by US Forest Service and Bureau of Land Management officials was a consultation that regarded allowing a Native American tribe to harvest a single cedar tree for use as a ceremonial canoe. It required about two years.”⁷⁵

Figures 6 and 7 are taken from this report and show the numbers of informal and formal consultations completed by the FWS alone from fiscal year (FY) 2001 through FY 2004. FWS, itself said, in its fiscal year 2000 strategic plan, that “[t]housands of federal actions are reviewed each year by the Service, which constitutes an immense workload due to case-specific analysis and interpersonal communication that is required.”⁷⁶ More recently, in a 2005 Technical Review, The Wildlife Society (TWS) acknowledged this issue, stating

“Funding and staffing for the Services to provide consultations have not kept pace with the growing number of federal actions requiring consultation, with resulting backlogs and delays in federal agency decision making in some circumstances. Funding for the Bureau of Land Management (BLM) and Forest Service has been inadequate to complete consultation and monitoring work.”⁷⁷

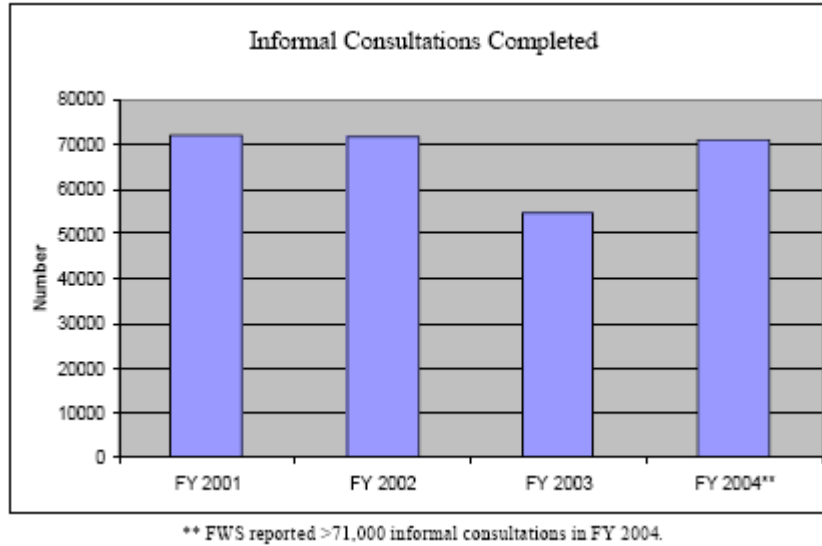
The counterpart regulations were promulgated in large part as a result of concerns about consultation workload and interest in accelerating implementation of activities that have

⁷⁵ Pombo, Implementation of the Endangered Species Act of 1973 (2005) at 5. This report is the subject of much criticism, with environmental organizations arguing that the report is flawed, and it has not been officially adopted by the Committee on Resources. However, the criticisms of the report are not directed at the consultation figures or discussion of consultation workload. See, Center for Biological Diversity, “Pombo’s Endangered Species Report Flawed: Latest Anti-Endangered Species Act Report by Pombo is Erroneous, Misleading.” (2005) and Center for Native Ecosystems, “Pombo’s Endangered Species Report Flawed: Latest Anti-Endangered Species Act Report by Pombo is Erroneous, Misleading.” (2005).

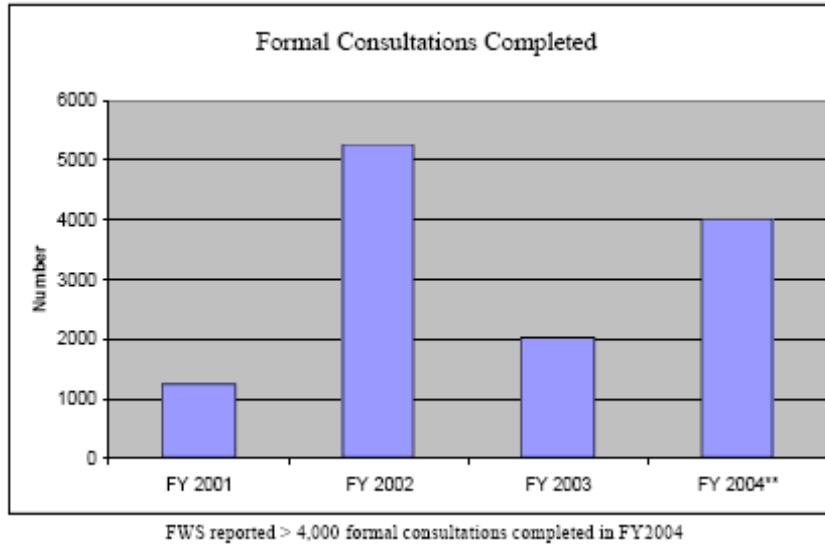
⁷⁶ U.S. Fish and Wildlife Service, FY 2000 Annual Performance Plan (2005).

⁷⁷ The Wildlife Society, Practical Solutions to Improve the Effectiveness of the Endangered Species Act for Wildlife Conservation (2005) at 7.

**Figure 6: Informal Consultations Completed
FY 2001 through FY 2004⁷⁸**



**Figure 7: Formal Consultations Completed
FY 2001 to FY 2004⁷⁹**



beneficial, insignificant or discountable effects. The preamble of the rule establishing the NFP counterpart regulation indicates the premise underlying the elimination of requiring Service

⁷⁸ Pombo, Implementation of the Endangered Species Act of 1973 (2005) at 49.

⁷⁹ Id. at 50.

concurrence on not likely to adversely affect determinations is that there may be little benefit received by species from the amount of time and resources invested in obtaining that concurrence.

“Using the existing consultation process, the Action Agencies have consulted with the Service on many thousands of proposed actions that ultimately received written concurrence from the Service for NLAA [not likely to adversely affect] determinations. Those projects had only insignificant or beneficial effects on listed species or posed a discountable risk of adverse effects. The concurrence process for such projects has diverted some of the consultation resources of the Service from projects in greater need of consultation and caused delays. The proposed counterpart regulations will effectively reduce these delays by increasing the Service's capability to focus on Federal actions requiring formal consultation by eliminating the requirement to provide written concurrence for actions within the scope of the proposed counterpart regulations.”

The preamble of the rule establishing the counterpart regulations for FIFRA decisions expresses the same concern.

Supported by Legislative History

Amending the ESA to eliminate the need for action agencies to consult with the Services when actions may benefit listed species would be entirely consistent with the stated purpose of the ESA and is supported by the Act's legislative history. A review of the evolution of the Act and the regulations implementing the consultation requirements indicates that the primary focus has been on avoiding adverse effects on listed species rather than finding ways to proactively benefit the species.

Though the ESA has been amended a number of times since it was signed into law in 1973, and some of the amendments modified Section 7, the basic requirement for federal agencies to use their authorities, in consultation with the Services, to establish programs for the conservation of species and to avoid jeopardizing the continued existence of species has remained the same. When the law was enacted in 1973, Section 7 read:

“The Secretary shall review other programs administered by him and utilize the programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.”⁸⁰

The House Conference Report accompanying the ESA included no specific discussion of the Section 7 provisions.⁸¹ The mandate apparently was considered sufficiently clear that no further explanation was deemed necessary. In *TVA v. Hill*, the Court itself said

“One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies ‘to 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 habitat of such species’ 16 U. S. C. § 1536 (1976 ed.).”⁸²

Thus, the substance of the basic Section 7 consultation mandate has remained virtually unchanged over the years; the only revision has been to its structure and to modify the provision from requiring that the Services ensure actions *do not* jeopardize species to ensuring actions *are not likely to* jeopardize the continued existence of species.⁸³

The policy established by the Act was “that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in

⁸⁰ 16 U.S.C. § 1536 (1973), P.L. 93-205 (December 28, 1973).

⁸¹ See H.R. Rep. No. 740, 93rd Cong., 1st Sess. (1973).

⁸² *TVA v. Hill*, 437 U.S. 153, 173 (1978); 98 S. Ct. 2279.

⁸³ The 1979 amendments made the change from “do not jeopardize” to “not likely to jeopardize.” Many other changes were made to Section 7, particularly by including the addition of details concerning the consultation process itself, but they did not affect these basic mandates.

furtherance of the purposes of this Act.”⁸⁴ Moreover, the purposes of the ESA as enacted in 1973, and as they are today, include providing “a means whereby the 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...”⁸⁵ It is clear from the plain language of these provisions and from Section 7 that Congress has always intended federal agencies to work with the Services to identify and implement actions that benefit ESA-protected species, and not simply to ensure their actions are not likely to jeopardize the continued existence of species.

The ESA did not include any provision for recovery plans when it was initially enacted in 1973. It was not until the Act was amended in 1978 that Section 4(g) was added to mandate the development of recovery plans.⁸⁶ The House Report accompanying the House version of the bill acknowledged that

“Although recovery plans are implicit in the Endangered Species Act, the Act does not specifically mandate recovery plans. As a result, recovery plans have been given a low priority within the Endangered Species Act Budget.

“The committee intends the Secretary to establish recovery teams to assist with: (1) the development of plans; (2) periodic amendment of plans; and (3) the implementation of plans. The committee hopes that the Secretary will appoint full-time professionals to insure that planning and implementation proceed expeditiously.”⁸⁷

⁸⁴ 16 U.S.C. § 1521(c) (1973), P.L. 93-205, Sec. 2(c) (December 28, 1973).

⁸⁵ 16 U.S.C. § 1531(b) (1973), P.L. 93-205, Sec. 2(b).

⁸⁶ “The Secretary shall develop and implement plans (hereinafter in this subsection referred to as ‘recovery plans’) for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans (1) shall, to the maximum extent practicable, give priority to those endangered species or threatened species most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other developmental projects or other forms of economic activity, and (2) may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.” P.L. 95-632 (November 10, 1978). See also, H.Rept. 95-1804 (October 15, 1978), accompanying S. 2899 as Reported by the Conference Committee.

⁸⁷ H.R. Rep. No. 1625, 95th Cong., 2nd Sess. (1978) at 18.

Even with the addition of the requirement to plan and implement recovery plans, Congress provided no specifics concerning the contents of the plans. As a result, the plans often did not include more than general guidance to minimize mortality or conflicts with human activities.⁸⁸ This was far from sufficient to adequately provide for recovery of the listed species. The issue was addressed with another ESA amendment in 1988.⁸⁹ This amendment identified minimal requirements for recovery plan contents, provided for public review and comments on recovery plans, and made other changes to the recovery planning process, all of which continue in effect today.

Given the mandates and policies Congress set forth in the ESA, the question then becomes how consultation is to occur and whether it should contribute to the recovery process. This is where the Services, to whom Congress gave authority to implement the ESA, get involved.

Evolution of the Regulations Governing Section 7 Consultation

The consultation process has evolved since 1973. Congress did not originally require the Services to develop regulations implementing the ESA consultation provisions, and they did not do so initially. In fact, there was no guidance at all concerning the process until, in late 1974, the Secretaries of the Interior and Commerce issued “a joint letter to all Federal agencies ... [in which they] pointed out the responsibilities of the agencies under section 7 and asked for their cooperation in implementing the Act.”⁹⁰ Subsequently, at the request of the other federal agencies, the Services developed “Guidelines to Assist the Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973,” and in April 1976, sent them to the agencies

⁸⁸ Stanford Environmental Law Society, *The Endangered Species Act* (2001) at 72.

⁸⁹ P.L. 100-478 (October 7, 1988).

⁹⁰ 43 Fed. Reg. at 870.

for review and comment.⁹¹ Even at that time, about a third of the agencies were concerned about the potential for delays due to consultation.⁹² After receiving extensive feedback from the agencies on the guidelines, the Services published a proposed rule governing the Section 7 consultation process.⁹³ Much like the current regulations governing Section 7 consultation, this proposed rule provided that consultation was not required if the federal action agency reviewed the action and determined there would be no effect on listed species. However, if a federal agency determined an action may affect a listed species, then the agency was to initiate consultation.⁹⁴ No reason was given for requiring consultation based on a “may affect” determination, and federal agencies apparently did not raise concerns about this requirement.⁹⁵

The Services indicated they would conduct “a threshold examination...to ascertain if an action will adversely affect listed species or their habitat.”⁹⁶ They gave themselves 60 days within which to make this threshold determination.⁹⁷ The proposed rule then distinguished between actions intended to benefit species and those not intended to benefit species. It stated that if the Services determined the federal action promoted “the conservation of listed species...additional consultation shall be unnecessary unless it would further benefit the listed species.”⁹⁸ On the other hand, the rule also stated that

“If an identified activity or program is not specifically for the conservation of listed species, but the Director or Regional Director concludes from the threshold examination that in no likelihood will the activity or program jeopardize

⁹¹ Id.

⁹² “...nearly one-third of the of the Federal agencies commenting expressed in one for or another that set time frames are necessary for the consultation process. The FWS and NMFS acknowledge these agencies’ concern that the process not be protracted.” 42 Fed. Reg. at 4869.

⁹³ 42 Fed. Reg. 4868 (January 26, 1977).

⁹⁴ 42 Fed. Reg. at 4870.

⁹⁵ See preamble of 42 Fed. Reg. 7970.

⁹⁶ 42 Fed. Reg. at 4870 and 42 Fed. Reg. at 4875. At the time, the Department of the Interior and Department of Commerce published separate rules, but the rules were virtually identical. There were no differences in the consultation provisions.

⁹⁷ 42 Fed. Reg. 4869, 4870 and 4872.

⁹⁸ 42 Fed. Reg. 4871, 4872.

the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat...further section 7 consultation shall be unnecessary.⁹⁹

Thus, it appears that if the action were not specifically intended to benefit listed species, consultation was not required. No examination was to be made to determine whether the action might benefit listed species if minor modifications were made. If the threshold examination indicated the action might adversely affect listed species or habitat, then further consultation was required and the Services were to issue a Biological Opinion.¹⁰⁰ Action agencies had the responsibility of providing “the biological information necessary for adequate review of the effect an activity or program has upon listed species or their habitat.”¹⁰¹ The Services provided the agencies with such information only upon the agencies’ request.¹⁰²

In response to the proposed rules,¹⁰³ the Services received a total of only 65 comments. Of the comments they received, 31 were from other federal agencies, and nine were from state or regional organizations. Of the remaining comments, seven were from private environmental organizations and 18 were from businesses.¹⁰⁴ About one-third of the commenters supported the proposed rule as written, seven expressed a total lack of support, and the remaining provided substantive comments on specific provisions.

One of the issues frequently raised in comments was whether the consultation process should be mandatory or discretionary with federal agencies. In reaching their decision that the process should be mandatory, the Services referenced the 1976 decision in National Wildlife

⁹⁹ 42 Fed. Reg. at 4872 and 42 Fed. Reg. at 4875.

¹⁰⁰ 42 Fed. Reg. at 4870. The issuance of a Biological Opinion was not required by the ESA itself until its amendment in 1978 by P.L. 95-632 (November 10, 1978).

¹⁰¹ 42 Fed. Reg. at 4871.

¹⁰² Id. This approach effectively continues today, putting the burden on the action agencies to identify relevant scientific information and analyze its application to the proposed action and affected species.

¹⁰³ In 1977, the FWS and NMFS published separate, but coordinated proposed rules to implement the consultation provisions. (42 Fed. Reg. 4868 and 42 Fed. Reg. 4873.) In 1978, the agencies issued one joint final rule. (43 Fed. Reg. 870.)

¹⁰⁴ 43 Fed. Reg. 871.

Federation v. Coleman.¹⁰⁵ In that case, the judge referenced the fact that Congress gave the Secretary of the Interior the primary responsibility for implementing Section 7, and held that while federal agencies are required to consult with the Services

“before taking any action which may affect endangered species or critical habitat...the final decision of whether or not to proceed with the action lies with the agency itself. Section 7 does not give the Department of Interior a veto over the actions of other federal agencies, provided that the required consultation has occurred.... Once that decision is made it is then subject to judicial review to ascertain whether ‘the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’ Citizens to Preserve Overton Park, Inc. v. Volpe, *supra*, 401 U.S. at 416, 91 S. Ct. at 824, 28 L. Ed. 2d at 153.”¹⁰⁶

In 1977, the same rationale was applied in Hill v. TVA,¹⁰⁷ which upheld the right of a federal agency to make its own decision whether to proceed with an action so long as it first consulted with the Services, as appropriate. The Services relied upon these decisions to make Section 7(a)(2) consultation mandatory “upon a determination that an activity or program may affect a listed species or its critical habitat.”¹⁰⁸ In making this determination, the Services made it clear that it is the action agency’s responsibility “to obtain the biological data necessary to evaluate the effect of an activity or program.”¹⁰⁹ Neither the court, in Coleman, nor the Services, in formulating their proposed or final rules, provided any insight to their rationale for requiring consultation upon an agency’s determination that an action *may affect* a listed species or designated critical habitat as opposed to a determination that an action *may adversely affect* such a species or habitat.

¹⁰⁵ 529 F.2d 359 (5th Cir. 1976).

¹⁰⁶ 529 F. 2d at 371, 372. Full citation for Citizens to Preserve Overton Park, Inc. v. Volpe, is 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136. (1971).

¹⁰⁷ 549 F. 2d 1064 (6th Cir. 1977), *aff’d*, TVA. v. Hill, 437 U.S. 153, 98 S. Ct. 2279 (1978).

¹⁰⁸ 43 Fed. Reg. 871. It is interesting that there was no similar discussion of whether the nature of Section 7(a)(1) was mandatory or discretionary.

¹⁰⁹ 43 Fed. Reg. 874.

The Services also received numerous comments about the need for allowing flexibility in the procedures to accommodate the widely varying responsibilities of federal agencies.¹¹⁰ In response to these comments, the Services added a provision allowing the development of joint counterpart regulations, stating that

“Such counterpart regulations would have to be first published as proposed and final rulemaking with at least a 60-day period for public comment. The joint participation and approval of the FWS and NMFS would also be required on those rulemakings in order to guarantee that the efficiency of consultation and the overall degree of protection afforded listed species is not diminished as a result of an agency’s counterpart regulations. Changes in the general consultation framework established by this final rulemaking must, therefore, be designed to enhance the efficiency of the consultation process, without decreasing the availability of biological information or eliminating ultimate Federal agency responsibility for compliance with section 7.”¹¹¹

The length of time required to conduct consultation was another concern, not only of commenters, but of the Services, as well. In the preamble of the final rule published in 1978, the Services “estimated that requests for consultation could run from between 10,000 to 20,000 per year.”¹¹² When commenters suggested reducing the time frame for consultations from 60 to between 30 and 45 days, the Services responded by saying “In light of the expected volume of consultation requests, the complexity of the biological issues involved and the frequent lack of available information, as a general rule a 60-day limit appears to be the shortest time frame possible.”¹¹³ The Services also cited time frames as a concern in rejecting suggestions that there be additional requirements for public participation, stating:

“First, the time frame for consultation is long enough as it is without additional delays in the process. Federal agencies will be reluctant to initiate consultation unless they can be assured of receiving a prompt and efficient reply.

¹¹⁰ Among those making these comments were the Office of Management and Budget and the White House Council on Environmental Quality. 43 Fed. Reg. 871.

¹¹¹ 43 Fed. Reg. 871.

¹¹² 43 Fed. Reg. 872. According to the Report to the House Committee on Resources, which was published in May 2005 on the Implementation of the Endangered Species Act, the FWS alone reported completing more than 71,000 informal consultations and more than 4,000 formal consultations in FY 2004. Pombo at 49, 50.

¹¹³ 43 Fed. Reg. 873.

“Secondly, the success of the entire consultation process may depend in large part upon the ability of the parties engaged in consultation to avoid antagonistic positions and unnecessary defensiveness. Consultation discussions should be limited to the expected biological impacts of an activity or program upon a listed species or its critical habitat. Political considerations or the popularity of a particular proposal are irrelevant. Federal agencies may avoid the consultation process if they are given the impression that they are going to be subjected to protracted political battles under the guise of public comment and participation.”¹¹⁴

Another change the Services made in the final rule in response to comments about the need for flexibility and efficiency in the consultation process was to allow consultation to occur at a broader scale than just separate activities or projects. Thus, similar projects in similar areas could be batched together and undergo “aggregate” consultation. The Services placed a caveat on this provision, though, stating that “[t]he concurrence of the FWS or NMFS on the scope of ‘aggregate’ consultation would be required, in order to guarantee that it does not render biological analysis inaccurate or impossible.”¹¹⁵ Their concurrence on the scope of the consultation was in addition to the need for the Services’ concurrence that an action is not likely to jeopardize the continued existence of the species or destroy or modify designated critical habitat.

In the final rule, the Services also made it clear that

“It is the primary responsibility of each Federal agency requesting consultation to conduct the appropriate studies and to provide the biological information necessary for an adequate review of the effect an identified activity or program has upon listed species or their habitat. To the extent it is available, the Service will upon request provide all relevant data and reports, personnel, and recommendations for additional studies or surveys, but the Service is not obligated to fund any such additional studies or surveys.”¹¹⁶

¹¹⁴ 43 Fed. Reg. 872.

¹¹⁵ 43 Fed. Reg. 871.

¹¹⁶ 43 Fed. Reg. 875; 402.04(c).

Because the Services are not responsible for identifying or developing relevant scientific information on which federal agencies are to base their determination about the effect a proposed action may have on a listed species or designated critical habitat, the Services' role under the rule seems primarily to be that of a watchdog, particularly in the case of actions that are not likely to adversely affect listed species. In such cases, the Services merely were to review the information that the agency provided, determine whether the information was sufficient to make a decision about what effect the action may have on listed species or designated critical habitat, and either request additional information, challenge the conclusion, or send written notice that no further consultation was necessary.¹¹⁷ The action agency itself had to obtain sufficient biological expertise and access to scientific information to enable it to make an initial reasoned determination of the effect the proposed action was likely to have on listed species.

In sum, the final rule promulgated in January 1978 made it clear that consultation was mandatory any time a federal agency determined its action "may affect" a listed species or its critical habitat, and that this consultation was considered to be "formal" consultation. However, if the Services believed that a program or activity would "promote the conservation of listed species" or was "not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat," additional consultation was unnecessary.¹¹⁸ No specific rationale was provided as to why consultation should occur when an action may benefit a species, nor was there any discussion about what benefits would accrue from consultation in such cases. There also was no discussion about why the Services chose to review actions that were likely to benefit listed species but not to review agency determinations

¹¹⁷ 43 Fed. Reg. 875.

¹¹⁸ 43 Fed. Reg. 875. At the time, the entire consultation process as set forth in the regulation was considered to be part of a "formal" consultation process. The Services did acknowledge, however, that communications could be occurring outside this formal process and outside of the regulations, and those communications were referred to as "informal." See 42 Fed. Reg. 4870.

that their actions would have no effect on listed species or designated critical habitat. At the same time, both the Services and federal agencies expressed concerns about the workload associated with consultation as well as potential for delays. The Services did include some provisions allowing flexibility and limiting consultation time frames, though they continued to mandate consultation anytime a federal agency determined an action may affect a listed species, regardless of whether the effect was beneficial or adverse.

It is plausible that at that time, Congress and the Services were construing “may affect” to refer to actions having a possibility to “adversely affect” listed species. A major amendment to the Section 7 provisions was enacted in 1979, and the legislative history of that amendment provides some evidence for this view.¹¹⁹ The comment that is most directly on point is found in Senate Report 95-874.¹²⁰ In that report, the Senate Committee on Environment and Public Works referenced the Services’ Section 7 regulations, stating

“Under the current section 7 regulations, Federal agencies have a responsibility to identify activities or programs which they undertake that may affect listed species or their critical habitat and to request consultation with the Services concerning those activities or programs. Thus, the consultation must be initiated at that point in the implementation of the action where the Federal agency first recognizes that the activity *may have a detrimental effect* on a species or its critical habitat.”¹²¹ (Emphasis added.)

This comment clearly indicates that the Committee viewed the term “may affect” as used in the Services regulations to mean “may detrimentally affect” or “may adversely affect.”

On June 29, 1983, the Services published a proposed rule, again modifying the consultation process. These changes were proposed to address amendments made to the

¹¹⁹ This was a period of much ESA debate, particularly focusing on the conflict between development and protection of species, and about the role of the consultation process. GAO was completing a report on the effectiveness of the ESA, though their preliminary findings had been released indicating problems with the listing process, including politicization of the process, and with the consultation process, as well. See H. Rept. 95-1757, Oct. 13, 1978, Providing for the Consideration of H.R. 14104. This was the impetus for the ESA amendments adding more detailed requirements for the Section 7 process.

¹²⁰ S. Rept. 95-874, May 15, 1978.

¹²¹ S. Rept. 95-874 at 6.

Endangered Species Act in 1978, 1979, and 1982, and the experience the Services had gained in the consultation process since the regulations were published in 1978. Among the amendments to the statute was a provision establishing an Endangered Species Committee consisting of the heads of a number of federal agencies; this “God Squad,” as it became commonly known, was authorized to provide exemptions to the ESA when the consultation process failed to resolve conflicts between development and the protection of listed species. Another provision added was the requirement for federal agencies to prepare biological assessments for “major construction activities,” and to allow “early consultation” so applicants for federal permits, licenses or funding could get an early read on the Services’ reaction to their proposed project.¹²²

In its new proposed rule, the Services identified four components to the Section 7 consultation process—“early consultation, informal consultation, formal consultation, and further discussion.”¹²³ It was at this time that the provision was made for a federal agency to make the determination of whether an action “may adversely affect” outside the formal consultation process, within an informal process defined to include “all discussions, correspondence, etc., between the Service and the Federal agency... prior to initiation of formal consultation.”¹²⁴ The purpose of the informal consultation process was to “assist the Federal agency in determining whether a ‘may adversely affect’ situation exists.”¹²⁵ No provision was made in the proposed rule for requiring the Services’ written concurrence with this

¹²² Another important change to the ESA was the addition of the requirement that consultation and the Services’ Biological Opinions be based on the “best scientific and commercial data available.” This was intended to address issues related to the need for agencies to conduct additional research before making effect determinations and the costs and time associated with conducting such research. While there is much that could be said about this standard, such a discussion is beyond the scope of this paper. There is a good discussion of the changes made by the ESA amendments in the preamble of the final rule at 51 Fed. Reg. 19926 (June 3, 1986).

¹²³ 48 Fed. Reg. 29991 (1983).

¹²⁴ 48 Fed. Reg. 29990 (1983), proposed definition of “informal consultation” at § 402.2.

¹²⁵ 48 Fed. Reg. at 29995 (1983).

determination.¹²⁶ Formal consultation was limited to situations in which an agency's action may adversely affect a listed species or critical habitat. The preamble of the proposed rule states

“‘May adversely affect’ is the standard used to require the initiation of formal Section 7 consultation. This standard represents a change from the present regulations which requires formal consultation for all actions that ‘may affect’ listed species or critical habitat. The Service believes that this new standard will decrease the number of formal consultations without decreasing the protection provided listed species and critical habitat under Section 7.”¹²⁷

Another change the Services made in their proposed rule was to add the concept of “conservation recommendations.” The Services explained that these recommendations are to help “agencies meet their Section 7(a)(1) obligations through the development of conservation recommendations.”¹²⁸ When provided, the recommendations were to be considered only as suggestions for reducing adverse effects of a proposed action, and were not to be binding on federal agencies.¹²⁹

The Services received about 70 comments on its proposed rule, some of which related to the procedures governing the informal and formal consultation process.¹³⁰

“Two commenters contended that the ‘may adversely affect’ standard for initiating formal consultation yielded too much discretion to action agencies. They stated that such a threshold would shift the benefit of the doubt from one in favor of the listed species to one in favor of the Federal agency’s action. Noting the Service’s expertise on wildlife issues, the commenter urged the Service to reverse this shift.”¹³¹

¹²⁶ “If a Federal agency decides, through informal consultation with the Service, that its action will not adversely affect listed species or critical habitat, formal consultation shall not be initiated.” 48 Fed. Reg. 29990 (1983) at § 402.15(c).

¹²⁷ 48 Fed. Reg. at 29993 (1983).

¹²⁸ 48 Fed. Reg. at 29993 (1983).

¹²⁹ 48 Fed. Reg. 29990 (1983). Based on decisions such as NWF v. Coleman and TVA v. Hill, which stand for the proposition that while consultation is mandatory, the decision is still to be made by the action agency, it could be argued that the Services’ determinations under Section 7(a)(2) are advisory only, and therefore have the same effect as the Services’ conservation recommendations. In practice, however, the Services’ views are given much weight in determining whether an action agency has violated the ESA if it does not follow the Services’ opinion. No doubt this is because of the prohibition against “take,” but it would seem conservation recommendations should carry more weight, as well, in view of Section 7(a)(1), but little attention has been paid to this issue.

¹³⁰ 48 Fed. Reg. at 19927 (1983).

¹³¹ 51 Fed. Reg. 19949 (1986).

The Service responded to these comments stating that it

“did not intend to reverse the burden of proof with the focus on ‘adverse effects.’ The goal is to reduce procedural barriers for actions which the Service believes are not likely to have an adverse effect, while retaining full protection for listed species or critical habitat.... Therefore, the burden is on the Federal agency to show the absence of likely, adverse effects to listed species or critical habitat as a result of its proposed action in order to be excepted from the formal consultation obligation.”¹³²

Another commenter expressed the opinion that the procedure set forth in the proposed rule “unrealistically allows Federal agencies to determine the presence of a ‘detrimental effect,’ through informal consultation, when the precise objective of formal consultation is to reach that same goal.”¹³³ The Services indicated disagreement with this comment, stating that

“...because formal consultation is conducted to determine if an action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Adverse effects may exist without constituting jeopardy.... If the Federal agency determines, with Service concurrence, that its action is not likely to adversely affect any listed species or critical habitat, there is no need for formal consultation.

Imposing the time delays and information responsibilities of formal consultation on such actions would not provide any additional protection to listed species or critical habitat and may discourage interagency cooperation. Regulatory flexibility is appropriate here to eliminate undue burdens. By requiring the Service’s ‘written concurrence’ with a ‘not likely to adversely affect’ finding as a prerequisite to invoking the exception to formal consultation, the Service believes it has retained adequate review authority through informal consultation.”¹³⁴

Nonetheless, even though the Services were inclined to allow action agencies to make their own not likely to adversely affect determinations, ultimately the requirement for the Services’ concurrence was added in an attempt to strike a balance between workload and concerns expressed by commenters about the potential for abuse and the lack of expertise on the

¹³² Ibid.

¹³³ 51 Fed. Reg. 19950.

¹³⁴ Ibid.

part of action agencies. Interestingly, in response to two comments stating that the final rule should allow the Director to require a federal agency to consult, the Services said

“Although the Service will, when appropriate, request consultation on particular Federal actions, it lacks the authority to require the initiation of consultation. The determination of possible effects is the Federal agency’s responsibility.... The Federal agency makes the final decision on whether consultation is required, and it likewise bears the risk of an erroneous decision.”¹³⁵

Such a response seems to be inconsistent with the Services’ statement that the burden is on the federal agency to show the absence of likely adverse effects and almost invites federal agencies to avoid consultation if they are confident their determination is correct.

Several comments were also made on the lack of Section 7(a)(1) consultation guidelines, and the Services responded that

“...it is beyond the scope of these regulations to address how other Federal agencies should implement and exercise their authority to carry out conservation programs for listed species under section 7(a)(1). However, the Service stands ready to assist any Federal agency in developing and carrying out conservation programs. The Service cautions that all Federal actions including ‘conservation programs’ are subject to the requirements of section 7(a)(2) if they ‘may affect’ listed species or their critical habitats. If the Service agrees, through informal consultation, that the action is not likely to adversely affect the species, then formal consultation is not required [see §402.13(a)-(b)]. Each Federal agency has the responsibility to implement its authority under section 7(a)(1).”¹³⁶

It is not clear why the Services would respond in this manner, giving such short shrift to this mandate for consultation, when it applies equally as much as the other consultation mandate. It is true that civil and criminal penalties attach if there is an unlawful “take” of a species; therefore, agencies may be more motivated to undertake consultation to ensure this situation does not arise than they are to consult about ways to benefit listed species. However, this should not absolve the Services of making efforts to enforce the requirement.

¹³⁵ 51 Fed. Reg. 19949.

¹³⁶ 51 Fed. Reg. 19929.

In any case, after considering the comments it had received, the Services changed the trigger for formal consultation to “may affect” rather than “may adversely affect,” but provided that formal consultation could be avoided if, during informal consultation, the Services provide written concurrence with the agency’s determination that the proposed action may affect, but is not likely to adversely affect, a listed species or designated critical habitat.¹³⁷ This is the provision that is in place today. As a result, the focus of ESA Section 7 implementation is on avoiding adverse effects rather than on establishing programs within existing agency authorities to further the conservation of species. The Services have made no regulatory attempt to require federal agencies to establish or carry out species conservation programs in consultation with the Services. However, the fact that Section 7(a)(1) imposes a mandatory duty on federal agencies is clear. In Sierra Club v. Glickman, the court stated “we find that § 7(a)(1) contains a clear statutory directive (it uses the word ‘shall’) requiring the federal agencies to consult and develop programs for the conservation of each of the endangered and threatened species listed pursuant to the statute.”¹³⁸

Promulgation of Counterpart Regulations

Over time, the number of consultations has greatly increased from the 10,000 to 20,000 estimated when the rule governing the Section 7 consultation process was first developed in 1978. The FS alone now initiates about 9,000 ESA section 7 consultations per year with the Services.¹³⁹ A Report to the House Committee on Resources published in May 2005 on the Implementation of the Endangered Species Act indicates that the FWS reported completing more

¹³⁷ 51 Fed. Reg. 19927, 19929 (June 3, 1986).

¹³⁸ Sierra Club v. Glickman, 156 F.3d 606, at 617 (5th Cir. 1998).

¹³⁹ U.S. Forest Service, U.S. Fish and Wildlife Service, and National Marine Fisheries Service, Section 7 Consultation Delays (2001).

than 71,000 informal consultations in FY 2004 and more than 4,000 formal consultations,¹⁴⁰ and this does not include the consultations conducted by the NMFS. Because of the workload Section 7 consultation represents and the amount of time it requires, the federal land-managing agencies, in particular, have sought ways to increase the efficiency of the consultation process.

In March 1995, well before the counterpart regulations were proposed, the FS, BLM, FWS and NMFS initiated an effort to streamline the consultation process for activities related to forest health and salvage timber harvest in the West. Among other things, the goals were

- “To further the conservation of listed species by reducing the likelihood of conflicts with proposed actions.
- To rapidly conclude consultation on projects that comply with standards and guidelines of programmatic plans, such as the Northwest Forest Plan, PACFISH, INFISH, and eastside Land and Resource Management Plans.
- To use interagency...Teams to review the adequacy of biological assessments and effects determinations, and develop the framework for biological opinions.
- To complete informal consultation within 30 days and formal consultation within 60 days after submission of agreed-upon biological assessments.
- To promptly elevate issues or barriers that preclude meeting these timeframes to the appropriate level for resolution.”¹⁴¹

When it later reviewed how well the streamlined approach was working, the FS found that the process was most effective when the Services were involved early in the planning process. While the FS acknowledged that there may be an increased workload in the short term using these approaches, they expected to find workload reductions in the long term.¹⁴² On the other hand, the FS found that “problems with the process seemed to be associated more with personalities, lack of commitment, inconsistent application of the process, or agency turf.”¹⁴³

In 1999, the procedures for carrying out the streamlined approach were revised to provide clarifications and to integrate guidance that had been issued concerning ESA and the Clean

¹⁴⁰ Pombo at 49, 50.

¹⁴¹ Streamlining Consultation under Section 7 of the Endangered Species Act. July 1998. Available June 24, 2005 at http://www.fs.fed.us/r6/fish/990727-streamlining/990727_streamlining_questionnaire6h.htm.

¹⁴² *Id.* at 3.

¹⁴³ *Id.* at 2.

Water Act and Tribal Rights.¹⁴⁴ The greatest benefit recognized at that time from the streamlined procedures was “increased interagency cooperation and understanding among our staffs at all levels....”¹⁴⁵ Guidance was again issued in April 2000 to reaffirm the agencies’ commitments to the process and to develop “an interagency training program to improve the agencies’ collective knowledge of the streamlining process by field staff and managers” in each agency.¹⁴⁶ In addition, on August 30, 2000, the FS, BLM, FWS, and NMFS entered into a National Memorandum of Understanding that outlined the agencies’ agreement to share information and established “a general framework for a ‘streamlined’ (i.e., easier and more effective) process for interagency cooperation”¹⁴⁷ in carrying out their respective ESA responsibilities, including furthering the conservation of species.

Despite the efforts to streamline the consultation process, the FS continued to have concerns about delays, and in July 2001 the FS issued a questionnaire to their Regional Foresters in an effort to gain a better understanding of how many delays actually were occurring.¹⁴⁸ In November 2002, the FS published the results of the questionnaire in a memorandum issued to Regional Foresters.¹⁴⁹ As discussed previously herein, the FS found that about 15 percent of consultations at any given time were reportedly delayed.¹⁵⁰

¹⁴⁴ July 27, 1999 Memorandum on Streamlined Consultation Procedures for Section 7 of the Endangered Species Act (ESA) July, 1999. Available July 9, 2005 at <http://www.blm.gov/nhp/efoia/or/fy99/IBs/b99-276.htm>.

¹⁴⁵ *Id.*

¹⁴⁶ April 7, 2000 Memorandum concerning Interagency Streamlining Process at 1. Available July 9, 2005, at <http://www.blm.gov/nhp/efoia/or/fy2000/im/m2000-051.htm>. It is rather telling that a statement was made during the discussion of the Consultation Streamlining Refresher Workshop that “[a]dditional discussion regarding conflict resolution, professional risk-taking, and team-building to improve team operations could benefit personnel from all four agencies.” (Id. at 4.) It seems that the concerns the Services expressed in the preamble of its 1978 rule about antagonistic positions and unnecessary defensiveness were sometimes coming to fruition. (43 Fed. Reg. 872.)

¹⁴⁷ Memorandum of Agreement: Endangered Species Act Section 7 Programmatic Consultations and Coordination among Bureau of Land Management, Forest Service, National Marine Fisheries Service and Fish and Wildlife Service. August 30, 2000.

¹⁴⁸ Furnish. July 13, 2001.

¹⁴⁹ Gladen. November 27, 2002.

¹⁵⁰ *Id.* at 1, and Sec. 7 Consultation Delays – Forest Service, FWS, NMFS. August 6, 2001.

“One of the significant findings...was that many of the consultation delays reported were caused by a failure to elevate disputes to the next higher management level when resolution could not be achieved at lower levels.... Another significant factor involved in the reported consultation delays was insufficient FWS and NMFS staff to complete consultation work. Both agencies have been working very hard, and with some success, to provide staff adequate to meet the consultation needs of the FS, and in meeting the consultation needs of other agencies and other workloads. In addition, the FS has provided significant funds to the FWS and NMFS for new positions to conduct National Fire Plan consultations.”¹⁵¹

The streamlined consultation process in the Pacific Northwest relied heavily on standards and guidelines developed first to protect existing quality habitat on FS and BLM federal lands, to stop the further decline of habitat conditions elsewhere on these public lands, and later to improve conditions, particularly for aquatic species.¹⁵² The strategies themselves were the subject of consultation and the guidelines that resulted were used to plan and implement site-specific projects. The idea was that if consultation occurred on the overall guidelines, and those guidelines were followed in implementing the site-specific projects, additional consultation would not be required on a site-specific basis, thus reducing the overall number of consultations that had to occur.

However, actions implemented in reliance on the streamlined consultation processes were legally challenged, in part on the basis that site-specific actions were being implemented without adequate consultation.¹⁵³ The result was a ruling that while it is rational for the Services to assume at a programmatic level that site-specific actions would be implemented consistently

¹⁵¹ Id. at 1, 2. The transfer of funds from FS to FWS and NMFS also raises questions about who is actually making the decision when FS is paying for the staff. It also raises questions about whether such a transfer of funds may be an improper augmentation of the Services' appropriations since the Services are appropriated funds to carry out its mandated consultation duties. See discussion in: U.S. General Accounting Office. March 2001. Principles of Federal Appropriations Law, Second Edition, Vol. IV. GAO Report GAO-01-179SP at pp 15-21 through 15-204.

¹⁵² See discussion in Lohn at 1, 2.

¹⁵³ Pacific Coast Federation of Fishermen's Associations v NMFS, No. C97-775R (W. Dist. Wash. 1998) (PCFFA 1) at 4, and Pacific Coast Federation of Fishermen's Associations et al. v NMFS, 71 F. Supp 2d 1063 (1999) (PCFFA 2). Pacific Coast Federation of Fishermen's Assoc. v. NMFS (PCFFA II), 71 F.Supp.2d 1063, 1069 (W.D. Wash. 1999), aff'd, Pacific Coast Federation of Fishermen's Assoc. v. NMFS (PCFFA III), 265 F.3d 1028, 1035-1036 (9th Cir. 2001).

with the strategy, the Services must review site-specific projects to ensure they actually are planned and implemented in accord with the strategy; the Services could not merely assume that they would be implemented as agreed.¹⁵⁴ This severely reduced any workload savings that could be gleaned from using such streamlined approaches.¹⁵⁵

It was against this backdrop, as well as extensive wildland fires that occurred during the summers of 2000 and 2002, that the first counterpart regulation was proposed in 2003 to address National Fire Plan activities conducted by the FS, BLM, NPS, BIA and FWS on public lands.¹⁵⁶ The Administration perceived a need to facilitate the agencies' abilities to carry out certain forest management activities needed to minimize the threat of catastrophic wildfire that had increased as a result of years of suppressing natural fires in forest ecosystems.¹⁵⁷

The preamble of the proposed counterpart regulation explains that

“The alternative consultation process contained in these proposed counterpart regulations will allow the Service to provide training, oversight, and monitoring to an Action Agency through an alternative consultation agreement (ACA) that enables the Action Agency to make an NLAA [not likely to adversely affect] determination for a project implementing the NFP without informal consultation or written concurrence from the Service.

“Using the existing consultation process, the Action Agencies have consulted with the Service on many thousands of proposed actions that ultimately received written concurrence from the Service for NLAA determinations. Those projects had only insignificant or beneficial effects on listed species or posed a discountable risk of adverse effects. The concurrence process for such projects has diverted some of the consultation resources of the Service from projects in greater need of consultation and caused delays. The proposed counterpart regulations will effectively reduce these delays by increasing the Service's capability to focus on Federal actions requiring formal consultation by eliminating

¹⁵⁴ Id. at 30.

¹⁵⁵ After acknowledging workload concerns and consultation delays associated with the current consultation process, the Wildlife Society recommended, among other things, that the Services and action agencies develop “interagency guidelines through broad planning efforts, establishing explicit and proactive interagency consultation procedures...and conducting programmatic-level consultations...” (The Wildlife Society, Practical Solutions to Improve the Effectiveness of the Endangered Species Act for Wildlife Conservation (2005).) In view of the Pacific Coast cases, this recommendation is not likely to result in a substantial workload reduction.

¹⁵⁶ 68 Fed. Reg. 33806 (June 5, 2003).

¹⁵⁷ Id. at 33807.

the requirement to provide written concurrence for actions within the scope of the proposed counterpart regulations.”¹⁵⁸

As stated above, the counterpart regulations provide for the Services to train land management agency personnel with the idea that that they will then have the expertise to make “not likely to adversely affect” determinations without the concurrence of the Services. This training and the requirement for oversight reviews to be conducted were provided in an attempt to minimize any risk to listed species that might otherwise occur by entrusting action agencies to make their own “not likely to adversely affect” determinations.

The final counterpart regulation governing National Fire Plan activities was published on December 8, 2003.¹⁵⁹ More than 50,000 comments were received,¹⁶⁰ but the Services made few changes from the proposed rule. Most of the comments centered on concerns about the shift of decisionmaking from the Services to action agencies. For example, the preamble states that

“Many commenters felt that the proposed counterpart regulations will give some interest groups, such as logging companies and other commercial interest free reign over public land, which will increase commercial timber sales, and that this result is not in the best interest of the species or the public.”¹⁶¹

The Services responded that formal consultation would still be required when commercial timber sales adversely affect listed species or designated critical habitat and that the species would ultimately benefit from this focus.¹⁶²

Another comment expressed many times was that

“the Action Agencies do not have the expertise to make the determinations without concurrence from the Service. They believe the Service is the expert agency and without the Services’ input many of the decisions will have a negative impact on listed species. In particular, the commenters believe that the Action

¹⁵⁸ Id. at 33808.

¹⁵⁹ 68 Fed. Reg. 68254 (December 8, 2003).

¹⁶⁰ 68 Fed. Reg. at 68257.

¹⁶¹ 68 Fed. Reg. at 68258.

¹⁶² 68 Fed. Reg. at 68258.

Agencies do not know the biology of the species or the other indirect or cumulative effects that should be factored into the analysis.”¹⁶³

Many others said they do not believe decisions made by the Action Agencies would be as sound or as protective of the species as decisions made by the Services.¹⁶⁴ In response, the Services stated a number of times that the regulations “do not change the standards that apply in assessing the effects of the action.”¹⁶⁵ The same information standard applies—action agencies must “use the best available scientific and commercial information.”¹⁶⁶ The Services also indicated that action agencies employ professional biologists, and reiterated that the counterpart regulations provide for training and oversight of action agencies.¹⁶⁷ In response to the comment that “adoption of this counterpart regulation violates the plain language of the statute,” the Services said that “[n]either informal consultation nor NLAA [not likely to adversely affect] concurrence is specified in the ESA.”¹⁶⁸

Between the time the proposed and final NFP counterpart regulations were published, the Services published an additional rule proposing counterpart regulations for FIFRA regulatory determinations.¹⁶⁹ As was the case with the NFP counterpart regulation, the Services cited

¹⁶³ Id.

¹⁶⁴ Id. at 68259.

¹⁶⁵ Id.

¹⁶⁶ Id.

¹⁶⁷ The Alternative Consultation Agreement between the Services and FS, which was executed subsequent to promulgation of the final rule, states that “Implementation of the counterpart regulations and this ACA is expected to maintain the same level of protection for threatened and endangered species and designated critical habitat as under 50 CFR Part 402, Subpart B. It is expected that projects with NLAA determinations by the Forest Service would have been considered to be NLAA determinations by the National Marine Fisheries Service (NMFS) or U.S. Fish and Wildlife Service (FWS).” U.S. Forest Service, National Marine Fisheries Service, and U.S. Fish and Wildlife Service. Alternative Consultation Agreement to Implement Section 7 Counterpart Regulations (2004). The Services and the FS are currently evaluating the first year of use of the counterpart regulations.

¹⁶⁸ Id. at 68260.

¹⁶⁹ 69 Fed. Reg. 4465 (January 30, 2004). “FIFRA generally prohibits the sale or distribution of a pesticide product unless it has first been ‘registered’ by EPA. FIFRA section 12(a)(1)(A). EPA issues a license, referred to as a ‘registration,’ for each specific pesticide product allowed to be marketed; the registration approves sale of a product with a specific formulation, in a specific type of package, and with specific labeling limiting application to specific uses.” 69 Fed. Reg. at 4467.

workload as one of the reasons supporting a need for new procedures.¹⁷⁰ In addition to workload, the Services justified these regulations based on EPA and APHIS expertise in risk assessment and pesticide components.¹⁷¹ As with the NFP counterpart regulation, the proposed counterpart regulation governing pesticide determinations provided for training, oversight and monitoring of EPA not likely to adversely affect determinations. Again, the Services received thousands of comments, most of which expressed concerns similar to those expressed with regard to the proposed NFP counterpart regulation. The Services' response was much the same as it was to comments on the NFP rule, and the final rule establishing counterpart regulations for FIFRA determinations was published on August 9, 2004,¹⁷² substantially unchanged from the proposed rule.

Federal Agency Biological Expertise Has Increased

The perspective that the Services have greater biological expertise than other federal agencies is not as true now as it was in 1973, when the ESA was enacted. While statistics are not available about the number of biologists who worked for the FS or any other federal agency in 1973, a study by the National Academy of Public Administration (NAPA) indicates that the FS has increased the proportion of its employees who qualify in one of the biological sciences fields in its workforce since 1985. At that time, 69.5 percent of the FS workforce consisted of

¹⁷⁰ "In a typical year, EPA will make hundreds of significant decisions regarding pesticide registration. For example, in fiscal year (FY) 2003, EPA registered 31 new pesticide active ingredients; approved the addition of 334 new uses of previously registered active ingredients on over 1,500 different crops; and completed more than 6,500 more minor registration actions. EPA also completed reregistration assessments on 28 previously registered active ingredients, and processed nearly 500 emergency exemption requests in FY 2003. Numbers of actions in most of these categories have risen each year since FY 2000. The number of requests by EPA to initiate consultation on pesticide actions is expected to increase substantially in future years. The large number of consultations and their complexity is expected to require a significant level of resources, requiring careful use of resources by both EPA and the Services to effectively address issues of high biological priority and high priority to users in the most efficient manner possible." 69 Fed. Reg. at 4471.

¹⁷¹ See 69 Fed. Reg. at 4470.

¹⁷² 69 Fed. Reg. 47732 (August 5, 2004).

biological scientists, and according to NAPA, in 1990, 75.5 percent of the workforce fell into that classification.¹⁷³ From 1990 to 1999, that percentage fell to 73.9 percent as a result of a shift toward increasing the numbers of FS employees with social science expertise.¹⁷⁴ “Within the biological sciences, there has been a significant shift toward ecology, wildlife biology, and plant physiology, and away from research foresters working in the biological sciences.”¹⁷⁵

Specifically, over the period from 1985 to 1999, FS employees who qualified as ecologists increased from 1.3% to 12.6%; wildlife biologists increased from 6.2% to 11.1%; plant physiologists increased from 3.8% to 7.3%; and fish biologists increased from 1.2% to 3.5%.¹⁷⁶

For about 30 years, all federal agencies have been responsible for preparing the analyses of the effects of their actions on endangered and threatened species, whether it takes the form of a biological assessment or a letter to the Services requesting concurrence with the agency’s determination that their proposed action is not likely to adversely affect a listed species. In addition, since 1970, agencies have had an obligation under the National Environmental Policy Act (NEPA) to prepare public documents in the form of Environmental Assessments (EAs) and Environmental Impact Statements (EISs) before carrying out activities that do not fall within established categorical exclusions from those requirements. To carry out such responsibilities, the action agencies must either employ biologists or contract with biologists to prepare the analysis of the effects of proposed actions on ESA-protected species. Even when biologists are hired under contract, agency personnel must still have sufficient knowledge to review the analysis and ensure that it supports the effect determination the agency makes. Some agencies

¹⁷³ National Academy of Public Administration Center for Human Resources Management, US Forest Service Workforce Plan (1999) at 79. The data on which this report is based was provided by the FS.

¹⁷⁴ Id.

¹⁷⁵ Id.

¹⁷⁶ Id. at 80.

have more biological experts available than others, but all agencies have them. As stated in the preamble to the NFP counterpart regulations,

“The Action Agencies have engaged in thousands of formal and informal consultations with the Service in the 30 years since the passage of the ESA, and have developed substantial scientific, planning, mitigation, and other expertise to support informed decision-making and to meet their responsibilities under ESA section 7 to avoid jeopardy and contribute to recovery of listed species. To meet their obligations, the Action Agencies employ large staffs of qualified, experienced, and professional wildlife biologists, fisheries biologists, botanists, and ecologists to help design, evaluate, and implement proposed activities carried out under land use and resource management plans.... In particular, the informal consultation and concurrence process has given the Action Agencies considerable familiarity with the standards for making NLAA determinations for their proposed actions.”¹⁷⁷

Data shown in Table 1 provides some evidence that Action Agencies do, indeed, employ large staffs of biologists and related scientists.

**Table 1: Employment of Biologists by Selected Federal Agencies
March 2005¹⁷⁸**

Federal Agencies	# of Biologists in all positions (400 series)	# of all Employees	Biologists as % of Employees
BLM	2,879	10,387	28
Bureau of Indian Affairs	1,059	10,484	10
BOR	271	5,813	4.6
U.S. Geological Survey	1,350	9,317	14
NPS	1,780	20,109	9
FWS	4,931	9,607	51
FS	16,677	33,450	50
NRCS	9,025	12,867	70
APHIS	3,678	7,695	48
NOAA	1,537	12,308	12.5

¹⁷⁷ 68 Fed. Reg. 33805 (June 5, 2003).

¹⁷⁸ Data in the table was obtained from queries of the Office of Personnel Management’s Fed Scope database.

The scientific information on which the analysis is based is equally as available to action agencies as it is to the Services. In fact, more information is readily available over the internet now than was easily available even to the Services in 1973. In addition, detailed training is now being made available to the action agencies that have promulgated counterpart regulations to improve the likelihood that the action agency determinations are consistent with the determinations the Services would make.¹⁷⁹ As of July 2005, “over 250 Forest Service line officers, and over 500 biologists have both taken the training and been certified to use the new regulations.”¹⁸⁰ There is no reason this type of training could not be made available to all federal agencies.

Guardians of the ESA

As does the debate over the counterpart regulations, the proposal made herein to eliminate the need to obtain concurrence with “not likely to adversely affect” determinations raises a question of who, exactly, is responsible for ensuring the ESA mandates are appropriately carried out. If it is the Services, then arguments against eliminating the requirement for the Services to concur with action agency “not likely to adversely affect” determinations may carry some weight. Certainly, at the time Congress passed the ESA, the Services were seen as the fish and wildlife experts of the federal family. Congress entrusted these agencies with crafting ESA regulations, enforcing the Act, and even required other federal agencies to consult with them concerning the effects of proposed actions on ESA-protected species. No doubt the Services do

¹⁷⁹ The FS and the Services are, at the time of this writing, in the process of evaluating the quality of FS “not likely to adversely affect” determinations to ensure they are consistent with the determinations the Services would have made. The training will be updated as needed. U.S. Forest Service, et al., Alternative Consultation Agreement to Implement Section 7 Counterpart Regulations (2004).

¹⁸⁰ U.S. Forest Service Update, ESA Section 7 Counterpart Regulations (July 2005).

safeguard the ESA to an extent; however, experience over time has shown that citizens, and their access to the judicial system, are at least co-guardians of the ESA, if not the ultimate guardians.

The ESA contains provisions allowing any person to file a civil suit under the Act:

“(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... the prohibitions set forth in or authorized pursuant to... 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.”¹⁸¹

Thus, with some exceptions, when federal action agencies or the Services do not carry out their responsibilities under the Act, citizens may file suit on their own behalf to compel enforcement of the Act. This provision has been used frequently to ensure endangered and threatened species are afforded appropriate protection under the law.

“By empowering individual groups and citizens to directly enforce the law Congress has written, Congress creates an important check on the agencies’ ability to subvert Congress’ will. The goal is not to set up the courts as the arbiters of environmental disputes or to assign citizens [sic] groups around the country some special policy-making responsibility. Instead, the goal is simply to enlist our established judicial procedures and willing lawyers (motivated by a promise of attorneys [sic] fees if they bring a successful suit) in the effort to see that Congress’ will is carried out. Ideally, the mere threat of successful litigation will prevent an agency from flouting the will of Congress and avoid the need for actual litigation.”¹⁸²

Citizen suit provisions are particularly necessary in light of the fact that the Services are led by individuals who are politically appointed and politically motivated. Despite the fact that the Services have said that they intend for political considerations and the popularity of a

¹⁸¹ 16 U.S.C. § 1540(g)(1).

¹⁸² Echeverria, John D., Statement before the Senate Environment and Public Works Subcommittee on Fisheries, Wildlife, and Water. (May 21, 2001).

particular proposal to be irrelevant,¹⁸³ the Services are Executive Branch agencies with leadership appointed by the President, and they interpret and apply the laws passed by Congress according to the views of their political leadership. As long ago as 1978, Members of Congress recognized this tendency.¹⁸⁴ Environmental interest groups recognize it as well, and understand the potential effect it may have. For example, when the appointment of the new FWS Director was announced in 2005, the Defenders of Wildlife issued a press release saying,

"We have to be honest about our views on this nomination. There are many senior officials at the U.S. Fish & Wildlife Service whose nomination to be its director we would eagerly applaud. But the White House has picked one of the few whose history at the agency raises questions about his real commitment to wildlife conservation and to the objective enforcement of the nation's wildlife laws. Given the Bush administration's terrible record on conservation, one doesn't have to be paranoid to fear that the White House may have purposefully selected someone whom they believe will do their bidding by administratively unraveling the conservation laws he oversees.... Recently he was criticized by more than 160 prominent scientists for his directive that federal biologists ignore new genetic information in making plans to protect endangered animals."¹⁸⁵

In July 2005, the Executive Director of Public Employees for Environmental Responsibility (PEER) testified before the House Committee on Government Reform's Subcommittee on Regulatory Affairs. In his testimony, he described the results of surveys that PEER had undertaken with the Union of Concerned Scientists to discern the extent to which the technical conclusions of FWS Ecological Services Division scientists may have been manipulated.

"The survey posed 42 questions that had been selected by a committee of current and former agency staff to gauge current perceptions of scientific integrity within the USFWS, as well as political interference, resources and morale.

¹⁸³ See 43 Fed. Reg. 872.

¹⁸⁴ See H. Rept. 95-1757 (Oct. 11, 1978), in which Rep. Robin Beard of Tennessee stated that "...some species have been kept off the list apparently under political pressure." See also, S.Rept. 95-874 (May 15, 1978), in which the Committee on Public Works stated that "...the General Accounting Office suspects, but has not confirmed, that the Fish and Wildlife Service has refrained from listing species which may pose a conflict with a Federal action, for fear of provoking the Congress into weakening the protective provisions of section 7."

¹⁸⁵ Defenders of Wildlife. White House Selection For Wildlife Post Questioned: Hall's Record Raises Wildlife Conservationists' Concerns (2001).

Despite agency directives not to reply—even on their own time—nearly 30% of all the scientists returned surveys yielding the following results:

- “Nearly half of all respondents whose work is related to endangered species scientific findings (44%) reported that they “have been directed, for non-scientific reasons, to refrain from making jeopardy or other findings that are protective of species;
- “One in five agency scientists revealed they have been instructed to compromise their scientific integrity—reporting that they have been ‘directed to inappropriately exclude or alter technical information from a USFWS scientific document;’
- “More than half of all respondents (56%) reported cases where ‘commercial interests have inappropriately induced the reversal or withdrawal of scientific conclusions or decisions through political intervention;’ and
- “More than a third (42%) said they could not openly express ‘concerns about the biological needs of species and habitats without fear of retaliation’ in public while nearly a third (30%) felt they could not do so even inside the confines of the agency.
- “Almost a third (32%) felt they are not allowed to do their jobs as scientists.”¹⁸⁶

PEER reported that similar results were obtained from surveys of NMFS scientists.¹⁸⁷ Thus, it appears likely that even if it does not do so to the extent identified in PEER’s report, politics does play a role in how the Services implement the ESA.

Even when politics are removed from the equation, making decisions under the ESA can be complex and require sensitivity to both species and to humans, particularly when there is incomplete information. GAO itself has acknowledged that “[e]ven under normal workload conditions, the consultation process can be difficult, in part because decisions about how species will be protected must often be based on uncertain scientific information and on professional judgment.”¹⁸⁸ There can be benefits to having a watchdog over the Services, as well as over

¹⁸⁶ Testimony of Jeff Ruch, PEER Executive Director. “Improving Information Quality in the Federal Government” (2005) at p. 2.

¹⁸⁷ *Id.* at 3.

¹⁸⁸ U.S. General Accounting Office, *Endangered Species: Despite Consultation Improvement Efforts in the Pacific Northwest, Concerns Persist about the Process* (2003).

action agencies; the Services do not always make decisions that are consistent with ESA requirements. For example, In Pacific Coast v. Bureau of Reclamation, the court stated that

“The agency’s analysis of the beneficial effects of the long-term flows, in combination with the absence of analysis of the effects of the substantially lower short-term flows, lead us to conclude that the reasoning behind the agency’s plan cannot be reasonably discerned. In fact, the agency’s decision appears to conflict with the analysis in the BiOp [Biological Opinion]. The BiOp contains no analysis that suggests that the agency determined that, during the eight-year period encompassed by Phases I and II, the coho [salmon] would receive sufficient protection against jeopardy under the proposed plan of operations.”¹⁸⁹

Similarly, in Pacific Coast Federation of Fishermen’s Associations (PCFFA) v. NMFS,¹⁹⁰ the court also found that NMFS incorrectly failed to consider short-term adverse effects in its Biological Opinion, while focusing instead on the long-term beneficial effects.¹⁹¹ In another case, NRDC v. Evans, the Court, in its Opinion and Order on Crossmotions for Summary Judgment, found that “[b]ecause the Biological Opinion did not consider the best available science, it was flawed.”¹⁹² Many similar cases in which the Services’ determinations have been held to be flawed can be found, as well.¹⁹³

It is not only the courts that have found fault with the science supporting the Services’ decisions. The National Academy of Science National Research Council’s (NRC) Committee on Endangered and Threatened Fishes in the Klamath River Basin reviewed the Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin, and found that scientific evidence showed there was no need to maintain water levels as high as the Services required in

¹⁸⁹ Pacific Coast V. Bureau of Reclamation, 9th Cir. 2005, no. 03-16718 (October 18, 2005) at 14311.

¹⁹⁰ 71 F.Supp 2d 1063 (US Dist Ct Wash 1999).

¹⁹¹ “The court further concludes that NMFS could not rationally conclude, based on the evidence before it, that evaluating only long term impacts of agency activities satisfied its mandate to ensure ACS compliance. Its failure, therefore, to evaluate the short tem impacts...was also arbitrary and capricious.” Id. at [last page of decision]

¹⁹² NRDC v. Evans, Civ. No. C-02-3805-EDL (N. Dist. Calif. August 26, 2003) at 59.

¹⁹³ See, for example, Defenders of Wildlife v. Norton, 130 F. Supp. 2d 121 (D.D.C. 2001) and its discussion in Snape III, William, Michael Senatore, Kara Gillon, Susan George, Carroll Muffett, Rennie Anderson and Rachel Kondor. 2001. Protecting Ecosystems Under The Endangered Species Act: The Sonoran Desert Example. 41 Washburn L.J. 14.

their Biological Opinions.¹⁹⁴ While the NRC also found there was evidence the water should be maintained at a level higher than that proposed by the Bureau of Reclamation, the Services had gone overboard in their efforts to provide for the species' needs. In the end, this can be as damaging for the species as not providing as much protection as the ESA requires; it leads to the "shoot, shovel, and shut up"¹⁹⁵ mentality because of the belief that the Services will go overboard to protect species to the detriment of humans and their livelihoods.

Thus, just as is sometimes true of action agencies, the determinations of the Services do not always meet the requirements of the ESA. This may be because of politics, misinterpretation of legal requirements, or for other reasons, but it leads to the conclusion that the true guardians of the ESA must be the public and the judiciary, not the Services. That being the case, eliminating the requirement that federal agencies obtain FWS or NMFS concurrence when they make not likely to adversely affect determinations under Section 7(a)(2) will not affect the ability of the ESA guardians to safeguard endangered and threatened species against the actions of headstrong agencies.

Opposing Perspectives

There clearly will be opponents to this proposal to amend the ESA. Some of the strongest arguments likely to be made against the proposal to eliminate the requirement for Service concurrence with "not likely to adversely affect" determinations are those provided in

¹⁹⁴ 2002. Scientific Evaluation of Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin: Interim Report. Committee on Endangered and Threatened Fishes in the Klamath River Basin, National Research Council. Board on Environmental Studies and Toxicology, Division on Earth and Life Studies, National Research Council. National Academy Press, Washington, D.C. Available December 18, 2005 at http://www.nap.edu/catalog/10296.html?onpi_newsdoc020402. (Online) at 4. This finding is important because when the Services require a higher threshold of protection than the ESA requires, they arguably are infringing on private property rights without authority. Moreover, these types of decisions give rise to substantial criticism of the Act and strengthen opponents' resolve to weaken or eliminate the Act.

¹⁹⁵ This is a term commonly used in reference to the pre-emptive destruction of endangered species' habitats, or even of the species themselves, to avoid ESA restrictions and penalties. See, for example, the discussion in Simmons at 7 and Reiland.

comments received on the 1988 consultation regulations and the counterpart regulations, as well as in the lawsuits that have been filed challenging the validity of the counterpart regulations, but there are other arguments, as well. As discussed above, commenters on the counterpart regulations were concerned primarily about the potential for action agencies to abuse the privilege of making their own “not likely to adversely affect” determinations and to err on the side of carrying out actions that may, in fact, harm listed species. In part, this concern is based on the belief that action agencies may put their own missions above that of the ESA. This is true particularly for agencies such as the Department of Commerce, Department of Housing and Urban Development, and Department of Transportation, which are tasked with fostering economic growth and development. Ecologists have argued that any economic growth harms wildlife.

“Pursuant to the ecological principle of competitive exclusion, resource consumption by any species increases only at the expense of other species. The scope of competitive exclusion is determined by the breadth of the species' niche. Due to the tremendous breadth of the human niche, the scale of the human economy...expands at the competitive exclusion of nonhuman species in the aggregate. Growth in [the human economy] occurs via the reallocation of natural capital (water, forests, minerals, etc.) from the “economy of nature”—used here to refer to nonhuman species in the aggregate—to the human economy.”¹⁹⁶

From an ecological perspective, this is no doubt true. However, the ESA was not intended to stop all economic growth or even to stop all harm to species. Provisions were made for takes of listed species to occur so long as the harm does not jeopardize the continued

¹⁹⁶ Czech, Brian, *Technological Progress and Biodiversity Conservation: A Dollar Spent, A Dollar Burned* (2003). See, also, Czech, Brian, *Economic growth as the Limiting Factor for Wildlife Conservation* (2000) at 7. (“Based on these findings, it is logical to classify economic growth as the limiting factor for wildlife conservation. If the human economy shrank, whether via population or per-capita consumption, then populations of many species would be expected to increase, except in cases where the damage was irreversible.”)

existence of those species.¹⁹⁷ This would not be the case if Congress had intended that endangered and threatened species be protected at all costs to the human economy.

Moreover, the fact that agencies would not have to consult when they determine there may be beneficial effects should not make it any more likely agencies will inflict harm on species than is already the case. Agencies have always had the opportunity to avoid consultation simply by determining an action will have no effect on a listed species. Even assuming agencies would have an increased tendency to ignore adverse effects if they were able to avoid consultation by making a “may benefit” determination, there is another check for actions that may have a significant effect on the quality of the human environment. Agencies have an obligation under NEPA to prepare public documents in the form of EAs and EISs before carrying out activities that do not fall within established categorical exclusions from those requirements.¹⁹⁸ Because EAs and EISs are public documents, there is an opportunity for the Services and members of the public to review the action and provide the action agencies with evidence of adverse effects on listed species. Upon receipt of such evidence, the action agencies would be required to initiate consultation with the Services.

Another reason some believe federal agencies may make erroneous “may benefit” determinations is based on the belief that the Services have biologists with knowledge about the species and their habitat requirements that are superior to the action agencies.¹⁹⁹ As discussed previously, agencies have long been developing biological assessments and analyzing the effects of their actions through the NEPA process, so it is clear the agencies must have some measure of

¹⁹⁷ 16 U.S.C. 1539(a)(2).

¹⁹⁸ 40 CFR Part 1500.

¹⁹⁹ See, for example, Davis, Jesse B., “Comment: The Healthy Forests Initiative: Unhealthy Policy Choices in Forest and Fire Management” (2004) at 1230, 1231.

biological expertise or they would be unable to carry out these responsibilities.²⁰⁰ To allay any additional concern, the Services could redirect their efforts into ensuring sound scientific information is readily available to action agencies so they may discern the difference between an adverse and a beneficial effect on each listed species.

TWS recently identified “Practical Solutions to Improve the Effectiveness of the Endangered Species Act for Wildlife Conservation.”²⁰¹ While TWS recognizes the workload concerns and concerns about delays resulting from consultation, it does not recommend eliminating consultation when an agency determines an action may benefit a listed species. Instead, TWS recommends expansion of programmatic consultations and increased funding.²⁰² As already discussed, however, these solutions are not practical, because of the court rulings that a site-specific review must be made to ensure agencies are appropriately incorporating the guidelines agreed to during the programmatic consultation.²⁰³ Additional funding does not appear likely, either, given the historic low levels of funding provided relative to the potential workload.²⁰⁴

Defenders of Wildlife has taken issue with the elimination of the consultation requirement for “may affect but not likely to adversely affect” determinations, stating that

“The proposed joint counterpart regulations on consultation over projects implemented pursuant to the National Fire Plan would eliminate consultation over projects that “may affect” a listed species or critical habitat. [Citation omitted.]

²⁰⁰ See discussion, *supra*.

²⁰¹ The Wildlife Society, *Practical Solutions to Improve the Effectiveness of the Endangered Species Act for Wildlife Conservation* (2005).

²⁰² *Id.* at 8.

²⁰³ *Pacific Coast Federation of Fishermen’s Associations v NMFS*, No. C97-775R (W. Dist. Wash. 1998) (PCFFA 1) at 4, and *Pacific Coast Federation of Fishermen’s Associations et al. v NMFS*, 71 F. Supp 2d 1063 (1999) (PCFFA 2). *Pacific Coast Federation of Fishermen’s Assoc. v. NMFS (PCFFA II)*, 71 F.Supp.2d 1063, 1069 (W.D. Wash. 1999), *aff’d*, *Pacific Coast Federation of Fishermen’s Assoc. v. NMFS (PCFFA III)*, 265 F.3d 1028, 1035-1036 (9th Cir. 2001).

²⁰⁴ See discussion, *supra*.

This is a radical change in the law and policy of the Endangered Species Act that goes well beyond the scope of a permissible administrative regulation change.”²⁰⁵

Unfortunately, Defenders of Wildlife does not recognize that the phrase “may affect” also includes “may benefit” and instead focuses on the mitigation actions that can result from consultation when there is an adverse effect. The organization does not seem to recognize that consultation is still required when an action may adversely affect listed species.

Along these same lines, the Center for Biological Diversity (CBD) commented on the issuance of counterpart regulations applicable to FIFRA determinations, saying that

“Through the Joint Counterpart Regulations, EPA has unveiled its true intentions - establishing a procedure by which it can avoid ESA ‘complications’ by declaring that species are not adversely affected by pesticide use. Although this decision should rightfully be made by the agencies entrusted to assess impacts to listed species, EPA arrogantly asserts that it has the requisite experience to make such decisions despite an overwhelming record to the contrary....

“Formal consultation with the USFWS and NOAA Fisheries under the ESA provides one of the most effective mechanisms for imposing constraints on the use of harmful pesticides. Consultation ensures that the EPA avoids jeopardizing the continued existence of listed species and also provides the agency with comprehensive scientific information regarding locations, population trends, and threats to the survival of imperiled species. Over the past ten years, the EPA has failed to complete a single consultation that has not been the result of litigation brought by environmental organizations....

Furthermore, the EPA has refused to enter into consultation when requested to do so by the USFWS.... The CBD and other conservation groups have been forced to file numerous lawsuits to attempt to compel the EPA to consult with the USFWS on pesticide impacts to endangered species.”²⁰⁶

As with the Defenders of Wildlife comments, the CBD’s concerns may sound reasonable, but the counterpart regulations impose no real change on the conditions that existed prior to promulgation of those regulations. CBD acknowledged that numerous lawsuits have had to be filed in the past to compel EPA into consultation; the citizen suit provisions and lawsuits will

²⁰⁵ Defenders of Wildlife, *Sabotaging The Endangered Species Act: How the Bush Administration Uses the Judicial System To Undermine Wildlife Protections* (2003) at 11.

²⁰⁶ Center for Biological Diversity, “Report Highlights Pesticide Threats To Endangered Species and Human Health: Bush Administration Rollback Would Weaken Regulation of Harmful Pesticides” (2004).

likely be relied upon in the future to compel EPA into formal consultation and to ensure the EPA does not arbitrarily determine pesticides to be safe for endangered and threatened species. This is true regardless of whether the Services concur in “not likely to adversely affect” determinations. No proposal is being made to eliminate formal consultation; it will continue to be required when approval of pesticide use is likely to adversely affect a listed species. In terms of the Services being the agencies rightfully entrusted to assess impacts to listed species, it has already been shown that the Services do not always make effect determinations in accordance with the law, either, and the scientific information upon which these determinations are to be based is equally available to the EPA as it is to the Services and all other federal agencies.

In their Complaint against the Services, the Plaintiffs in Washington Toxics Coalition v. Dept. of Interior expressed their lack of trust in EPA’s ability to comply with the ESA, saying “EPA’s consultation history has been marked by fits and starts with little follow through and virtually no changes to pesticide registrations and labels.”²⁰⁷ The Complaint outlines a number of concerns about EPA’s lack of response to the Services’ non-concurrence with EPA not likely to adversely affect determinations, as well as about the Services’ apparent reversal of a position they initially took in which they expressed a number of concerns about EPA’s risk assessment process.²⁰⁸ As is the case with CBD’s concerns, the issues the Plaintiffs raised in this case would not be eliminated or increased by a counterpart regulation allowing EPA to make its own not likely to adversely affect determinations. The heart of Plaintiffs’ concerns really arise from two basic facts—that agencies are political in nature, and that one federal agency is unable to force another federal agency to take a particular action. The mere fact that FWS, for example,

²⁰⁷ Washington Toxics Coalition v. Department of Interior, Civ. No. 2:04-cv-01998-JCC (West. Dist. Wash. Filed September 23, 2004). Complaint for Declaratory and Injunctive Relief at 15.

²⁰⁸ *Id.* at 20, et seq.

disagrees with EPA's decision not to consult does not provide FWS with the ability to take any punitive or legal action itself. Only citizens may enforce the ESA against a federal agency.

In their challenge to the NFP counterpart regulations, Defenders of Wildlife and the other Plaintiffs in the suit against the FWS referenced the legislative history to support its argument that the counterpart regulations contravene the provisions of the ESA.²⁰⁹ For example, the Plaintiffs state that

“in describing section 7(a)(2) in 1978 – when Congress amended the provision in response to the Supreme Court's ruling in *TVA v. Hill* – Congress explained that:

[i]n addition to requiring Federal agencies to ensure that their actions do not adversely impact endangered species, the section also requires all federal agencies to consult with the Department of the Interior (Department of Commerce in the case of marine species) when any of their actions may affected [sic] endangered species

1978 House Report reprinted in ESA Leg. Hist. at 735 (emphasis added). The legislative history is replete with similar expressions of legislative intent that there be ongoing consultation with the Services regarding any project that “may” affect listed species or critical habitat. . . .”²¹⁰

It is true that Congress refers to the need for agencies to consult with the Services when they determine their actions may affect listed species. However, when the discussions are read in context, as discussed, *supra*, it is quite likely that at that time of this debate, Congress and the Services were considering “may affect” to refer to actions that had a possibility of adversely affecting listed species.²¹¹ Moreover, as the Services said in the preamble of the final NFP counterpart rule, “[n]either informal consultation nor NLAA concurrence is specified in the ESA.”²¹² Congress could have explicitly required consultation with the Services when a federal

²⁰⁹ See *Defenders of Wildlife v. Norton*, Civ. No. 04-1230 (GK) (U.S. Dist. Ct. DC May 2005), Plaintiffs' Motion for Summary Judgment.

²¹⁰ *Id.* at 44, 45.

²¹¹ See discussion at p. 30, *supra*, and S. Rept. 95-874 at 6.

²¹² 68 Fed. Reg. at 68260.

agency determined a proposed action may affect a listed species, but it did not. Section 7(a)(2) specifically requires consultation only to ensure federal actions are not likely to jeopardize the continued existence of listed species, which is a much higher standard than one requiring consultation whenever there is any adverse effect.

Defenders of Wildlife and the other Plaintiffs also argued in their Motion for Summary Judgment that

“it was exactly because Congress did not want the ‘fox in charge of the henhouse’ that it demanded that ‘conflicts between the Endangered Species Act and Federal actions’ be ‘resolved by full and good faith consultation between the project agency and the Fish and Wildlife Service or the National Marine Fisheries Service.’ *Id.* at 943-44 (1978 Senate Report).”²¹³

Plaintiffs also cite Senate discussions about an amendment offered by Senator John Stennis that would have eliminated the need for consultation in favor of allowing action agencies to make their own determinations based on guidelines requiring the agencies to “balance the need for and worth of the project against the environmental consequences which would result if the project was completed.”²¹⁴ In doing so, they reference the arguments made by Senator John Chafee against taking such an approach, and supporting retention of the consultation process.²¹⁵ Plaintiffs then use this background to argue that

“If Congress believed – as it most assuredly did in enacting and amending the ESA – that “preempt[ing] the consultation process created under section 7”

²¹³ Defenders of Wildlife v. Norton, Civ. No. 04-1230 (GK) (U.S. Dist. Ct. DC May 2005). Plaintiffs’ Motion for Summary Judgment at 46.

²¹⁴ Senate consideration and passage of S. 2899, with amendments (July 17, 1978).

²¹⁵ “The result of consultation is that in almost all cases Federal agencies have found that for both proposed and ongoing projects, modifications or alternatives can be designed which avoid conflict with the Act. Senator Stennis’ amendment fails in my judgment to recognize this fact.... It seeks to avoid conflicts by outright exemptions from the act for large classes of projects. This appears to me stopping the consultation effort before it even has a chance to begin. Senator Stennis’ approach has a number of shortcomings which will almost certainly result in unnecessary destruction of endangered species and habitats critical to their existence. *Id.* at 994-995 (emphasis added). See Defenders of Wildlife v. Norton, Civ. No. 04-1230 (GK) (U.S. Dist. Ct. DC filed May 3, 2005). Plaintiffs’ Motion for Summary Judgment at 46, 47.

would “result in unnecessary destruction of endangered species and habitats critical to their existence,” then it cannot possibly be the case that defendants are free to accomplish the same subversion of section 7 through administrative fiat.”²¹⁶

When Senator Chafee made his rebuttal, there was a proposal on the table to eliminate the need for consultation altogether. That is not the case here. Under the counterpart regulations and the current proposal, consultation would still be required when an action is likely to adversely affect a listed species and when there are conflicts between the Endangered Species Act and federal actions.

In a lawsuit filed against the Services challenging the validity of the FIFRA counterpart regulations,²¹⁷ Plaintiffs focus on the language of ESA Section 7, requiring agencies to “insure” that agency actions are not likely to jeopardize the continued existence of listed species.²¹⁸ They argue that “[i]n order to ‘insure’ against a likelihood of jeopardy, any risk ‘must be borne by the project, not by the endangered species.’ [Citation omitted].”²¹⁹ Changing the standard to “may adversely affect” from “may affect” is deemed to be a shift that is “perilously close to Section 7’s ‘not likely to jeopardize’ standard.”²²⁰ Plaintiffs also cite the language of the Section 7 regulation authorizing counterpart regulations, stating

“Given that the ESA institutionalizes caution through the Section 7(a)(2) consultation process, jettisoning inter-agency consultation for actions that EPA deems ‘not likely to adversely affect’ listed species or their habitat fails to ‘retain the overall degree of protection afforded listed species’ by the ESA and the joint consultation regulations.”²²¹

²¹⁶ Defenders of Wildlife v. Norton, Civ. No. 04-1230 (GK) (U.S. Dist. Ct. DC 2005). Plaintiffs’ Motion for Summary Judgment at 47.

²¹⁷ Washington Toxics Coalition v. Department of Interior, Civ. No. 2:04-cv-01998-JCC (West. Dist. Wash. Filed September 23, 2004)

²¹⁸ Id. at 40.

²¹⁹ Id. at 41.

²²⁰ Id.

²²¹ Id. at 42.

The counterpart regulations are considered “far too broad and open-ended to retain the same level of protection afforded by the current informal consultation scheme in which the Services must concur in an action agency’s ‘not likely to adversely affect’ determination.”²²² Plaintiff’s express concerns that there is nothing to “constrain EPA’s discretion or otherwise ensure that EPA will make credible and appropriate effects determinations based on the best available science.”²²³

The argument that eliminating the requirement for concurrence in not likely to adversely affect determinations is perilously close to the jeopardy standard mischaracterizes the nature of the effects that a “not likely to adversely affect” determination covers. Actions are considered not likely to adversely affect only if they have beneficial, discountable, or insignificant effects on listed species.²²⁴ Any action that may adversely affect a listed species beyond this requires formal consultation. Such a standard cannot reasonably be considered perilously close to a standard that prohibits actions that are likely to jeopardize the continued existence of listed species. Even actions that have some adverse effect do not necessarily jeopardize the continued existence of an entire species, and so long as the action has more than a discountable or insignificant adverse effect, it remains subject to formal consultation.

It is true that the Services stated in the preamble of the 1978 rule that the overall degree of protection should not be diminished by the counterpart regulations. They also said, however, that “so long as the general consultation framework is used as a starting point, Federal agencies can anticipate little difficulty in securing approval of the FWS and NMFS for counterpart

²²² Id.

²²³ Id.

²²⁴ See 51 Fed. Reg. at 19949.

regulations.”²²⁵ The provisions of the interagency cooperation regulations authorizing counterpart regulations states simply:

“The consultation procedures set forth in this part may be superseded for a particular Federal agency by joint counterpart regulations among that agency, the Fish and Wildlife Service, and the National Marine Fisheries Service. Such counterpart regulations shall be published in the Federal Register in proposed form and shall be subject to public comment for at least 60 days before final rules are published.”²²⁶

So long as the requirement is retained to consult with the Services when an action is likely to adversely affect a listed species, the general consultation framework is still being followed. Merely eliminating the requirement to obtain concurrence with a “not likely to adversely affect” determination does not change the level of protection afforded species by the ESA.

In terms of the Plaintiffs’ argument that the lack of Service oversight would leave nothing to ensure credible and appropriate not likely to adversely affect determinations would be made, it has already been shown that “mistakes” can be made by the Services, as well as by action agencies. Moreover, because obtaining Service concurrence with a “not likely to adversely affect” determination can delay actions, incentives already exist for agencies to avoid consultation unless someone is watching. In addition, the ESA itself only requires that agencies ensure they do not take actions that are likely to jeopardize the continued existence of species; it does not necessarily require consultation on every single action that federal agencies propose to take. The true guardians of the ESA, the public, will continue to ensure the ESA is applied appropriately, much as they do now. In any case, it is clear that the Services do not have sufficient staff to enable them to do all they are currently tasked to do under the ESA, and it is

²²⁵ *Id.* at 871.

²²⁶ 50 C.F.R. § 402.04. The regulation was first published in 1978, and has only been slightly modified since that time to make non-substantive changes. See 43 Fed. Reg. at 876.

unlikely they will be funded at levels sufficient to allow them to do so. Some change must be made.

Does TESRA Do the Job?

On September 30, 2005, the U.S. House of Representatives referred to the Senate a bill titled “Threatened and Endangered Species Recovery Act of 2005” (TESRA).²²⁷ It includes provisions that would, among other things, reform the ESA recovery planning provisions and certain provisions related to interagency consultation. However, a careful review of TESRA indicates that it does not include requirements that would address the proposal made in this paper for reforming the ESA consultation provisions. Appendix B is a table that shows the changes TESRA would make to the existing ESA Section 7(a)(1) and (2) consultation provisions.

TESRA neither eliminates the need to consult when there may be beneficial effects, nor includes provisions necessary to integrate the recovery planning process with the Section 7(a)(1) directive that federal agencies shall use their authorities to further the conservation of species. In terms of the Section 7(a)(1) and (2) consultation processes, TESRA seems to focus primarily on addressing legal challenges to the legitimacy of counterpart regulations, and on eliminating references to designated critical habitat. (See Conference Committee excerpts in Appendix B.)

With regard to recovery planning, TESRA would require plans to be developed within two years of listing, would require measurable criteria to be specified that, when met, would be the basis for a delisting or downlisting²²⁸ decision. TESRA would also require plans to include specific measures that would be used to accomplish the measurable criteria. Along with specifying the criteria, recovery plans would have to identify the anticipated time and cost

²²⁷ H.R. 3824. On December 15, 2005, S. 2110, a bill sponsored by Senator Mike Crapo to amend the ESA, was referred to the Senate Committee on Finance. At the time of this writing, the bill was not available for review from the Government Printing Office.

²²⁸ “Downlisting” is a change in the status of a species from endangered to threatened.

associated with implementing the required measures. In addition, recovery plans would identify areas that the team considers to be of special value for conservation. This provision, if taken farther, could be of particular value in linking areas within public lands to a Section 7(a)(1) program for the conservation of species. As written, however, the link is not made. TESRA also requires the Services to promulgate regulations governing the composition of recovery teams, and indicates that they should include members who will represent the perspectives of those who will be most affected by the recovery plan. Again, this could potentially be an opportunity to specifically link the recovery planning process to the use of federal agency authorities to benefit species, but TESRA does not do so.

“TESRA states that the recovery plan does not impose any regulatory requirements on federal agencies and nonfederal persons. As stated elsewhere in this report, recovery plans are intended to inform, but not dictate, relevant decision making under the ESA. That recovery plans do not have the force and effect of law not only is the law, given the absence of any direction to the contrary in the current recovery plan language in current section 4 of the ESA and the consistent interpretations by all Administrations and by the courts, but also is a matter of practical necessity. As a practical matter, the recovery plan cannot have such force and effect because it is prepared on the basis of statutory standards (both those in the current ESA section 4 and in the new section 5 language of TESRA) that are more stringent than the statutory standards for most other decisions under the ESA, e.g., consultation on federal agency actions under ESA section 7 and approval of incidental take permits and safe harbor agreements under ESA section 10.”²²⁹

Thus, as currently formulated, TESRA does not mandate the development of appropriate and feasible federal species conservation programs in consultation with the Services. It does not address in any way the Section 7(a)(1) mandate that federal agencies shall, in consultation with the Services, use their authorities to develop programs for the conservation of endangered and threatened species. Therefore, TESRA does not address the proposal made in this paper for ESA

²²⁹ 109th Congress House of Representatives, Threatened and Endangered Species Recovery Act of 2005, September 27, 2005. Report 109-237 at 41.

reform or the main concern underlying the recommendation – the need for federal agencies to make proactive efforts to further the conservation of listed species.

Conclusion

It is clear that the Section 7 consultation workload is straining the Services' resources, and something must change if agencies are to be able to continue carrying out their missions on a timely basis. Recovery plans for all listed species have not been developed and even fewer are being effectively implemented. The availability of funds and Service staffing are not sufficient to meet all the needs, and additional funds are not likely forthcoming.²³⁰ There is a multitude of species that are candidates for listing or are otherwise at risk,²³¹ and the consultation workload is likely to become heavier as new species are listed.

The consultation that occurs when an action may beneficially affect listed species or has discountable or insignificant effects adds little value except to confirm that the federal action agency had a reasonable basis for its determination, and to strengthen the agency's position in the event of a legal challenge. Currently, when the Services review "not likely to adversely affect" determinations, they only look for ways to reduce adverse effects so that formal consultation can be avoided, and generally do not seek to increase potential benefits. Thus, there is little added value for the species. Moreover, agencies are free to take the risk of making a "no effect" determination without seeking the Services' concurrence, even when species are present in the action area. Allowing them to make a "not likely to adversely affect" determination

²³⁰ Budget deficits have increased dramatically over past years, and there has consistently been limited funding of the Services to implement the ESA. See, Buck, et al. at 15, 16. "Beginning in FY1998, Congress enacted annual limits (i. e., 'caps') on funding FWS for its ESA listing function. This language limits FWS discretion to transfer funds to finance additional listings: if courts mandate agency action on listing certain species, other listings may not be able to be funded." Buck, et al. at 16. Should the limitations on listings be lifted, consultations would skyrocket. See discussion in Implementation of the ESA – A Report to House Committee on Resources at 29.

²³¹ See discussion on p. 11, *supra*.

without the Services' concurrence adds little additional risk since actions with adverse effects still require formal consultation. If there is judicial review, the action agency will be called upon to show why its decision was reasonable and on what evidence it was based. Thus, there is little risk to be had by eliminating the requirement for Service concurrence with not likely to adversely affect determinations, but much to be gained in terms of freeing resources to focus on achieving the real purpose of the ESA—recovery of listed species.

It appears that the Section 7(a)(2) requirement is treated much more seriously than the Section 7(a)(1) mandate. This may be because there are penalties associated with a “take” of a listed species, while there is no penalty for an agency’s failure to establish programs, in consultation with the Services, that further the conservation of listed species. Courts have ruled that “Section 7 does not give the Department of Interior a veto over the actions of other federal agencies, provided that the required consultation has occurred.”²³² However, this rule has been rendered virtually meaningless because the opinion of the Services is given substantial deference when an action agency’s determination is subjected to judicial review.²³³ Allowing action agencies to make “not likely to adversely affect” determinations without Service concurrence will restore meaning to the rule that action agencies are ultimately responsible for making their own determinations about whether proceeding with an action would violate the ESA.²³⁴

While much attention has been paid to the Section 7(a)(2) requirements, little has been paid to the Section 7(a)(1) mandate for federal agencies to use their authorities to establish programs for the conservation of species. This can and should be changed by an ESA amendment linking Section 7(a)(1) to the recovery planning process. Clearly, it is important to

²³² NWF v. Coleman, 529 F. 2d 359 (5th Cir. 1976).

²³³ This is done to ascertain whether “the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” NWF v Coleman, citing Overton Park.

²³⁴ See discussion at 43 Fed. Reg. 871.

stop adversely impacting endangered and threatened species and the habitats on which they depend; but that alone is not enough. Congress has been clear that federal agencies need to do more than just avoid adverse effects on species—they must make proactive efforts to further the conservation of species. Recovery plans should be the vehicles through which federal agencies make a commitment to carry out appropriate proactive measures, to the extent feasible, to benefit listed species. Knowing what the federal agencies will do to help the species will enable state, tribal and local governments, as well as private individuals, to better understand what they must do to further foster species' recovery. That should be the role of the recovery planning process, and is the important task on which FWS and NMFS could focus their resources if they no longer were required to provide concurrence on actions that are not likely to adversely affect endangered and threatened species. If the ESA were amended to require federal agencies to participate in the development of recovery plans with an eye toward specifying how they will use their authorities to develop a program to further the conservation of the species, the species could only benefit.

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**Summary of the Number of Listed Species:
December 26, 2005 “Boxscore”**

(Source: http://ecos.fws.gov/tess_public/TESSBoxscore)

Threatened and Endangered Species System (TESS)

<i>Summary of Listed Species, Species and Recovery Plans as of 12/26/2005</i>						
<i>Group</i>	<i>Endangered</i>		<i>Threatened</i>		<i>Total Species</i>	<i>U.S. Species with Recovery Plans**</i>
	<i>U.S.</i>	<i>Foreign</i>	<i>U.S.</i>	<i>Foreign</i>		
 <i>Mammals</i>	<i>68</i>	<i>254</i>	<i>11</i>	<i>20</i>	<i>353</i>	<i>55</i>
 <i>Birds</i>	<i>77</i>	<i>175</i>	<i>13</i>	<i>6</i>	<i>271</i>	<i>78</i>
 <i>Reptiles</i>	<i>14</i>	<i>64</i>	<i>22</i>	<i>16</i>	<i>116</i>	<i>33</i>
 <i>Amphibians</i>	<i>12</i>	<i>8</i>	<i>9</i>	<i>1</i>	<i>30</i>	<i>16</i>
 <i>Fishes</i>	<i>74</i>	<i>11</i>	<i>42</i>	<i>1</i>	<i>128</i>	<i>97</i>
 <i>Clams</i>	<i>62</i>	<i>2</i>	<i>8</i>	<i>0</i>	<i>72</i>	<i>69</i>

 <i>Snails</i>	24	1	12	0	37	29
 <i>Insects</i>	36	4	9	0	49	32
 <i>Arachnids</i>	12	0	0	0	12	5
 <i>Crustaceans</i>	19	0	3	0	22	13
<i>Animal SubTotal</i>	398	519	129	44	1090	427
 <i>Flowering Plants</i>	571	1	143	0	715	584
 <i>Conifers and Cycads</i>	2	0	1	2	5	3
 <i>Ferns and Allies</i>	24	0	2	0	26	26
 <i>Lichens</i>	2	0	0	0	2	2
<i>Plant SubTotal</i>	599	1	146	2	748	615
<i>Grand Total</i>	997	520	275	46	1838*	1042

Total U.S. Endangered -- 997 (398 animals, 599 plants)
Total U.S. Threatened -- 275 (129 animals, 146 plants)
Total U.S. Species -- 1272 (527 animals*, 745 plants)**

** There are 1868 total listings (1300 U.S.). A listing is an E or a T in the "status" column of 50 CFR 17.11 or 17.12 (The Lists of Endangered and Threatened Wildlife and Plants). The following types of listings are combined as single counts in the table above: species listed both as threatened and endangered (dual status), and subunits of a single species listed as distinct population segments. Only the endangered population is tallied for dual status populations (except for the following: Olive ridley sea turtle ; for which only the threatened U.S. population is tallied) . The dual status U.S. species that are tallied as endangered are: California tiger Salamander , Chinook salmon , Coho salmon , Gray wolf , Green sea turtle , Piping Plover , Roseate tern , Sockeye salmon , Steelhead , Steller sea-lion . The dual status foreign species that are tallied as endangered are: Argali , Chimpanzee , Leopard , Saltwater crocodile . Distinct population segments tallied as one include: California tiger Salamander , Chinook salmon , Chum salmon , Coho salmon , Dugong , Steelhead . Entries that represent entire genera or families include: African viviparous toads , Gibbons , Lemurs , Musk deer , Oahu tree snails , Sifakas , Uakari (all species) .*

*** There are 551 distinct approved recovery plans. Some recovery plans cover more than one species, and a few species have separate plans covering different parts of their ranges. This count include only plans generated by the USFWS or jointly by the USFWS and NMFS, and includes only listed species that occur in the United States.*

**** 11 animal species have dual status in the U.S.*

Endangered Species Act Sections 7(a)(1) and 7(a)(2): A Comparison Before and After Amendment by the Threatened and Endangered Species Recovery Act of 2005

ESA	TESRA	Comments ²³⁵
<p>SEC. 7. (a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.- (1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act. (2) Each Federal agency</p>	<p>11. INTERAGENCY COOPERATION AND CONSULTATION. (a) Consultation Requirement- Section 7(a) (16 U.S.C. 1536(a)) is amended-- (1) in paragraph (1) in the second sentence, by striking `endangered species' and all that follows through the end of the sentence and inserting `species determined to be endangered species and threatened species under section 4.'; (2) in paragraph (2)-- (A) in the first sentence by striking `action' the first place it appears and all that follows through `is not' and inserting `agency action authorized,</p>	<p>TESRA would change Section 7(a)(1) to read: <i>The Secretary shall review other programs administered by him [the Secretary] and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act. [species determined to be endangered species and threatened species under section 4.]</i></p> <p>TESRA would change Section 7(a)(2) to omit the reference to critical habitat and to the Endangered Species Committee exemption process, and to add a new Subsection B. It would read: <i>[(A)] 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 [agency action authorized, funded, or carried out by such agency 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 consultation 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. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available [best available scientific data].</i></p>

²³⁵ Language that is struck through is that which TESRA would delete, and bracketed language is that which TESRA would add.

<p>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 consultation 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</p>	<p>funded, or carried out by such agency is not';</p> <p>(B) in the first sentence by striking ` , unless' and all that follows through the end of the sentence and inserting a period;</p> <p>(C) in the second sentence, by striking `best scientific and commercial data available' and inserting `best available scientific data'; and</p> <p>(D) by inserting `(A)' before the first sentence, and by adding at the end the following:</p> <p>`(B) The Secretary may identify specific agency actions or categories of agency actions that may be determined to meet the standards of this paragraph by alternative procedures to the procedures set forth in this subsection and subsections (b) through (d), except that subsections (b)(4) and (e) may apply only to an action that the Secretary finds, or concurs, does meet such standards, and the Secretary</p>	<p><i>[B) The Secretary may identify specific agency actions or categories of agency actions that may be determined to meet the standards of this paragraph by alternative procedures to the procedures set forth in this subsection and subsections (b) through (d), except that subsections (b)(4) and (e) may apply only to an action that the Secretary finds, or concurs, does meet such standards, and the Secretary shall suggest, or concur in any suggested, reasonable and prudent alternatives described in subsection (b)(3) for any action determined not to meet such standards. Any such agency action or category of agency actions shall be identified, and any such alternative procedures shall be established, by regulation promulgated prior or subsequent to the date of the enactment of this Act.]</i></p> <p><i>The House Report states:</i></p> <p><i>“The new language added to section 7 puts into the ESA both authority to adopt alternative `consultation' procedures which the Secretary exercised in promulgating in the 1986 regulations for informal consultation, and authority to devise additional alternative `consultation' procedures tailored to particular agencies or agency actions as exercised twice previously. This new language would constrain these alternative procedures authorities in several ways. First, it does not alter the ESA section 7 substantive jeopardy standard for agency actions. Second, it allows the adoption of alternative `consultation' procedures only by notice-and-comment rulemaking, and only by the Secretaries who have the duty to protect listed species, not the Federal agencies proposing the agency actions. Third, it maintains all the key requirements of the current ESA section 7 statutory procedural steps for agency actions that may adversely affect listed species.”</i></p> <p><i>“Under the current statutory procedures, the only way that a Federal action agency (and any applicant for a Federal permit, license, funding, etc.) can obtain immunity from adverse effects to a listed species caused by an agency action is to obtain an incidental take statement from the Secretary under ESA section 7(b), after consultation with the Secretary under ESA section 7(a) and preparation by the Secretary of a biological opinion under ESA section 7(b). Under the new paragraph, if any agency</i></p>
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<p>available.</p>	<p>shall suggest, or concur in any suggested, reasonable and prudent alternatives described in subsection (b)(3) for any action determined not to meet such standards. Any such agency action or category of agency actions shall be identified, and any such alternative procedures shall be established, by regulation promulgated prior or subsequent to the date of the enactment of this Act.;</p> <p>(4) by adding at the end the following:</p> <p>(5) Any Federal agency or the Secretary, in conducting any analysis pursuant to paragraph (2), shall consider only the effects of any agency action that are distinct from a baseline of all effects upon the relevant species that have occurred or are occurring prior to the action.</p>	<p><i>action has the likelihood of adversely affecting a species, the agency (and the applicant) will still have to seek consultation with the Secretary, and the Secretary's preparation or concurrence in a biological opinion, to obtain the protection of the issuance of an incidental take statement. Also, under current ESA law, if the agency action's adverse effects are significant enough to fail to meet the ESA section 7(a) jeopardy standard, the Federal action agency (and applicant) for all intents and purposes only can proceed, and only can secure an incidental take statement, if it engages in consultation with and obtains a biological opinion from the Secretary, and agrees to undertake a 'reasonable and prudent alternative' to the action suggested by the Secretary under ESA section 7(b). Under this new language, the same steps--consultation, biological opinion, Secretarial suggestion of or concurrence in a reasonable and prudent alternative--would have to occur and could not be avoided by any alternative procedure established under the new language."</i></p> <p>Another change affecting Section 7(a)(2) is the addition of Section 7(a)(5), which reads: <i>Any Federal agency or the Secretary, in conducting any analysis pursuant to paragraph (2), shall consider only the effects of any agency action that are distinct from a baseline of all effects upon the relevant species that have occurred or are occurring prior to the action.</i></p> <p>The House Report describes the effect of this section, stating: <i>"The ESA section 7(a) analysis is to determine the incremental effects of a proposed Federal agency action. Federal actions such as the ongoing operation of existing facilities cannot be expected to compensate for past activities or events in many cases occurring long before the ESA was originally enacted. Thus, this section provides that a jeopardy finding under ESA section 7(a) as amended would have to be based only on the incremental effects of the proposed action and not on pre-existing conditions."</i></p>
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