Changes to the Consultation Regulations of the Endangered Species Act (ESA)

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June 5, 2009

Congressional Research Service
7-....
www.crs.gov
RL34641

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

The Endangered Species Act (ESA) requires all federal agencies to consult with either the Fish and Wildlife Service or the National Marine Fisheries Service (the Services) to determine whether their actions may jeopardize the continued existence of a listed species or destroy or adversely modify designated critical habitat of listed species. In August 2008, FWS and NMFS proposed changes to the regulations that address the consultation process. Final regulations were published December 16, 2008, and took effect on January 15, 2009. On May 4, 2009, those regulations were withdrawn and the regulations that were in effect before the changes were reinstated. FWS and NMFS were authorized by P.L. 111-8, § 429 to make the substitution. This report explains what changes had been made to the consultation regulations and related issues.

The revisions were intended to do three things, according to the Services: clarify when consultation is applicable; clarify certain definitions; and establish time frames for consultation. The Services argued that the new regulations showed the ESA does not require consultation on greenhouse gas emissions' contribution to global warming and its associated impacts on listed species.

The revised regulations gave federal agencies greater discretion to determine when and how their actions may affect listed species. They also addressed issues of causation—when an agency action truly affects the well-being of listed species or critical habitat. The changes modified definitions and altered the process for consultations. The definitions that were modified include *cumulative effects, effects of an action,* and *biological assessment*. The changes added criteria for determining when consultations do not apply. The Action Agency continued to determine whether consultation is required. The processes for formal and informal consultations were revised to include a 60-day deadline (which may be increased to 120 days) for the appropriate Service to concur in writing with an Action Agency's finding during informal consultation. If the Service failed to respond in writing, the project could continue without further consultation at the discretion of the Action Agency.

Congress addressed the regulations. A provision in the 2009 Omnibus Appropriations Act (P.L. 111-8) allowed the Secretaries of the Interior and Commerce to withdraw the regulations without any administrative steps, putting the previous regulations back in effect, provided they acted within 60 days. Additionally, President Obama issued a memorandum directing those Secretaries to decide whether to develop new regulations that would "promote the purposes of the ESA." The memorandum also requested all agencies to exercise the discretion allowed under the revised regulations to "follow the prior longstanding consultation and concurrence practices" of the Services.

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Introduction and Background into the Section 7 Consultation Process

The purpose of the Endangered Species Act (ESA) (16 U.S.C. §§ 1531 *et seq.*) is threefold: to provide a means to conserve ecosystems upon which endangered and threatened species depend; to provide a program to protect those species; and to take steps to achieve the purposes of related treaties and conventions.[1] Section 7 of the ESA requires all federal agencies to carry out programs for the conservation of endangered and threatened species in furtherance of those purposes.[2] The statute says that the federal agencies "shall" work toward those goals "in consultation with and with the assistance of" the two agencies that supervise the ESA program: the Fish and Wildlife Service (FWS) of the Department of the Interior, and the National Marine Fisheries Service (NMFS) of the Department of Commerce (together: the Services).

The ESA prohibits *taking* endangered wildlife species, defining *take* as: harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.[3] The purpose of the Section 7 consultation is to make sure that federal agencies (known as Action Agencies) avoid jeopardizing listed species or adversely modifying their designated critical habitat. If a federal agency action causes some unavoidable taking incidental to an otherwise lawful purpose, the ESA allows the Services to issue an Incidental Take Statement to the Action Agency, meaning the harm will not be prosecuted. The Action Agency must also minimize the effects of the taking. Acting without a Section 7 consultation leaves a federal agency at risk of violating the ESA because it would not have the Incidental Take Statement excusing its conduct.

Section 7 also prohibits a federal agency from making "irreversible or irretrievable commitment of resources" that would prevent the effectiveness of any alternative measures suggested by the Service.[4]

The Regulations, Generally

While not stated in the statute, as a practical matter not every federal action requires consultation. It has long been within the discretion of the Action Agencies to determine whether a proposed action requires consultation. This option was provided in the regulations of 1986.[5] The 1986 regulations were in place until the 2009 regulations took effect, and were reinstated in May of that year. A comparison of the versions of the regulations is in **Table 1** at the end of this report. Throughout this report the regulations that were in place between January 15, 2009, and May 4, 2009, are referred to as the *revised regulations*. The regulations that are in place now are referred to as the *existing regulations* or regulations, depending on context.

[1] 16 U.S.C. § 1531(b).

[2] 16 U.S.C. § 1536(a)(1). "Section 7" refers to where the consultation requirement appears in the public law establishing the Endangered Species Act, P.L. 93-205. The citations in this report will refer to the codified version of that law.

[3] 16 U.S.C. § 1532(19).

[4] 16 U.S.C. § 1536(d).

[5] 50 C.F.R. part 402.

Informal and formal consultation procedures were established in 1986. When an Action Agency realizes its project *may affect* a listed species or critical habitat, it must consult with the Service.[6] This decision must be made "at the earliest possible time."[7] If the action may affect critical habitat or species, then the Action Agency will submit an "initiation package" described in 50 C.F.R. § 402.14(c). This information must be based on the best scientific and commercial data available.[8] The initiation package starts the formal consultation process.

A consultation is an ongoing conversation between the Action Agency and the Service biologists.[9] A few phone calls may suffice to reassure the Action Agency that there are no listed species in the action area, or if there are, that they will not be affected. FWS or NMFS may ask for relatively minor amounts of additional written documentation and then conclude (still fairly quickly) that neither jeopardy to the species nor adverse modification of its habitat will occur. Alternatively, the Services may conclude that more information is needed and ask the agency to carry out a biological assessment (BA) for formal consultation. This process may proceed in days, weeks, or sometimes months.[10] There was no deadline for the Service to respond to a request for concurrence in the previous regulations.

The statute requires the Services to respond to a consultation initiation within 90 days or on a mutually agreed upon date.[11] The Services mark initiation of the consultation from when the Service receives a complete BA, i.e., one that has sufficient information to assess the effects of the proposed action. The Action Agencies' perception of when formal consultation begins is often earlier, and likely a source of the frustration noted below. For those agencies that consult regularly (e.g., Forest Service, Bureau of Land Management, Environmental Protection Agency), consultation is a well-trodden path. But for others, consultation may be an extremely rare event and difficult for the Action Agency to manage.

Repeated requests for additional data have led to great frustration among Action Agencies and the non-federal parties relying on them for permits, loans, sales, licenses, etc. Some see consultation as needless delay of weeks, months, or even a year or more, even if the result of the consultation is a "no jeopardy" biological opinion (BiOp), which finds that the action will not jeopardize the species nor adversely modify designated critical habitat.

According to the Services, the workload associated with consultations has grown since 1996, with FWS reporting double the consultations.[12] The FWS reports that in 2006, there were 39,346 requests for technical assistance, 26,762 requests for informal consultations, and 1,936 requests for formal consultations.[13]

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[6] See NRDC v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998).

[7] 50 C.F.R. § 402.14.

[8] 50 C.F.R. § 402.14(d).

[9] For a detailed discussion of consultation practices, see Consultation Handbook, cited above.

[10] The authors are not aware of any comprehensive studies examining the duration of typical formal and informal consultations.

[11] 16 U.S.C. § 1536(b).

[12] 72 Fed. Reg. 76272, 76280 (Dec. 16, 2008). According to the same notice, NMFS did not have data for the number of consultations.

[13] Id.

Revised Regulations

On August 15, 2008, the Services issued proposed revisions to the Section 7 consultation regulations.[14] A draft environmental assessment was prepared under the National Environmental Policy Act, finding that the changes would not have a significant impact on the environment.[15] The final version was published December 16, 2008, and took effect January 15, 2009.[16] A lawsuit was filed to set aside the revised regulations, claiming they violated federal law.[17] In March 2009, a provision in the Omnibus Appropriations Act of 2009 authorized withdrawal or reissuance of the regulations without a notice and comment period. On May 4, 2009, the Services "amended" the consultation regulations by reinstating the version that was in place prior to December 16, 2008.[18]

Omnibus Appropriations Act of 2009 (P.L. 111-8)

The 111th Congress acted to allow the revised regulations to be withdrawn or reissued without having to undergo additional regulatory rulemaking. A provision of the Omnibus Appropriations Act of 2009 (P.L. 111-8) authorized the Secretaries of the Interior and Commerce to "withdraw or reissue" the revised regulations within 60 days of the act "without regard to any provision of statute or regulation."[19] This meant no rulemaking steps were required, such as notice and comment periods. The law also provided that the previous regulations go back into effect.[20]

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[14] 73 Fed. Reg. 47868 (Aug. 15, 2008).

[15] 73 Fed. Reg. 63667 (Oct. 27, 2008). The final EA was announced with the final regulations. 73 Fed. Reg. at 76272.

[16] Comments were originally due within 30 days, but that was extended to 60 days. 73 Fed. Reg. 52942, 52943 (Sept. 12, 2008). Although no specific number of comments was given in the final notice, as usually is done, reportedly over 200,000 comments were received. See, e.g. Erika Dimmler, *Environmentalist Blast Changes to Endangered Species Rules*, CNN.com (Dec. 12, 2008).

[17] Center for Biological Diversity v. Kempthorne, No. CV-08-5546 (N.D. Cal. *filed* Dec. 11, 2008). The Center for Biological Diversity, Greenpeace, and Defenders of Wildlife were plaintiffs. The State of California joined the suit as a plaintiff.

[18] 74 Fed. Reg. 20421 (May 8, 2009). The notice states: "With this final rule, the Department of the Interior and the Department of Commerce amend regulations governing interagency cooperation under the Endangered Species Act of 1973, as amended (ESA). In accordance with the statutory authority set forth in the 2009 Omnibus Appropriations Act (P.L. 111-8), this rule implements the regulations that were in effect immediately before the effective date of the regulation issued on December 16, 2008."

[19] Div. E, Tit. IV, § 429(a)(1) (March 11, 2009). This provision also authorized withdrawing the polar bear special rule. However, the Department did not withdraw those regulations. For more analysis on the special rule, see CRS Report RL34573, *Does the Endangered Species Act (ESA) Listing Provide More Protection of the Polar Bear?: A Look at the Special Rule*, by (name redacted), by (name redacted), and CRS Report RL33941, *Polar Bears: Listing Under the Endangered Species Act*, by (name redacted), (name redacted), and (name redacted).

On April 3, 2009, 44 Members of the House of Representatives wrote Secretary Salazar and Secretary Locke asking that the revised consultation regulations be withdrawn.

[20] The law provides that if the rule is withdrawn, the Secretary "shall implement the provisions of law under which the rule was issued in accordance with the regulations in effect under such provisions immediately before the effective date of such rule, except as otherwise provided by any Act or rule that takes effect after the effective date of the rule that is withdrawn." Div. E, Tit. IV, § 429(b).

A proposed amendment to the bill (that was defeated) would have required the Secretaries to follow full rulemaking procedures with a comment period of at least 60 days if they withdrew or repromulgated the regulations. S.Amdt. 599.

President Obama issued a memorandum on March 3, 2009, directing the Secretaries of the Interior and Commerce to consider issuing new regulations to "promote the purposes of the ESA."[21] The memorandum also requested that other federal agencies exercise the discretion allowed under the revised regulations to follow the "prior longstanding consultation and concurrence practices" involving the Services, since nothing in the revised regulations prohibited agencies from carrying out a full consultation.

How the Regulations Were Revised

The regulations that were in effect from January 15, 2009, to May 4, 2009, had revised the consultation process by: (1) allowing already prepared documents to be used as a BA; (2) allowing Action Agencies greater discretion to determine whether consultation applies; (3) clarifying certain definitions; and (4) making procedural changes to informal consultations.[22]

A stated goal of the revised regulations related to climate change. The Services said that the modifications would "reinforce the Services' current view that there is no requirement to consult on [greenhouse gas] emissions' contribution to global warming and its associated impacts on listed species."[23] Some believe that the ESA is not the appropriate statutory vehicle for regulating greenhouse gas emissions, as it was not implemented to analyze air quality. Others note that the ESA has no exceptions for types of projects and that exceptions could not be created by regulation. Still others suggest that the existing causation requirements linking an agency action to a particular harm already limit the ESA's use as a tool in regulating global warming.

The suit against the changes argued that the revisions would not achieve these goals:

> contrary to the Services' characterization, the proposed changes would severely limit the kinds of direct, indirect, and cumulative effects that must be addressed in section 7 consultations, and would also result in a plethora of actions harmful to listed species proceeding without the Services' input or involvement merely because the Services lacked adequate time or resources to respond within the mandatory time frames imposed by the regulations.[24]

Six substantive changes were made to the regulations. The alterations included the following:

- changing the definition of biological assessment;[25]
- changing the definition of cumulative effects;[26]
- changing the definition of effects of the action;[27]
- changing when a consultation is needed;[28]

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[21] See Memorandum for the Heads of Executive Departments and Agencies (March 3, 2009), online at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies/.

[22] 73 Fed. Reg. at 47869.

[23] 73 Fed. Reg. at 47872.

[24] Center for Biological Diversity v. Kempthorne, No. CV-08-5546, at 17-18 (N.D. Cal. *filed* Dec. 11, 2008).

[25] 50 C.F.R. § 402.02.

[26] 50 C.F.R. § 402.02.

[27] 50 C.F.R. § 402.02.

- changing the procedure for informal consultation;[29] and
- changing the procedure for formal consultation.[30]

The revised regulations altered the criteria for when a consultation would be needed, but otherwise made no significant changes to the proposed revision.

Amended Definition of Biological Assessment (BA) (§ 402.02)

The revised regulations added two sentences to the definition of BA to allow other documents to serve as a formal BA, with a stated goal of promoting efficiency. See **Table 1.** Action Agencies would not have to create a special document when that information was already available in another form, although the Action Agency would have to indicate where the relevant material appeared if another document were used. This appeared to be consistent with the statute, which already allows the BA to be part of a review under the National Environmental Policy Act (NEPA).[31] Additionally, the existing regulations already provided that the contents of a BA were at the discretion of the Action Agency.[32] Therefore, this addition appeared to have little legal or policy impact on the operation of the consultation process.

Amended Definition of Cumulative Effects (§ 402.02)

The revised regulations added a sentence to the definition of *cumulative effects*. See **Table 1.** The existing regulations define cumulative effects as "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area." The amendment added this sentence: "Cumulative effects do not include future Federal activities that are physically located within the action area of the particular Federal action under consultation."

The concept of *cumulative effects* was created by regulation, not by statute. In 1986, when this regulation was established, the Service justified using the term by saying that since federal agencies were required to investigate environmental impacts of a proposed action in compliance with NEPA, and NEPA required a cumulative effects analysis, it was already the Action Agency's "responsibility to develop this information."[33] In proposing the 1986 regulations, the Services stated that the context of cumulative effects under NEPA is broader than that under the ESA, noting that the ESA does not require consideration of future federal actions.[34]

(...continued)

[28] 50 C.F.R. § 402.03.

[29] 50 C.F.R. § 402.13.

[30] 50 C.F.R. § 402.14.

[31] 42 U.S.C. §§ 4321 *et seq.* See Wilderness Society v. Wisely, 524 F. Supp. 2d 1285, 1303 (D. Colo. 2007) (holding that an environmental assessment under NEPA sufficed to provide the Service with adequate information about listed species).

[32] 50 C.F.R. § 402.12(f) (listing five areas that may be considered for inclusion).

[33] 51 Fed. Reg. 19926, 19932 (June 3, 1986).

[34] 73 Fed. Reg. 47868, 47869 (August 15, 2008). NEPA does not use *cumulative effects*, but instead uses *cumulative impact*, which is defined by the Council on Environmental Quality as follows: "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 (continued...)

Action Agencies are required to consider cumulative effects in their BAs,[35] and to provide a written analysis of cumulative effects in the request for formal consultation.[36] The Services are also required to consider cumulative effects. During formal consultation, a Service must review cumulative effects,[37] and its BiOp must be based on whether the action, together with cumulative effects of the action, will jeopardize a species or adversely modify critical habitat.[38]

It is not clear what the language added to the definition provided. The added language reiterated that federal activities were not a factor in cumulative effects, "cumulative effects do not include future Federal activities," and refined the definition only to state that the effects did not include federal activities "physically located" within the action area.[39] Since federal activities were already excluded, it is not clear why it was necessary to specify that federal activities that are physically located near the project were also excluded.

Amended Definition of Effects of the Action (§ 402.02)

The concept of cumulative effects is clearer when read together with the regulation addressing effects of the action. While a cumulative effects analysis excludes federal actions, the definition of *effects of the action* requires Action Agencies and the Services to consider the "past and present impacts" of federal actions and the "anticipated impacts of all proposed federal projects in the action area" that have already undergone consultation.[40] See **Table 1.** Note that neither term requires consideration of *future* federal actions.

The Action Agencies and the Services must consider the "effects of an action" during the consultation process. The existing regulations require the Action Agency to discuss the effects of an action as part of its BA.[41] The Service must include a detailed discussion of the effects of an action in its BiOp.[42]

The revised regulations modified a term nested within the definition of effects of an action, *indirect effects*. Indirect effects were included within the regulation in 1986 in response to a Fifth Circuit court case requiring the Action Agency to consider indirect effects during consultation.[43] When the 1986 regulation was being drafted, the Services refused to narrow the definition to omit these effects, stating "the Service declines to narrow the scope of its review (as requested by one commenter) in light of existing case law."[44]

(...continued)

C.F.R. § 1508.7.

[35] 50 C.F.R. § 402.12(f)(4)

[36] 50 C.F.R. § 402.14(c)(4).

[37] 50 C.F.R. § 402.14(g)(3).

[38] 50 C.F.R. § 402.14(g)(4).

[39] 73 Fed. Reg. at 47874 (August 15, 2008).

[40] 50 C.F.R. § 402.02.

[41] 50 C.F.R. § 402.12(f)(4).

[42] 50 C.F.R. § 402.14(h)(2).

[43] National Wildlife Federation v. Coleman, 529 F.2d 359, 373-74 (5th Cir. 1976) (the fact that the Federal Highway Administration did not control private development that would result following construction of its highway did not relieve the agency of its responsibility under Section 7 of the ESA), *cert. denied*, 429 U.S. 979 (1976).

[44] 51 Fed. Reg. at 19932 (June 3, 1986).

The revised regulation made two changes to the definition of *indirect effects*. The Services stated that these changes would "simplify the consultation process and make it less burdensome and time-consuming."[45] The first change required the proposed action to be an *essential cause* of those indirect effects. According to the Services, an *essential cause* is a cause that is necessary for that effect to occur.[46] The revision continued: "If an effect will occur whether or not the action takes place, the action is not an essential cause of the indirect effect." This suggested that when multiple stressors affect a species, an Action Agency might not have to consider what harm an action was doing to a species, if other harms were just as severe, or if the same consequences would occur without the action.

A similar interpretation of *effects of the action* was rejected by at least one federal court. Specifically, the Ninth Circuit rejected an argument that an agency action would not jeopardize a species because the species was in jeopardy already: "even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm."[47] Including *essential cause* seemed to take the position rejected by the court by saying that if a species is already in jeopardy, an agency action that adds to that harm is not an essential part of the effect of the action. This appeared contradictory to the fundamental purpose of the ESA: to conserve threatened and endangered species. The act requires more of agencies than simply to avoid jeopardizing listed species: they have an affirmative responsibility to conserve species.[48] According to the U.S. Supreme Court, federal agencies have the obligation "to afford first priority to the declared national policy of *saving* endangered species" (emphasis added).[49]

The second change to *indirect effects* required that "reasonably certain to occur" must be based on "clear and substantial information." This is not the standard of information used throughout the ESA statute and regulations, which instead use "the best scientific and commercial data available," a standard with significant judicial analysis to define it.

Species become threatened, endangered, or extinct for a variety of reasons. Habitat loss or degradation is the most commonly cited cause, but is rarely the sole cause. Moreover, habitat may be lost in combination with many threats: both foraging habitat and competition from invasive species (e.g., in the case of the spotted owl); both foraging habitat and bioaccumulation of toxins (e.g., in the case of polar bears); and both excessive incidental take and loss of nesting habitat (e.g., in the case of sea turtles). In these three examples, any one of the threats, if left uncontrolled, might be sufficient to jeopardize the continued existence of the species and ultimately lead to its extinction. Would an action that exacerbates just one threat and not another be eliminated from consideration of the *effects of the action* in both the BA and the BiOp? The changes appeared to permit this outcome.

Specifically, the revised rule stated that if the action has "an effect [that] will occur whether or not the action takes place, the action is not an essential cause of the indirect effect."[50] In practice, it may have been extremely difficult for the Services to determine whether an effect would occur

[45] 73 Fed. Reg. at 47870 (August 15, 2008).

[46] Id.

[47] National Wildlife Federation v. National Marine Fisheries Service, 524 F.3d 917, 930 (9th Cir. 2008).

[48] 16 U.S.C. § 1536(a)(1).

[49] Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

[50] 50 C.F.R. § 402.02.

regardless of an agency action. The changed definition of *effects of the action* might have taken some actions and their effects off the consultation table when a species faced multiple severe threats as the following examples illustrate: Is a lower basin of a watershed going to receive less water for endangered fish because of an upstream dam—or also because of increasing frequency of drought? Will mountaintop species suffer population reductions due to global warming, and therefore the effects of upwind power plants can be ignored?

Changed Criteria for When a Consultation Is Not Applicable (§ 402.03)

The existing regulations require a Section 7 consultation for "all actions in which there is discretionary Federal involvement or control."[51] The consultation requirement had been interpreted to apply only to those actions that may affect a listed species or critical habitat. At the time of its promulgation in 1986, the discussion about the previous version of Section 402.03 centered on what was meant by *actions*, and since then, the focus has been on the term *discretionary*.[52] The revised regulations changed this section significantly. See **Table 1.** From January 15, 2009, to May 4, 2009, an Action Agency had more criteria for when a consultation did not apply. This section had the most changes between the proposed and the final versions.

How Subsection (b) Determinations Are Recorded

Under the revised regulation, Subsection (b) listed a number of criteria; if any one of the criteria was met, an agency did not have to consult. These criteria did not indicate what administrative record would memorialize the application of these criteria. Presumably, these would have been final agency actions, subject to review under the Administrative Procedure Act (APA), but the revised regulations provided scant information on how the decisions would be made or recorded. Additionally, the Action Agencies appeared free to make these determinations without relying on any standard—not the "best available scientific or commercial data available," as is used throughout the statute and regulations, nor "clear and substantial information," a standard created in part of these changes.

Considering *Take* in Deciding Whether a Consultation Applies

Under Subsection (b) of the revisions, no consultation was needed "when the direct and indirect effects of that action are not anticipated to result in take."[53] The addition of *take* as a criterion for when a consultation was required appeared to be a significant change. The standards for consultation before the revisions turned on questions of jeopardizing the continued existence of a listed species and modifying its critical habitat. That review considered effects that could be at a species or landscape level and applied equally to plants and animals. *Take*, on the other hand, is a more immediate action, focusing on individual organisms, and taking of plants is not prohibited.[54]

[51] 50 C.F.R. § 402.03.

[52] See National Association of Home Builders, Inc. v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) (holding that where a statute imposes strict guidelines on when a federal agency must act, the ESA does not apply as an additional requirement because the action is not discretionary).

[53] 50 C.F.R. § 402.03(b).

[54] Under the ESA, *take* is not a prohibited act when the species is a plant. 16 U.S.C. § 1538(a)(2).

Had that regulation not been replaced, the result may have been that projects that were unlikely to result in killing an animal, but might have more marginal effects (small decrease in the number of eggs laid, lower availability of spawning, degraded habitat, etc.), might have escaped the need for consultation, even if the long-term effects of the action might have eventually resulted in jeopardy. The take requirement might have reduced the number of consultations.

The additional criteria also seemed targeted at eliminating consultations. Those criteria were:

- The action has no effect on a listed species or critical habitat;[55]
- The effects of an action are manifested in global processes and cannot be reliably predicted or measured at the local scale;[56]
- The effects of an action are manifested in global processes and would result in only an extremely small, insignificant local impact;[57]
- The effects of an action are manifested in global processes and pose a remote potential risk of harm to species or habitat;[58]
- The effects of an action are not capable of being meaningfully identified or detected in a manner that permits evaluation;[59] or
- The effects of an action are wholly beneficial.[60]

If the Action Agency determined that any one of these criteria applied, consultation with the Services was not required.

Whether the Revisions Improperly Eliminated Some Consultations

Generally speaking, courts have not allowed regulations that eliminate the Services' role in ensuring that an agency action will not jeopardize a listed species or adversely modify its critical habitat. In a case in which regulations had been issued by the Services to allow the Environmental Protection Agency (EPA) to decide whether to initiate consultation when licensing pesticides, a federal district court found that the regulations amounted to the Services' abdicating their role in consulting to reach the jeopardy decision.[61] Those regulations would have allowed EPA to determine that its own action was not likely to adversely affect (NLAA) a species and end the Section 7 process there. The court found the regulation flawed: "A unilaterally-made NLAA determination cannot be converted into a section 7(a)(2) finding of 'not likely to jeopardize' without 'consultation' with the relevant Service."[62]

On the other hand, a different federal court found the regulations for the National Fire Plan were not contrary to the ESA because the Services still played an oversight role. In that case, the

[55] 50 C.F.R. § 402.03(b)(1).

[56] 50 C.F.R. § 402.03(b)(2)(i).

[57] 50 C.F.R. § 402.03(b)(2)(ii).

[58] 50 C.F.R. § 402.03(b)(2)(iii).

[59] 50 C.F.R. § 402.03(b)(3)(i).

[60] 50 C.F.R. § 402.03(b)(3)(ii).

[61] Washington Toxics Coalition v. U.S. Department of the Interior, 457 F. Supp. 2d 1158 (W.D. Wash. 2006).

[62] Washington Toxics Coalition, at 1179.

regulations allowed agency personnel to make NLAA determinations without a concurrence decision by a Service. The court held that the additional procedures in which the Services would monitor the program and train the personnel making the determinations adequately served the Section 7 consultation mandates.[63] The National Fire Plan is discussed in **a**, below.

In practice, Action Agencies decide when to consult. However, the revised regulations could have been seen as giving more discretion to the agencies and posing the risk of putting the jeopardy evaluation into the hands of the Action Agency without input from the Services. As the statute makes clear, the jeopardy decision is required to be a result of the consultation, not to precede it. On the other hand, it is difficult to see the conservation purpose in requiring consultations that have no effects on species or have wholly beneficial ones. Ultimately, however, it is the Action Agency that decides whether to consult, so any consultation is due to initiation of the process by the Action Agency. The changes would have provided a clearer regulatory justification for when they chose not to consult.

According to the *Federal Register* notice of the revised regulation,

> many commenters asserted the Services cannot allow action agencies to make applicability determinations as set out in the rule. That is, they asserted that action agencies cannot decide, without formal or informal consultation with the Services, that their action has no effect or is essentially not likely to adversely affect listed species or critical habitat.[64]

The Services addressed comments challenging the revisions to Section 402.3 in two ways. First, the Services noted that the statute did not define "consultation" or "assistance." Second, the Services asserted that "shall" in the statute at 16 U.S.C. § 1536(a)(2) did not modify consultation and assistance, but modified the portion of the sentence addressing jeopardy of the species and protection of habitat. Section 1536(a)(2) says, in relevant part:

> 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 ... 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....

The Services' first assertion appears to defy the plain meaning of the two words the Services (correctly) note are undefined in the statute. The Services said "these terms are quite broad and suggest that Congress has provided a great deal of discretion to define consultation and assistance in this provision."[65] While Congress may have provided discretion to define how these terms are applied, as a basic premise of statutory interpretation, in the absence of a definition the ordinary meaning will prevail.[66] In this case, under their common meanings neither *consultation* nor *assistance* can be defined as a unilateral action. Both require interaction with another party. That other party is established by the ESA as one of the Services.

[63] Defenders of Wildlife v. Kempthorne, 2006 WL 2844232 (D.D.C. September 29, 2006).

[64] 73 Fed. Reg. at 76279.

[65] 73 Fed. Reg. at 76279.

[66] *See, e.g.*, Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995) (defining marketing); Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471, 476 (1994) (defining cognizable); Mallard v. United States, 490 U.S. 296, 301 (1989) (defining request).

The second assertion was that "shall" did not pertain the phrase directly following it—"in consultation with and with the assistance of the Secretary." The Services said "we believe the mandatory term 'shall' in section 7(a)(2) refers to the obligation of the action agency to avoid jeopardy or destruction or adverse modification of critical habitat, not to a requirement to consult on each and every action."[67] This interpretation would mean that the statute requires Action Agencies to ensure their actions do not jeopardize species or harm critical habitat, but that the consultation and assistance section is optional. To a certain extent, this is the way Section 7 consultations have been conducted—Action Agencies do not consult on apparently ecologically trivial actions with no effect on a species or habitat. However, many commenters expressed concern that the revised regulations went too far in excusing consultations.

The Services also referred to a D.C. district court decision as support of their argument that Action Agencies may opt out of consultations in certain circumstances. The Services referred to *Defenders of Wildlife v. Kempthorne,*[68] saying that the court rejected a broad interpretation of Section 7 requiring Action Agencies to consult on each and every action. This may be an overly broad interpretation of that holding.

While the court did not require consultations on every action, the court stated that if there were a "possibility" of an effect on a species or habitat, the Action Agency must proceed to informal consultation.[69] Consultations were not required *only* if there were no effect:

> Congress intended to allow Action Agencies to initially evaluate the potential environmental consequences of federal actions and to move forward on many of them without first consulting the Services if they concluded that they had 'no effect' on listed species and their critical habitat.[70]

It is not clear whether the court would have considered "small," "insignificant," "remote," or "local" impacts (the language within revised Section 402.3(b)(2)) the same as *no effect*, or more similar to the *possibility of an effect*, and thus requiring informal consultation.

The Action Has No Effect on a Listed Species or Critical Habitat (§ 402.03(b)(1))

Section 402.03(b)(1) of the revised regulation allowed the Action Agency to decide that its action had no effect on a listed species or designated critical habitat without any consultation. This would have had the practical effect of eliminating consultations where species would not be impacted, which seemed consistent with the goal of the statute and was likely to promote efficiency for that reason.

There has always been a tension between the plain language of Section 7 and its practical application. Section 7(a)(2) requires Action Agencies to ensure that *any action* is not likely to jeopardize protected species or adversely affect their critical habitats. Logic dictates that not all actions—ordering office supplies, for example—require consultation. The statute requires agencies to determine that their actions will not commit the harm described with the "assistance

[67] 73 Fed. Reg. at 76279.

[68] 2006 U.S. Dist. LEXIS 71137 (D.D.C. Sept. 29, 2006). The same decision states that the duty to insure that harm does not occur is done "in 'consultation' with the Services," suggesting a mandatory role for the Services. Id. at 8.

[69] 2006 U.S. Dist. LEXIS 71137, *9 (D.D.C. Sept. 29, 2006).

[70] 2006 U.S. Dist. LEXIS 71137, *60 (D.D.C. Sept. 29, 2006).

of the Secretary" and "in consultation with" the Secretary. However, the Consultation Handbook of the Services provides that if an Action Agency determines that its action will have no effect on a species, it does not need to initiate consultation.[71] On the other hand, by allowing an Action Agency to decide initially that its project will have no effect, the regulations would read more like NEPA, which requires agencies to act *if* a project would have significant impacts on the environment.[72] That may be a more realistic approach to consultations, but it is arguably outside the Services' authority to create such a regulatory scheme.

The Action Is Manifested Only Through Global Processes (§ 402.03(b)(2))

This factor appears to have addressed the Services' intent to separate climate change issues from the ESA, although the revised regulations did not expressly refer to climate change. The revised version of Subsection (b)(2) was different from the proposed revision in several ways. Under the proposed version, consultation would not have been required if the action were "an insignificant contributor to any effects on a listed species or critical habitat." That language was completely eliminated from the final revision. Instead, the revised regulations referred to *global processes*, which was not defined in the regulations. In the notice of the final version, the Services had suggested that *global processes* could be synonymous with climate change: "The most topical example of effects that would be manifested only through a global process is the effects of individual sources of greenhouse gas emissions and their contribution to global climate change and warming."[73] The revised regulations stated that if effects of an agency action were evidenced only by global processes and one of three conditions occurred, consultation did not apply to that action. Specifically, consultation was not necessary if those effects:

- could not be reliably predicted or measured at the local scale, or
- would result in an extremely small, insignificant local impact, or
- had a remote potential risk of harm to species or habitat.[74]

The Services indicated that the addition of "global processes" was an attempt to limit the application of Section 402.3(b).[75] Because this change was more than mere semantics, it was exposed to the claim that it lacked public notice and comment. While final regulations are expected to have some changes from the draft version—notably, improvements based on comments—the final rule must be "the logical outgrowth of the proposed rule."[76] When a change is so different from the draft that it is considered unforeseeable, a court could find the change violated the APA requirements of giving the public notice and the opportunity to comment on regulatory changes.[77]

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[71] FWS and NMFS, *Final ESA Section 7 Consultation Handbook*, pp. 3-12 (March 1998) (hereinafter Consultation Handbook).

[72] 42 U.S.C. § 4322(c) requires a detailed statement for "major Federal actions significantly affecting the quality of the human environment."

[73] 73 Fed. Reg. at 76282.

[74] 36 C.F.R. §§ 402.3(b)(2)(i) – (iii).

[75] 73 Fed. Reg. at 76279.

[76] NRDC v. EPA, 279 F.3d 1180, 1186 (9th Cir. 2002).

[77] *See, e.g.*, Citizens for Better Forestry v. U.S. Dept. of Agriculture, 481 F. Supp. 2d 1059 (N.D. Cal. 2007) (rejecting a final rule because it was a paradigm shift from the draft rule).

This subsection seemed to require certain analyses to occur *before* consultation would be determined to apply. This appeared in the requirement that an Action Agency should evaluate the *effects of an action* to decide whether a consultation was applicable. Based on the definition of *effects of an action*, this evaluation required an agency to consider an environmental baseline and indirect and direct effects of its proposed action, and formed a significant portion of the consultation review. Under the existing regulations, that evaluation occurs *during* a consultation as part of a BA and a BiOp. The revised section 402.03(b) brought that phrase into a different part of the Section 7 process. If the revised regulation were taken at face value, the effects of an action would have had to be scrutinized in the context of global processes. This meant the revised regulations would have required Action Agencies to perform much of the work of a consultation before even determining one was required.

Another potential result of the revised regulations was that more actions could have advanced to consultation than under the proposed version. The Services indicated that the revisions were designed to create a "very narrow" exception to consultation.[78] Initially, the Services proposed rejecting consultations when effects were insignificant contributors to an effect on a species. Under that proposal, for example, it would have been difficult to argue that a single Title V permit issued under the Clean Air Act was responsible for the global warming that put endangered coral at risk. However, under the revised regulation, it was possible to argue that the effects of the permitting process are manifested through global processes and are predictable at a local level. Warmer oceans mean weaker coral. However, the Services argued that the effects must be considered only for those global processes produced by the one action, and that the result of one power plant's emissions could not be measured at the local scale.[79]

A second way in which the revised version appeared to advance more actions to consultation than would have occurred under the proposed revision is under Subsection (b)(2)(iii). Under the proposed version, if the effects of an action on listed species or critical habitat were "such that potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote," no consultation was required. The Services revised this due to public comment. The revised regulation read that if the effects are manifested only through global processes and "are such that the potential risk of harm to species or habitat is remote" then no consultation was required.[80] The distinction is between *jeopardizing* a listed species versus *harming* a listed species, and *adversely modifying or destroying critical habitat* versus *harming habitat*. These terms have precise meaning in ESA practice. *Jeopardizing* a species means the action is likely to cause the species to become extinct.[81] *Harming* a species, on the other hand, suggests injuring or killing a specific creature.[82] The same disparity occurred regarding habitat, in that *destroying critical habitat* is not as severe as *harming habitat*, especially when this appeared to apply to all habitat, and not merely that area specifically designated as critical. Accordingly, the revised regulation may have required consultation for less harmful actions than the Services had initially proposed, thereby increasing the number of consultations.

[78] 73 Fed. Reg. at 76282.

[79] 73 Fed. Reg. 76282.

[80] The Services indicated that this change is also intended to limit consultations for projects with greenhouse gas emissions. 73 Fed. Reg. at 47872.

[81] 50 C.F.R. § 402.02.

[82] 50 C.F.R. § 17.3.

The Effects Are Not Capable of Being Meaningfully Identified or Detected (§ 402.03(b)(3)(i))

This amendment also appeared intended to limit climate change challenges based on the ESA by requiring an identifiable link between the agency's action and the specific harm. No consultation was required if the effects of the action "are not capable of being meaningfully identified or detected in a manner that permits evaluation." This determination would be made by the Action Agency before the consultation process started, and it is not clear what scientific standards would have been used to make this determination. According to the Services, the Consultation Handbook indicates "best judgment" would be used.[83] Because Section 402.03(b) clearly addressed both direct and indirect effects, it may be presumed that the reference to *effects* meant both. This suggested that the Action Agency would perform some form of an effects analysis prior to deciding whether a consultation would be required.

The Action is Wholly Beneficial (§ 402.03(b)(3)(ii))

Under the revised regulations, an Action Agency could decide consultation was not necessary if the action would be wholly beneficial to the species. That rule would have promoted efficiency in the Section 7 process by eliminating unnecessary consultations. A similar provision is in the Consultation Handbook, but indicates the decision is made only after production of a BA or other similar document.[84] The revised regulation appeared to eliminate the Services' oversight under a strict reading of the statute, but when taken in light of the purposes of the statute, appeared consistent with the ESA's goals.

Consultation for Only Some Effects of an Action (§ 402.03(c))

The above factors from Subsection (b) were linked by an "or," suggesting that any one of them could have been the basis for an Action Agency not to initiate consultation. Subsection (c) discussed what would happen if some of the Subsection (b) criteria applied and some did not:

> If all of the effects of an action fall within paragraph (b) of this section, then no consultation is required for the action. If one or more but not all of the effects of an action fall within paragraph (b) of this section, then consultation is required only for those effects of the action that do not fall within paragraph (b).

This was an additional suggestion that Action Agencies would be performing a complicated effects analysis for determining whether they must consult with the Services. It seemed Subsection (c) could allow agencies to segment their projects and initiate consultation only for those parts that may have had an effect that is significant, identifiable, and would pose more than a remote risk of jeopardy. The Services used power plant emissions as an example, saying that the immediate, local effect of the emissions may require consultation, but the climate change aspects would not.[85] Because these determinations appeared to be made by an Action Agency without the consultation or assistance of the Services, they were arguably contrary to the ESA.

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[83] 73 Fed. Reg. at 76283 (the Services indicate this occurs on p. xv, but no such page was found. CRS found it in Section 3.5 on page 3-12 of the Consultation Handbook).

[84] Consultation Handbook, pp. 3-12.

[85] See 73 Fed. Reg. at 76282-83.

There appears to be an inconsistency between the revisions in Subsection (c) and those in Section 402.13. Subsection (c) permitted an agency to consult for only part of a project. However, the changes to Section 402.13—informal consultations—required an Action Agency to consider "the effects of the action as a whole." In that case, whatever aspects of the action that were not advanced to consultation could have been considered during the consultation anyway, when the agency considered the effects of the action as a whole.

Informal Consultation (§ 402.13)

The existing regulations distinguish between informal consultations and formal consultations, making a practical distinction based on the likely severity of an action's impacts. The informal consultation regulation was designed to provide a more efficient way of evaluating ESA effects by stopping the consultation process for projects that "upon further informal review, are found not likely to adversely affect a listed species or critical habitat."[86] If it agrees, the Service is required to concur with the Action Agency's determination of "not likely to adversely affect" in writing. The revised regulations made procedural changes and substantive additions to the informal consultation process that are no longer in effect.

Dividing Projects into Segments or Combining Projects for Consultations

The first change modified the scope of what was reviewed in an informal consultation. The existing regulations state, "If during informal consultation it is determined by the Federal agency ... 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."[87] The revised regulation increased the scope beyond the agency action to include other relevant projects. Section 402.13(a) read: "If during informal consultation it is determined by the Federal agency that the action, or a number of similar actions, an agency program, or a segment of a comprehensive plan is not likely to adversely affect listed species ... the consultation process is terminated ... if the Service concurs in writing." This appeared to allow one informal consultation for related projects, which could have promoted efficiency by allowing one review and one concurrence by the Service. Determining when actions were in fact "similar," however, could have been controversial.

It is also not clear whether the Action Agency would have had to determine unilaterally whether consultation would occur on one action or similar actions, or whether the decision to aggregate actions would have required the written concurrence of the Service. It appeared that the concurrence referred to the "not likely to adversely affect" determination. However, it was ambiguous and could mean the Service had to agree as to the relatedness of the actions, too.

Another significant issue is whether considering only a "segment of a comprehensive plan" could obscure the full agency action and thwart consideration of the adverse effects that may result from the entire project. The Ninth Circuit rejected an attempt to isolate a portion of a project when considering whether an action would be likely to jeopardize a species.[88]

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[86] 51 Fed. Reg. at 19948 (June 3, 1986).

[87] 50 C.F.R. § 402.13(a).

[88] National Wildlife Federation v. National Marine Fisheries Services, 524 F.3d 917, 933 (9th Cir. 2008) (holding that NMFS incorrectly considered only the discretionary actions of a project by isolating the non-discretionary ones in its BiOp).

Considering the Effects When Making a Request

A second change to the existing regulations altered the substance of the informal consultation review. That revision stated: "For all requests for informal consultation, the Federal agency shall consider the effects of the action as a whole on all listed species and critical habitats."[89] As discussed earlier, *effects of the action* appears in the context of an Action Agency's BA in formal consultations. This would have added that evaluation to informal consultations as well, and may have increased the burden of informal consultations without necessarily offering relief from the formal consultation process.

Deadline for a Service's Response

The revised regulations changed the informal consultation process by adding a deadline for a Service to provide a written response with the Action Agency's determination of not likely to adversely affect. If a Service had not responded within 60 days of the Action Agency's notification of its NLAA determination, the consultation could be terminated without the Service's concurrence.[90] The Services were allowed to extend the deadline by an additional 60 days, and consultation could have continued beyond this term if all the parties agreed. Section 402.13(b) stated that this termination meant that Section 7(a) was satisfied. While the deadline may have spurred efficiency by forcing a response from the Service, it also could have violated the statute's purpose of having the Service and the Action Agency determine a project's potential harms using the best scientific and commercial data available. Additionally, as pointed out in a GAO report referred to by the Services, having adequate staff to address consultations was a problem.[91] The time limit could have allowed projects that may have posed jeopardy to move forward due to default, or led to hasty conclusions by the Services.

Is a Request a Formal Document?

The revised regulation appeared to create a new document for informal consultations: a request. Based on the new deadline requirement, a request could serve an important procedural role by marking the date on which the consultation started. However, the revised regulations did not define *request*. A request marked the start of the informal consultation period under the revisions, suggesting that a written document may have been required as a record of the date. When read with the requirement that the Action Agency must consider the effects of an action when making a request, these changes escalated the informal consultation process, making it more like a formal one. The existing regulations do not require a specific request for informal consultation—a series of phone calls could start the process.

Formal Consultation (§ 402.14)

The only change to the formal consultation process was a link to the deadline imposed by the informal consultation. The revised regulation stated that formal consultation was not required

[89] 50 C.F.R. § 402.13(a).

[90] 50 C.F.R. § 402.13(b).

[91] GAO, *ESA: More Federal Management Attention Is Needed to Improve the Consultation Process*, GAO-04-93, p. 4 (March 2004).

under two circumstances: (1) if the Service agreed in writing that the action is not likely to adversely affect a listed species; or (2) if informal consultation had been completed without a written concurrence from the Service within the appropriate time.[92]

Overall, the potential effects of the changes included blurring the distinction between informal and formal consultation. Both would (presumably) begin with written requests, both would involve analyses of effects of the action, and both would have time limits for completion.[93] Informal consultation could become more formalized. Also, Action Agencies could be relieved from official formal consultations in the case of a default by the Services regardless of the impact of their projects.

The revised processes for informal and formal consultation raised a number of questions. The regulations might have created a perverse incentive to provide inadequate information because an agency could submit incomplete data in hopes that an already overburdened Service would miss its deadline and the project could proceed. (This would involve the Action Agency's assuming the risk of potentially taking a listed species without an Incidental Take Statement (ITS).) If the Services must judge whether a project may affect a species or critical habitat in a very limited time, would the Services issue fewer concurrences and require more projects to advance to formal consultation? If so, rather than decreasing the Services' responsibilities, the changes might increase their work load.

Climate Change and the Changed Regulations

In the notice of the proposed rule, the Services stated that there was no requirement to consult on greenhouse gas (GHG) emissions' contribution to global warming.[94] Some of the revised regulations separated projects that may affect climate change from the consultation process.

Before discussing climate change in this context, it should be noted that the purpose of the consultation process is to consider the effects of *agency actions* on listed species and their habitats—not the effects of climate change on listed species. There are few agency actions that produce GHGs directly. Most actions result in permits or licenses for others to produce the gases. Therefore, arguably, agency actions would have only indirect effects on producing GHGs, which then could affect climate change. The Services have argued that the lack of causation is the reason actions authorizing GHG emissions do not require consultation:

> There is currently no way to determine how the emissions from a specific project under consultation both influence climate change and then subsequently affect specific listed species or critical habitat, including polar bears. As we now understand them, the best scientific data currently available does not draw a causal connection between GHG emissions resulting from a specific Federal action and effects on listed species or critical habitat by climate change, nor are there sufficient data to establish the required causal

[92] proposed 50 C.F.R. § 402.14(b).

[93] Under current regulations, the deadline for formal consultation on projects that do not involve an applicant (for a license, permit, etc.) may be extended by mutual consent of the Action Agency and the Service (§ 402.14(f)).

[94] 73 Fed. Reg. at 47872.

> connection to the level of reasonable certainty between an action's resulting emissions and effect on species or critical habitat.[95]

The revised regulations advanced the Services' position that an ESA consultation should not consider the effects of GHG emissions. The Services gave these reasons for why GHG emissions from a project are not part of consultation:

- impacts associated with global warming do not constitute "effects of the action" because they are not an *essential cause* of the effects (§ 402.02);
- GHG emissions may be an "insignificant contributor" to any adverse impacts (proposed § 402.03(b)(2)) [this was eliminated in the final version];
- GHG emissions may not be "capable of being meaningfully identified or detected in a manner that permits evaluation" (§ 402.03(b)(3)(i)); and
- the potential risk of harm to species or habitat from those GHG emissions is remote (§ 402.03(b)(3)(iii)) [this was moved to 402.03(b)(2)(iii) and revised in the final version].[96]

The revised regulations, however, did not expressly refer to GHGs, but instead used the term global processes, which is undefined. The Services indicated they chose *global processes* as a way to limit application of the revised section of when consultation is needed, to exclude only those evaluations involving climate change.[97] It is not clear why they did not do so directly by referring to climate change, rather than using what could be found to be a vague term. *Global processes* could include such other interrelated factors as El Niño, changing drought patterns, and rising sea levels.

Most scientists agree that countless sources of GHG emissions are driving climate change. Under the revised regulations, however, GHG emissions from a particular or narrowly defined agency action would not have been considered an essential cause of any climate change effects on a species. Under the revised regulations, an agency action must be an *essential cause* of an effect on a species for it to be considered after the consultation process has begun. The Services described essential cause as meaning "the effect would not occur 'but for' the action under consultation.... there must be a close causal connection between the action under consultation and the effect that is being evaluated."[98] The causal link to affect a species is arguably quite tenuous: GHG emissions must first affect climate change, which then must affect an ecosystem, which then must affect a species.

The remaining changes in the rule influence how the Action Agency decides whether consultation applies to an action. Actions that manifest themselves in *global processes*, which presumably would include increased GHGs, would require consultation under certain circumstances, such as if the local impacts could be reliably predicted, or the local impacts were more than "extremely small, insignificant." Here, in the context of GHGs, the aggregation of actions could be key. According to the Services, EPA modeling indicated that "the emissions of a very large coal-fired power plant would likely result in a rise in the maximum global mean temperature of less than

[95] 73 Fed. Reg. 28305, 28313 (May 15, 2008) (special rules for polar bears).

[96] 73 Fed. Reg. at 47872.

[97] 73 Fed. Reg. at 76282.

[98] 73 Fed. Reg. at 47870.

one-thousandth of a degree."[99] However, an agency action that consists of a permitting process involving hundreds of GHG sources may be significant.

Projects leading to GHG emissions may not have required consultation if the effects of the action could not be meaningfully identified or detected "in a manner that permits evaluation." It is not clear what might have constituted an evaluation. For example, there may be enough data to determine whether an effect will be positive or negative, but not the magnitude of the effect. The standard for this evaluation may be the best available scientific information, in which case such an evaluation may suffice. The Services said the decision would be "based on best judgment."[100]

Another change to the current regulations that the Services have indicated will exclude some consultations on projects with GHG emissions, was the provision that the effects of the action must be such that the "potential risk of harm to species or habitat is remote." Remote has many meanings. Noting that the provision containing the term had been modified, the Services indicated that remote could apply to time, space, probability of occurrence, or other things.[101] The complexities of global climate modeling make such an assessment on an individual project problematic.

In the context of GHG emissions and global climate change, the question of aggregation of actions upon which to consult appears to be pivotal. The revised regulations allowed agencies to consider not just an agency action but "a number of similar actions, an agency program, or a segment of a comprehensive plan."[102] This seems targeted toward efficiency, but consolidated agency actions could have a much bigger impact than would be measurable for an individual action, and arguably constitute an essential cause of an indirect harm. However, it is not clear from the revision whether the decision to submit just one action or a combined program for review was at the discretion of the Action Agency or required the concurrence of the Service.

Proponents of the changes contend that GHG emissions from most agency actions do not have a causal effect on species and that the ESA should not be used to regulate GHG emissions. Others argue that climate change has an impact on species and should be considered under ESA consultations, although proponents maintain that the number of federal agency actions with the potential to affect climate change may be so large as to overwhelm the Services.[103] In the lawsuit challenging the regulations, the plaintiffs argued that omitting climate change from the consultation requirement leads to an inconsistent result: species may be listed as a result of climate change, but actions that contribute to climate change would not have to be reviewed by the Services to determine their effect on listed species and their environments.[104] At least one federal court required the Services to consider climate change as part of a Section 7 consultation.[105]

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[99] 73 Fed. Reg. at 76283.

[100] 73 Fed. Reg. at 76284 (referring to the Consultation Handbook).

[101] 73 Fed. Reg. at 76283.

[102] 50 C.F.R. § 402.13.

[103] John Kostyack and Dan Rohlf, *Conserving Endangered Species in an Era of Global Warming*, 38 ELR 10203 (April 2008).

[104] Center for Biological Diversity v. Kempthorne, No. CV-08-5546, at 18 (N.D. Cal. *filed* Dec. 10, 2008).

[105] Natural Resources Defense Council v. Kempthorne, 506 F. Supp. 2d 322, 369 (E.D. Cal. 2007).

Table 1. Comparison of Previous Regulations to Revised Regulations

(Proposed deletions from the current regulations are marked by brackets and written in italics. Proposed additions to the regulations are in bold type.)

Previous Version[a] of Title 50 C.F.R.	Final Version[a]
402.02 - Definition of Biological Assessment	
Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitat.	Biological assessment **means** the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitat. **A biological assessment may be a document prepared for the sole purpose of interagency consultation, or it may be a document or documents prepared for other purposes (e.g., an environmental assessment or environmental impact statement) containing the information required to initiate the consultation. The Federal agency is required to provide the Services a specific guide or statement as to the location of the relevant consultation information as described in 402.14, in any alternative document submitted in lieu of a biological assessment.**
402.02 - Definition of Cumulative Effects	
Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.	Cumulative effects **means** those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation. **Cumulative effects do not include future Federal activities that are physically located within the action area of the particular Federal action under consultation.**

Previous Version[a] of Title 50 C.F.R.	Final Version[a]
402.02 - Definition of Effects of the Action	
Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.	Effects of the action **means** the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action[,] that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those **for which the proposed action is an essential cause, and that** are later in time, but still are reasonably certain to occur. **If an effect will occur whether or not the action takes place, the action is not an essential cause of the indirect effect. Reasonably certain to occur is the standard used to determine the requisite confidence that an effect will happen. A conclusion that an effect is reasonably certain to occur must be based on clear and substantial information.** Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.
402.03 - Applicability	
Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.	**(a)** Section 7 and the requirements of this part apply to all actions in which **the Federal agency has** discretionary involvement or control. **(b) Federal agencies are not required to consult on an action when the direct and indirect effects of that action are not anticipated to result in take and:** **(1) Such action has no effect on a listed species or critical habitat; or** **(2) The effects of such action are manifested only through global processes and (i) cannot be reliably predicted or measured at the local scale, or (ii)would result at most in an extremely small, insignificant local impact, or (iii) are such that the potential risk of harm to species or habitat is remote; or** **(3) The effects of such action:** **(i) Are not capable of being meaningfully**

Previous Version[a] of Title 50 C.F.R.	Final Version[a]
	identified or detected in a manner that permits evaluation; or **(ii) Are wholly beneficial.** **(c) If all of the effects of an action fall within paragraph (b) of this section, then no consultation is required for the action. If one or more but not all of the effects of an action fall within paragraph (b) of this section, then consultation is required only for those effects of the action that do not fall within paragraph (b) of this section.**
402.13 - Informal Consultation	
(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary. (b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.	(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, **[***with the written concurrence of the Service,***]** that the action, **or a number of similar actions, an agency program, or a segment of a comprehensive plan,** is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary **if the Service concurs in writing**. **For all requests for informal consultation, the Federal agency shall consider the effects of the action as a whole on all listed species and critical habitats.** **(b) If the Service has not provided a written determination regarding whether it concurs with a Federal agency's determination provided for in paragraph (a) of this section within 60 days following the date of the Federal agency's request for *concurrence* the Federal agency may, upon written notice to the Service, terminate consultation. The Service may, upon written notice to the Federal agency within the 60-day period, extend the time for informal consultation for a period no greater than an additional 60 days from the end of the 60-day period. If the Federal agency terminates consultation at the end of the 60-day period, or if the Service's extension period expires without a written statement whether it concurs with a Federal agency's determination provided for in paragraph (a) of this section, the consultation provision in section 7(a)(2) is satisfied.** **(c) Notwithstanding the provisions of paragraph (b), the Service, the Federal agency, and the**

Previous Version[a] of Title 50 C.F.R.	Final Version[a]
	applicant, if one is involved, may agree to extend informal consultation for a specific time period in order to resolve consultation informally and allow the Service to concur with the Federal agency's not likely to adversely affect determination. **(d)** During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.
402.14 - Formal Consultation	
(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.	(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.
(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under Sec. 402.12 or as a result of informal consultation with the Service under Sec. 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat. {sections (c) - (k) omitted}	(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under Sec. 402.12 or as a result of informal consultation with the Service under Sec. 402.13, the Federal agency determines **[***with the written concurrence of the Director***]**, that the proposed action is not likely to adversely affect any listed species or critical habitat**, and the Director concurs in writing or informal consultation has been completed under § 402.13(b) without a written *statement* by the Service as to whether it concurs;** {sections (c)-(k) unmodified}

Source: Code of Federal Regulations and 73 Fed. Reg. 76272 (Dec. 16, 2008).

a. As of May 4, 2009, the regulations marked Final Version on this chart were replaced by the regulations marked Previous Version.

Appendix A. Internal Consultation: The National Fire Plan (NFP) of the Healthy Forests Initiative

The National Fire Plan, part of the Healthy Forests Initiative, is administered primarily by the Bureau of Land Management (BLM) and the Forest Service (FS).[106] Joint regulations were issued in 2003 to address the effects of increasing levels of wildfires on listed species. Among other things, those regulations turn consultation into a process that occurs wholly within BLM or FS, without concurrence by a Service, when the Action Agency finds its project is not likely to adversely affect a listed species.[107] These regulations were issued under the provision for counterpart regulations,[108] which some have suggested could be used as an alternative to the regulatory changes proposed.

In some respects, proposed Sections 402.03(b) and 402.03(c) resemble the internal consultations that were created under the NFP. A review of the delegation of some ESA consultation responsibilities to the NFP agencies may illuminate possible results for similar delegations apparently envisioned in the proposed regulations.

In January 2008, the Services, FS, and BLM issued a joint report on the NFP in its first full year of experience with these counterpart regulations (FY2004).[109] The Services reviewed whether the two Action Agencies met the various ESA requirements in their preparation of BAs. FS and BLM documents for their internal review were required to do the following:

- describe the federal action clearly;
- describe the action's direct and indirect environmental effects;
- describe the specific area that may be affected by the action;
- identify the listed species and the designated critical habitat that may be affected;
- compare the list of species and the potential effects to determine if exposure is likely, and if so, whether any exposure is likely to be beneficial, insignificant, or discountable; and

[106] The National Fire Plan (NFP) started as a response by the Clinton Administration to the severe fire season of 2000. It was primarily a request for supplemental appropriations for wildfire suppression and additional wildfire fuel reduction, and was largely enacted in the 2001 Interior appropriations act. Congress has provided funds at much higher levels since then. Following the 2002 fire season, the Bush Administration proposed the Healthy Forests Initiative to expand the NFP. Portions of the Initiative were enacted in the Healthy Forests Restoration Act (P.L. 108-148). Other portions to expedite fuel reduction efforts were effected through regulatory changes, one of which was the ESA counterpart regulations examined in this appendix. For more information and analysis on the NFP and the Healthy Forests Initiative, CRS Report RL33792, *Federal Lands Managed by the Bureau of Land Management (BLM) and the Forest Service (FS): Issues for the 110th Congress*, by (name redacted) et al.

[107] 50 C.F.R. § 402.31. See Defenders of Wildlife v. Kempthorne, 2006 wl 2844232 (D.D.C. September 29, 2006) (upholding the regulations because of the role played by the Services).

[108] The other counterpart regulation issued, for EPA pesticide licensing, was ruled as violating the ESA. Washington Toxics Coalition v. EPA, 457 F. Supp. 2d 1148 (W.D. Wash. 2006).

[109] NMFS, FWS, FS, and BLM, *Use of the ESA Section 7 Counterpart Regulations for Projects that Support the National Fire Plan: Program Review: Year One* (January 11, 2008) (hereinafter *ESA/NFP Review*). Available online at http://www.nmfs.noaa.gov/pr/pdfs/laws/fireplanreview.pdf.

- use the best available scientific and commercial data.[110]

NMFS and FWS constructed separate analyses of the results. **Table A-1** is the summary of the 10 projects involving species under NMFS management; **Table A-2** and **Table A-3** summarize the 50 projects with FWS species. The NMFS review concluded that there were deficiencies in all 10 project assessments in five of the six criteria for evaluation, including the use of the best available scientific information.[111]

Table A-1. Number of Projects Reviewed by NMFS that Did Not Meet Specified Criteria

(FS: 9 projects; BLM: 1 project)

	Product/Criterion	Yes	No
	Procedural Checklist was submitted with BA	9	1
(1)	Identifies proposed actions clearly (includes a description of various components of the action)	10	
(2)	Identifies spatial and temporal patterns of the action's direct and indirect environmental effects, including direct and indirect effects of interrelated and interdependent actions		10
(3)	Identifies Action Area clearly (based on information in 2)		10
(4)	Identifies all threatened and endangered species and any designated critical habitat that may be exposed to the proposed action (includes a description of spatial, temporal, biological characteristics and constituent habitat elements appropriate to the project assessment)		10
(5)	Compares the distribution of potential effects (identified in 2) with the Threatened and endangered species and designated critical habitat (identified in 4) and establishes, using the best scientific and commercial data available that (a) exposure is improbably or (b) if exposure is likely, responses are insignificant, discountable, or wholly beneficial		10
(6)	Determination is based on best available scientific and commercial information		10

Source: ESA/NFP Review, p. 12.

FWS analyzed 50 projects.[112] (See **Table A-2** and **Table A-3**.) Of the 43 FS project BAs, 18 met all of the review criteria, and 25 missed one or more. Six of the 25 (roughly 15% of the total projects) met none of the evaluation criteria. Of the seven BLM project BAs, one met all of the criteria, and six missed at least one. Of the six, there were two BAs that met none of the criteria. Overall, 31 of the 53 project BAs (66%) were deficient in at least one respect; 4% were deficient in all criteria. The two Action Agencies approved recommended measures to improve their BAs; those measures involved oversight and further training of personnel by the Action Agencies.[113]

[110] *ESA/NFP Review*, p. 2.

[111] NMFS found that both Action Agencies succeeded in the sixth criterion: summarizing their own actions clearly.

[112] There were 9 additional FS projects that included NMFS species and 1 additional BLM project that included NMFS species. Results for those projects are shown in the NMFS table.

[113] ESA/NPA Review, p. 21-23.

Table A-2. Number of Projects Reviewed by FWS that Did Not Meet Specified Criteria

(Forest Service: 43 projects; BLM: 7 projects)

	Criterion from Evaluation Form (Appendix 3 of Alternative Consultation Agreement)	Forest Service	BLM
(1)	Identified proposed action	8	5
(2)	Identified Direct/Indirect/ Interrelated/ Interdependent actions	12	6
(3)	Identified Action Area	16	4
(4)	Identified all T&E Species and/or Critical Habitat	10	3
(5)	Determined likelihood of exposure to effects	16	4
(6)	Determination was based on best available data	11	4

Source: ESA/NFP Review, p. 19.

Note: Columns cannot be added because different projects had varying numbers of deficiencies among the six criteria.

Compared to many other federal agencies, both BLM and FS have substantial experience in implementing the mandates of their agencies. Additionally, they received special training by the Services to perform the internal consultation. The apparently challenging start by these two agencies might presage a difficult period of adjustment to the proposed regulations, particularly for agencies that only rarely consider endangered species issues.

Table A-3. Total Number of Criteria Missed, by Project for FWS Species

Number of Criteria Missed	Forest Service	BLM
No Criteria Missed	6	0
1 to 5 Missed	19	6
Missed All 6 Criteria	18	1
Total	**43**	**7**

Source: ESA/NFP Review, p. 21-23.

Appendix B. Deadlines: The Desert Rock Energy Project

One major aspect of the proposed regulations is the imposition of a deadline on informal consultation and the subsequent effect of that deadline on formal consultation. This section will examine one project's request for consultation with FWS and relate it to the proposed regulations.

The Desert Rock Energy Project concerns the construction of a coal-fired power plant on Navajo land in northwestern New Mexico.[114] The Bureau of Indian Affairs (BIA) was the Action Agency. It is not clear when the phone calls and emails that often begin informal consultation first occurred. But on April 30, 2007, the BIA sent FWS its BA concerning the effects of the proposed project on five endangered species, one threatened species, and designated critical habitat for two of the endangered species.

The BA determined that the project was not likely to adversely affect the five endangered species, nor the two critical habitats, but was likely to adversely affect the threatened species. On July 2, 2007, FWS asked the BIA to submit additional information that was not included in the first BA. (Since an adequate BA had not yet been supplied, consultation was still considered informal.) The BIA submitted a revised BA on October 26, 2007. On January 7, 2008, FWS replied, noting that a number of the questions contained in its earlier response had not been answered, and that all of the species might be adversely affected, as might the designated critical habitats. Among the issues not addressed in the revised BA, according to FWS, were:

- The BA assumed that the plant would be fired by coal that was different in chemical composition (in concentrations of mercury, selenium, and other contaminants) from the nearby coal that was likely to be used and which, according to the U.S. Geological Survey, had higher concentrations of these contaminants than the coal assumed in the BIA analysis. FWS could not analyze species impacts until the BA included an analysis of the coal actually to be used.
- Heavy metals can accumulate in organisms. If the coal that is actually used has more heavy metals than BIA models assumed, then a new analysis of this risk would be necessary.
- The cumulative effects of three existing plants plus the new plant, plus global climate change, were not fully analyzed.

The Desert Rock Memorandum from FWS concluded that formal consultation would begin when it had received the requested information or an explanation why the information was not made available. No additional documents have been exchanged between the agencies, although discussion between them continues.

[114] It is not clear whether this timeline is typical of Section 7 consultations. It was chosen for the ready availability of relevant documents and the record of protracted discussions between an Action Agency and FWS—a scenario that may be affected by the deadlines proposed in the new regulations. For information on consultation on the Desert Rock Energy Project, see FWS Memorandum to Regional Director, Navajo Regional Office, Bureau of Indian Affairs, Gallup, New Mexico. "Subject: Information Needed for Formal Consultation on the Desert Rock Energy Project." Cons. #420-2004-F-0356. (January 7, 2008) (hereinafter *Desert Rock Memorandum*).

If the proposed regulations had been in effect, the following changes in the process might have occurred. First, there might have been some effort on the part of BIA to document the date on which informal consultation began. Second, if one assumes that the April 20, 2007 memo started informal consultation, then the proposed regulations would have allowed BIA to terminate consultation 120 days later, on August 28, 2007, without the concurrence of FWS, due to incomplete information.

However, BIA chose to continue the consultation process for several reasons. First, considerable opposition to the Desert Rock Energy Project exists, making a citizen suit likely, and BIA would not have an ITS excusing incidental takes. Second, FWS continues to work with BIA to address the problems in the second amended BA. If jeopardy or adverse modification of critical habitat could occur, it may be possible to develop reasonable and prudent alternatives through the consultation process that would avoid jeopardy, adverse modification of critical habitat, and citizen suits.

If Action Agencies were to choose to terminate informal consultation, and rely on that termination to avoid formal consultation, the focus of action would likely shift from the consultation process to the courtroom. Where quick resolution is a major goal, the courts might not be an Action Agency's preferred choice. More importantly, the Action Agency would not have an ITS that would excuse incidental takes of species, leaving it vulnerable to charges alleging ESA violations.

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