

# CRS Report for Congress

## Proposed Changes to Regulations Governing Consultation Under the Endangered Species Act (ESA)

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# Proposed Changes to Regulations Governing Consultation Under the Endangered Species Act (ESA)

## 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 carry out programs to conserve endangered and threatened species. The agencies, in consultation with the Services, 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. The deadline for comments is October 15, 2008.

While regulatory changes cannot modify the requirements placed on the agencies by the statute itself, the revisions are intended to do three things, according to the Services: clarify when consultation is applicable; clarify certain definitions, including the correct standards for the effects analysis; and establish time frames for consultation. The Services indicated that the proposed regulations would serve to clarify that the ESA did not require consultation on greenhouse gas emissions' contribution to global warming and its associated impacts on listed species.

The proposed regulations would give federal agencies greater responsibility in determining when and how their actions may affect listed species. They also attempt to clarify issues of causation — when an agency action truly affects the well-being of listed species or critical habitat. The changes modify administrative definitions and alter the process for consultations. The definitions that are modified include *cumulative effects*, *effects of an action*, and *biological assessment*. The process changes add five criteria for determining when consultations do not apply, instead of the current single factor (whether the agency action was discretionary or not). The Action Agency would continue to determine whether consultation was required in all cases. The processes for formal and informal consultations also would be 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 finding during informal consultation that its action is not likely to adversely affect a species or habitat. If the Service failed to respond in writing, the project could continue without further consultation at the discretion of the Action Agency.

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# Proposed Changes to Regulations Governing Consultation Under the Endangered Species Act (ESA)

## 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> The purpose of the Section 7 consultation is to make sure that agencies avoid jeopardizing listed species or adversely modifying their designated critical habitat during agency actions. If some taking cannot be avoided but is incidental to the otherwise lawful purpose, the effects of that taking are to be minimized, and authorized by the Service through an Incidental Take Statement. Acting without a Section 7 consultation leaves a federal agency at risk of violating the ESA.

The Section 7 consultation begins with identifying whether there are listed species in the affected area of planned federal programs, and then determining whether the federal action will jeopardize the continued existence of the species or destroy or adversely modify their critical habitat.<sup>4</sup> It involves an interchange between

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<sup>1</sup> 16 U.S.C. § 1531(b).

<sup>2</sup> 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.

<sup>3</sup> 16 U.S.C. § 1532(19).

<sup>4</sup> Although there are three types of actions under Section 7, this report will discuss only  
(continued...)

the relevant Service and the federal agency proposing to act, known as the Action Agency. The statute establishes a general process and a substantive requirement. The process is as follows:

- 1) The Action Agency “shall” request the Service for information on whether any species “which is listed or proposed to be listed may be present in the area of such proposed action;”<sup>5</sup>
- 2) The Service will advise whether species “may be present,” based on the best scientific and commercial data available;<sup>6</sup>
- 3) If the Service says species may be present, the action agency “shall conduct a biological assessment” to identify listed species “likely to be affected by such action.”<sup>7</sup>
- 4) The biological assessment (BA) is submitted to the Service;
- 5) Based on the BA and after consultation with the action agency, the Service will issue its opinion as to “how the agency action affects species or its critical habitat.” If the Service finds the action may place the species in jeopardy or adversely modifies critical habitat, the Service is required to suggest “reasonable and prudent alternatives” that “can be taken” by the action agency so that its project can occur without violating the act;<sup>8</sup> and
- 6) If some take will occur, the Service will issue an Incidental Take Statement that will specify the reasonable and prudent measures that are necessary to minimize impacts.<sup>9</sup>

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<sup>4</sup> (...continued)

those consultations brought under Section 7(a)(2), and not consultations in conjunction with an applicant under Section 7(a)(3), or the requirement to *confer* with the Service under Section 7(a)(4) for actions that might harm species proposed for listing.

<sup>5</sup> 16 U.S.C. § 1536(c)(1).

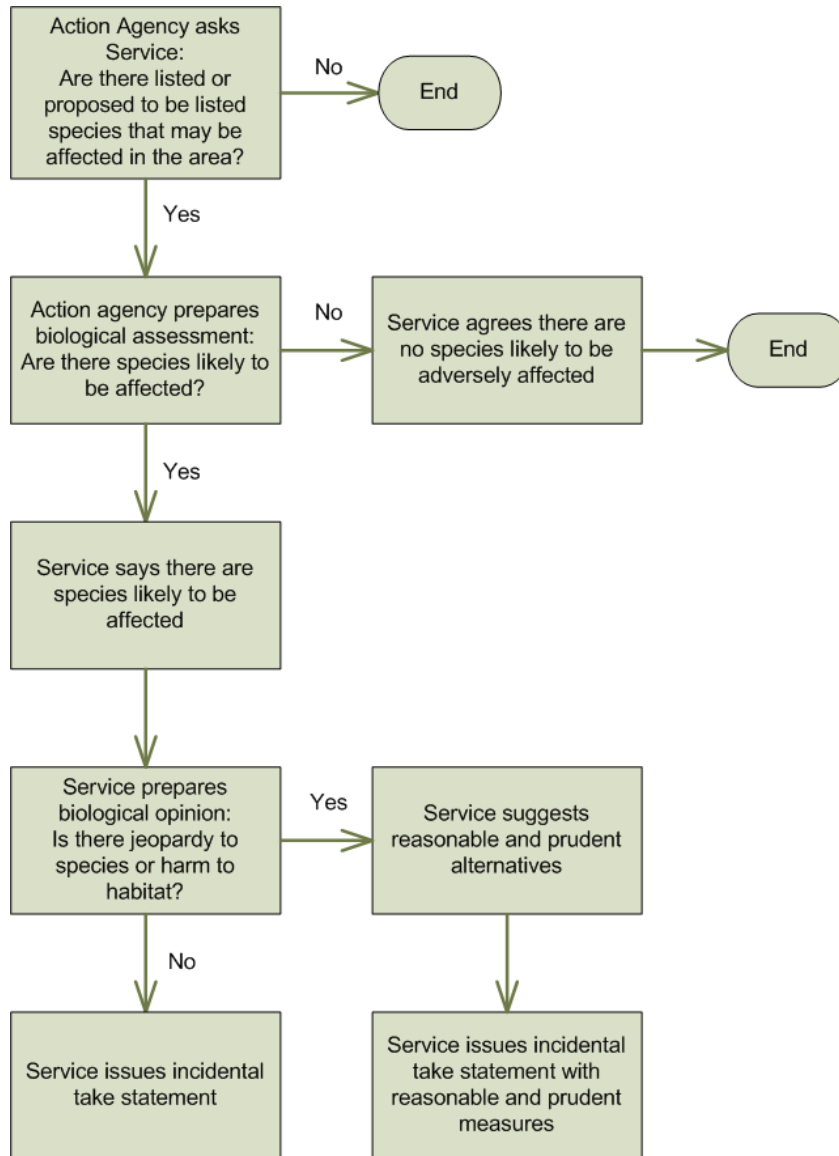
<sup>6</sup> 16 U.S.C. § 1536(c)(1).

<sup>7</sup> 16 U.S.C. § 1536(c)(1).

<sup>8</sup> 16 U.S.C. § 1536(b)(3)(A).

<sup>9</sup> 16 U.S.C. § 1536(b)(4).

**Figure 1. Section 7 Consultation Process Described by Statute**



**Source:** CRS.

The substantive requirement is that the Action Agencies will ensure that the actions do not put listed species in jeopardy of extinction or harm their habitats.

Section 7 also prohibits a federal agency from making “irreversible or irretrievable commitment of resources” that would foreclose the effectiveness of any reasonable and prudent alternative measures suggested by the Service after consultation was concluded.<sup>10</sup>

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<sup>10</sup> 16 U.S.C. § 1536(d).

## Current Regulations

The current regulations<sup>11</sup> attempted to detail the provisions of the statute. The regulations for Section 7 establish a slightly different process for consultation based on the requirements as laid out in the statute. They also provide definitions and explanations of what the Action Agencies and the Services are evaluating when performing their parts of the consultation process. Before considering the proposed changes, this report will review the current regulations, established by rulemaking in 1986. A comparison of the current regulations with the proposed changes is in **Table 1** at the end of this report.

The current regulations establish a formal consultation process and an informal consultation process. *Formal consultation* is defined as the process “that commences with the Federal agency’s written request for consultation under section 7(a)(2) of the Act and concludes with the Service’s issuance of the biological opinion under section 7(b)(3) of the Act.”<sup>12</sup> *Informal consultation* is defined as “an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency ... prior to formal consultation, if required.”<sup>13</sup>

The decision of which process is appropriate for an Action Agency is left to that agency. Informal consultation involves the Service, but does not require the Service to issue a biological opinion (BiOp). Instead, the informal consultation can be used to determine that the action is “not likely to adversely affect listed species or critical habitat,” at which point the consultation process is terminated if the Service provides a written concurrence.<sup>14</sup>

Under the regulations, the consultation process follows this course:

- 1) The Action Agency decides whether there are listed species present;
- 2) If there are listed species present, and the project is a major construction project, the Action Agency prepares a Biological Assessment;
- 3) The Action Agency determines whether the action is likely to affect listed species and seeks the concurrence of the Service;
- 4) If the Service concurs that species are likely to be adversely affected, the Action Agency initiates consultation by submitting a consultation package;
- 5) Upon receipt of the initiation package, the Service determines whether the action is likely to jeopardize listed species or whether it is likely to destroy or adversely affect critical habitat;
- 6) The Service issues a biological opinion giving its conclusion on those two issues.

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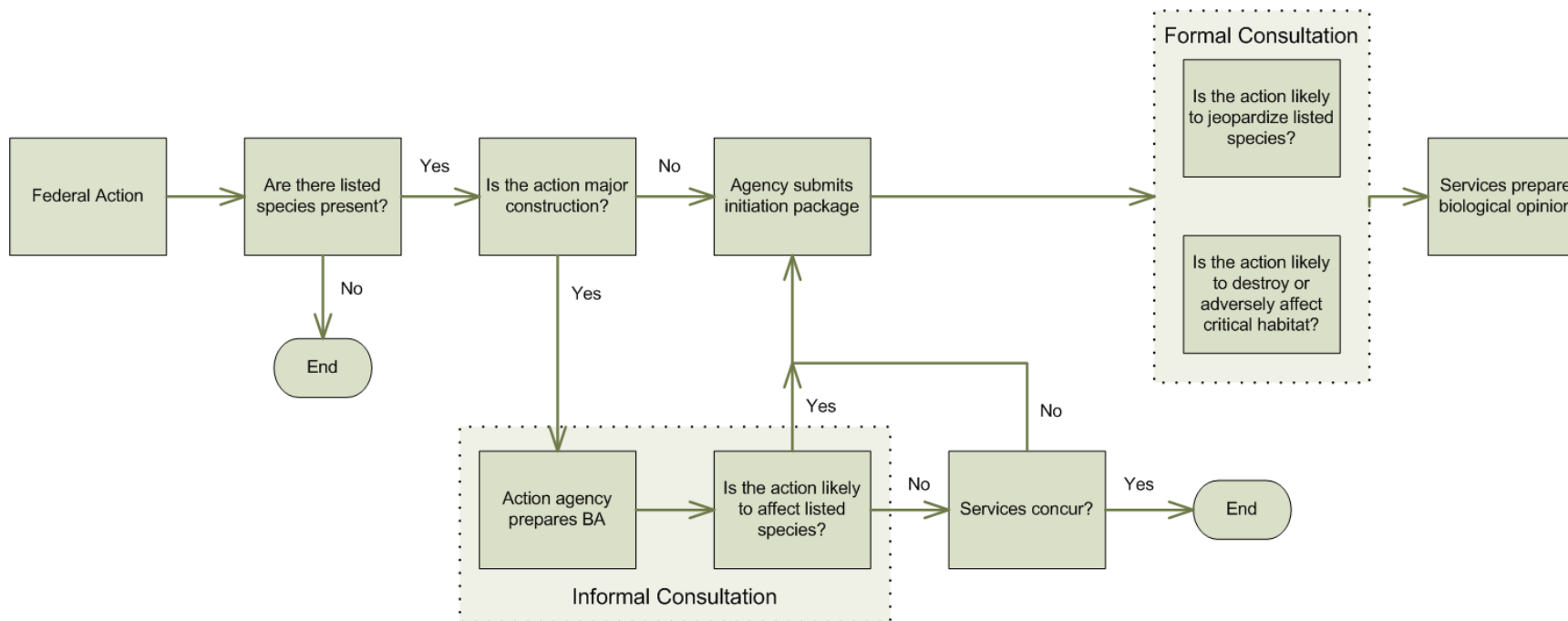
<sup>11</sup> 50 C.F.R. part 402.

<sup>12</sup> 50 C.F.R. § 402.2.

<sup>13</sup> 50 C.F.R. § 402.2.

<sup>14</sup> 50 C.F.R. § 402.13.

Figure 2. Section 7 Consultation Described by Regulation



Source: National Marine Fisheries Service training materials.



While not stated in the statute, as a practical matter, not every federal action requires consultation. It has long been in the discretion of the Action Agencies to determine whether a proposed action requires consultation. Where an Action Agency realizes its project *may affect* a listed species or critical habitat, it must formally consult with the Service.<sup>15</sup> This decision must be made “at the earliest possible time.”<sup>16</sup> If the action may affect critical habitat or species, then the Action Agency will submit an “initiation package” described in Section 402.14(c). This information must be based on the best scientific and commercial data available.<sup>17</sup> The initiation package starts the formal consultation process.

The Service reviews the information sent by the Action Agency, evaluating the effects of the action and the cumulative effects. These terms are defined in the regulations, and their definitions have been changed in the proposed amended regulations, as will be discussed later. If the Service determines that the action is likely to jeopardize the continued existence of a listed species or adversely modify critical habitat, it issues a “jeopardy” BiOp that will include reasonable and prudent alternatives to the proposed action. The Service will also issue an incidental take statement (ITS), which operates to excuse the agency from any prohibited take to a listed species.

Enforcement of these processes is vague. The current regulations allow a Service to make a written request to an Action Agency when the Service identifies an action that may affect listed species or critical habitat.<sup>18</sup> The Service may also request additional information if it does not have adequate data on which to **base** its BiOp. But the Service has no way of forcing an Action Agency to consult. However, if an Action Agency does not consult with the Service, it runs the risk of not only jeopardizing a listed species or adversely affecting the critical habitat, but of violating the ESA by taking a listed species. The assurance provided by the BiOp and the ITS motivates agencies to participate in consultation. As a practical matter, enforcement is initiated by citizen suit and performed by the courts.

## Authority to Issue Regulations

Generally speaking, federal agencies are authorized to issue regulations to effect the purposes of a statute. To be valid, however, the regulations must be “consistent with the statute under which they were promulgated.”<sup>19</sup> The determination of statutory consistency is left to the courts.<sup>20</sup>

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<sup>15</sup> See *NRDC v. Houston*, 146 F.3d 1118, 1125 (9<sup>th</sup> Cir. 1998).

<sup>16</sup> 50 C.F.R. § 402.14.

<sup>17</sup> 50 C.F.R. § 402.14(d).

<sup>18</sup> 50 C.F.R. § 402.14(a).

<sup>19</sup> *United States v. Larionoff*, 431 U.S. 864, 873 (1977).

<sup>20</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n. 9 (1984).

## Proposed Regulations

On August 15, 2008, the Services issued proposed revisions to the Section 7 consultation regulations. Comments to the proposed changes are due by September 15, 2008.<sup>21</sup> On September 12, 2008, the Services changed the deadline to October 15, 2008.<sup>22</sup>

The proposed regulation attempts to reduce the workload of the Services and streamline the consultation process by: 1) allowing for already prepared documents to be used as a BA, hence eliminating the need to create a new document; 2) allowing Action Agencies to determine the effects of their actions on listed species in certain situations; 3) clarifying the causation standard for determining the effects of Action Agencies; and 4) making procedural changes to the informal consultation process.<sup>23</sup>

The regulatory notice states that one goal is “to reduce the number of unnecessary consultations.”<sup>24</sup> According to the GAO report cited by the notice, the problem of unnecessary consultations was not suggested by the Services, but was raised by Action Agencies.<sup>25</sup> The Services stated the consultation process was necessary, even for actions with positive effects or minor effects, in order to enforce the ESA.<sup>26</sup>

An additional stated goal of the proposed regulations relates to climate change. The Services state that the proposed modifications will “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.”<sup>27</sup> Some believe that the ESA is not the appropriate statutory vehicle for regulating greenhouse gas emissions, as it was not implemented to analyze power plants. Others note that the ESA has no exceptions for types of projects and regulations cannot create one. 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.

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

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<sup>21</sup> There is no statutory requirement for the length of a comment period for a draft regulation. Executive Order 12866, § 6(a) states that agencies should provide a 60-day comment period. 58 Fed. Reg. 51735 (October 4, 1993).

<sup>22</sup> 73 Fed. Reg. 52942, 52943 (Sept. 12, 2008).

<sup>23</sup> 73 Fed. Reg. at 47869.

<sup>24</sup> 73 Fed. Reg. at 47871.

<sup>25</sup> GAO, *ESA: More Federal Management Attention Is Needed to Improve the Consultation Process*, GAO-04-93, pp. 43-44 (March 2004), available online at [<http://www.gao.gov/new.items/d0493.pdf>].

<sup>26</sup> *Id.*

<sup>27</sup> 73 Fed. Reg. at 47872.

- changing the definition of biological assessment;<sup>28</sup>
- changing the definition of cumulative effects;<sup>29</sup>
- changing the definition of effects of the action;<sup>30</sup>
- changing when a consultation is required;<sup>31</sup>
- changing the procedure for informal consultation;<sup>32</sup> and
- changing the procedure for formal consultation.<sup>33</sup>

**Amended Definition of Biological Assessment (§ 402.02).** The change to the definition of BA would add a sentence to allow other documents to serve as a formal BA, promoting efficiency. Action Agencies would not have to create a special document when that information was already available in another form. This appears consistent with the statute, which already allows the BA to be part of a review under the National Environmental Policy Act (NEPA).<sup>34</sup> Additionally, the current regulations already provide that the contents of a BA were at the discretion of the Action Agency.<sup>35</sup> Therefore, this additional statement appears to have little legal impact on the operation of the consultation process.

**Amended Definition of Cumulative Effects (§ 402.02).** The proposed regulations would add a sentence to the existing definition of *cumulative effects*. The current version defines 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 would add 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* is created by regulation, not by statute. In 1986, when this regulation was established, one commenter on the draft rule opposed the definition, arguing that the act did not require it. The Service responded 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 the Action Agency’s “responsibility to develop this information.”<sup>36</sup> In the notice accompanying the proposed regulations, the Services stated that

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<sup>28</sup> 50 C.F.R. § 402.02.

<sup>29</sup> 50 C.F.R. § 402.02.

<sup>30</sup> 50 C.F.R. § 402.02.

<sup>31</sup> 50 C.F.R. § 402.03.

<sup>32</sup> 50 C.F.R. § 402.13.

<sup>33</sup> 50 C.F.R. § 402.14.

<sup>34</sup> 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).

<sup>35</sup> 50 C.F.R. § 402.12(f) (listing five areas that may be considered for inclusion).

<sup>36</sup> 51 Fed. Reg. 19926, 19932 (June 3, 1986).

cumulative effects in the NEPA context is broader than that under the ESA, noting that the ESA does not require consideration of future federal actions.<sup>37</sup>

Action Agencies are required to consider cumulative effects in their BAs,<sup>38</sup> and to provide a written analysis of cumulative effects in the request to initiate formal consultation.<sup>39</sup> The Services are also required by regulation to consider cumulative effects. During formal consultation, a Service must review cumulative effects,<sup>40</sup> 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.<sup>41</sup>

It is not clear what the additional language to the definition provides. The added language reiterates that federal activities are not a factor in cumulative effects, “cumulative effects do not include future Federal activities,” and refines the definition only to state that the effects do not include federal activities “physically located” within the action area.<sup>42</sup> Since federal activities are already excluded, it is not clear why it is necessary to say federal activities that are physically located near the project are 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 cumulative effects excludes federal actions, the *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.<sup>43</sup> 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 regulations require the Action Agency to discuss the effects of an action as part of its BA.<sup>44</sup> The Service must include a detailed discussion of the effects of an action in its BiOp.<sup>45</sup>

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<sup>37</sup> 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 C.F.R. § 1508.7.

<sup>38</sup> 50 C.F.R. § 402.12(f)(4)

<sup>39</sup> 50 C.F.R. § 402.14(c)(4).

<sup>40</sup> 50 C.F.R. § 402.14(g)(3).

<sup>41</sup> 50 C.F.R. § 402.14(g)(4).

<sup>42</sup> 73 Fed. Reg. at 47874 (August 15, 2008).

<sup>43</sup> 50 C.F.R. § 402.02.

<sup>44</sup> 50 C.F.R. § 402.12(f)(4).

<sup>45</sup> 50 C.F.R. § 402.14(h)(2).

The proposed regulation modifies a term nested within the definition of effects of an action, *indirect effects*. Indirect effects are included within the regulation in response to a Fifth Circuit court case requiring the Action Agency to consider indirect effects during consultation.<sup>46</sup> When the regulation was being drafted in 1986, the Services refused to narrow the definition by not considering these effects, stating “the Service declines to narrow the scope of its review (as requested by one commenter) in light of existing case law.”<sup>47</sup>

The proposed regulations make two changes to the definition of *indirect effects*. The Services state that these changes will “simplify the consultation process and make it less burdensome and time-consuming.”<sup>48</sup>

The first change would require the proposed action to be *an essential cause* of those indirect effects. *Essential cause* is explained in the Federal Register notice as the action’s being necessary for that effect to occur.<sup>49</sup> The proposed regulation continues: “If an effect will occur whether or not the action takes place, the action is not a cause of the direct or indirect effect.” This suggests that where multiple stressors affect a species, an Action Agency would not have to consider what harm it was doing to a species, if other harms were just as severe.

A similar interpretation of *effects of the action* has already been 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.”<sup>50</sup> Inclusion of *essential cause* seems to commit the same error 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 appears contradictory to the fundamental purpose of the ESA: to conserve threatened and endangered species. The act does more than require agencies to avoid jeopardizing listed species: they have an affirmative responsibility to conserve species.<sup>51</sup> 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).<sup>52</sup>

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<sup>46</sup> National Wildlife Federation v. Coleman, 529 F.2d 359, 373-74 (5<sup>th</sup> 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).

<sup>47</sup> 51 Fed. Reg. at 19932 (June 3, 1986).

<sup>48</sup> 73 Fed. Reg. at 47870 (August 15, 2008).

<sup>49</sup> 73 Fed. Reg. at 47870 (August 15, 2008).

<sup>50</sup> National Wildlife Federation v. National Marine Fisheries Service, 524 F.3d 917, 930 (9<sup>th</sup> Cir. 2008).

<sup>51</sup> 16 U.S.C. § 1536(a)(1).

<sup>52</sup> Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

The second change to *indirect effects* requires that “reasonably certain to occur” must be based on “clear and substantial information.” This appears to be a new legal standard. It is not the standard of information used throughout the ESA statute and regulations, which instead use “the best scientific and commercial data available.”

**When a Consultation Is Applicable (§ 402.03).** Under current regulations a Section 7 consultation is required for “all actions in which there is discretionary Federal involvement or control.”<sup>53</sup> The consultation requirement has been interpreted to apply only to those actions that may affect a listed species or critical habitat. At the time of its promulgation, the discussion about current Section 402.03 centered on what was meant by *actions*, and since then, the focus has been on the term *discretionary*.<sup>54</sup> The 2008 proposed regulations would change this section significantly. The proposed changes add five ways in which an Action Agency could decide that consultation did not apply in proposed subsection (b). This report will discuss that subsection before discussing proposed subsection (c).

Proposed subsection (b) lists a number of criteria; if any one of the criteria is met, no consultation is necessary. These criteria do not indicate what administrative record will memorialize the decisionmaking used to determine whether they apply. Presumably, these would be final agency actions, subject to review under the Administrative Procedure Act (APA), but the proposed regulations provide scant information on how the decisions will be made or recorded. Additionally, the Action Agencies appear 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,” the new standard proposed in part of these changes. For all of the criteria in subsection (b), no consultation is required “when the direct and indirect effects of that action are not anticipated to result in take.”<sup>55</sup> Those criteria are:

- The action has no effect on a listed species or critical habitat;<sup>56</sup>
- The action is an insignificant contributor to any effects on a listed species or critical habitat;<sup>57</sup>
- The effects of an action on a listed species or critical habitat are not capable of being meaningfully identified or detected in a manner that permits evaluation;<sup>58</sup>

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<sup>53</sup> 50 C.F.R. § 402.03.

<sup>54</sup> 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).

<sup>55</sup> proposed 50 C.F.R. § 402.03(b).

<sup>56</sup> proposed 50 C.F.R. § 402.03(b)(1).

<sup>57</sup> proposed 50 C.F.R. § 402.03(b)(2).

<sup>58</sup> proposed 50 C.F.R. § 402.03(b)(3)(i).

- The effects of an action on a listed species or critical habitat are wholly beneficial;<sup>59</sup> or
- The effects of an action on a listed species or critical habitat have a remote potential risk of jeopardy.<sup>60</sup>

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.<sup>61</sup> The regulations in that case would have allowed EPA to determine that its 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."<sup>62</sup>

On the other hand, a different federal court found the regulations were not contrary to the ESA because the Services still played an oversight role. In that case the 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.<sup>63</sup> The program, the National Fire Plan, is discussed below.

Action Agencies are allowed to make unilateral decisions of when to consult. However, these regulatory changes could be 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, and not precede it. On the other hand, it is difficult to see the conservation purpose in requiring consultations that have no effects on species or 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 proposed changes would provide a clearer regulatory justification for when they choose not to consult.

***The Action Has No Effect on a Listed Species or Critical Habitat (§ 402.03(b)(1)).*** The first subpart of (b) allows the Action Agency to decide that its action has no effect on a listed species or designated critical habitat without any consultation. This would have the practical effect of eliminating consultations where

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<sup>59</sup> proposed 50 C.F.R. § 402.03(b)(3)(ii).

<sup>60</sup> proposed 50 C.F.R. § 402.03(b)(3)(iii).

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

<sup>62</sup> Washington Toxics Coalition, at 1179.

<sup>63</sup> Defenders of Wildlife v. Kempthorne, 2006 wl 2844232 (D.D.C. September 29, 2006).

species will not be impacted, which seems consistent with the goal of the statute and would likely promote efficiency.

There has always been a tension between the plain language of Section 7 and its practical application. The opening sentence of Section 7(a)(2) requires that Action Agencies shall ensure that *any action* is not likely to jeopardize protected species or adversely affect their habitats. Logic dictates that not all actions — ordering office supplies for example — require consultation. The statute requires an agency to determine that its action will not commit the harm described with the “assistance 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.<sup>64</sup> This is how the consultation process has worked. The proposed regulation would give that practice regulatory authority. However, by allowing an Action Agency to decide initially that its project will have no effect, the regulations read more like NEPA, which requires agencies to act if a project would have significant impacts on the environment. That may be a more realistic approach to consultations, but it is arguably outside the Services’ authority to create regulations.

***The Action is Wholly Beneficial (§ 402.03(b)(3)(ii)).*** This revision would allow an Action Agency to decide consultation is not necessary if the action would be wholly beneficial to the species. It would promote efficiency in the Section 7 process by eliminating steps in consultation. A similar provision is in the Consultation Handbook, but there the decision is made only after production of a BA or other similar document.<sup>65</sup> The proposed regulation appears to eliminate the Services’ oversight under a strict reading of the statute, but when taken in light of the purposes of the statute, appears consistent with the ESA’s goals.

***The Action Is an Insignificant Contributor (§ 402.03(b)(2)).*** This factor, along with the remaining two factors, appears to address the Services’ intent to separate climate change issues from the ESA. Under the proposal, consultation is not required if the action is “an insignificant contributor to any effects on a listed species or critical habitat.” With this in place, it would be difficult to argue, for example, that a single Title V permit issued under the Clean Air Act was responsible for the global warming that put endangered coral at risk. It is not certain if nationwide permitting schemes would also be excused from consultation, however. This may motivate Action Agencies to separate major projects into smaller pieces so that the effects are minimized. No cumulative effects analysis would apply since this decision would be made prior to initiation of consultation.

It is unclear how this determination fits with the definitions for *cumulative effects* and *effects of an action* because it would occur before consultation even started. An issue with this section is that it removes large portions of the review process from consultation by having them occur before consultation is determined to apply. It might be more consistent with the act to describe *insignificant*

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<sup>64</sup> FWS and NMFS, *Final ESA Section 7 Consultation Handbook*, pp. 3-12 (March 1998) (hereinafter Consultation Handbook).

<sup>65</sup> Consultation Handbook, pp. 3-12.



*contributor* in the context of the other effects definitions to be used at the time a consultation, informal or formal, is underway.

***The Effects Are Not Capable of Being Meaningfully Identified or Detected (§ 402.03(b)(3)(i)).*** This amendment also appears 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 is required if the effects of the action “are not capable of being meaningfully identified or detected in a manner that permits evaluation.” This evaluation is made by the Action Agency before the consultation process starts, and it is not clear what scientific standards will be used to make this determination. Because Section 402.03(b) clearly addresses both direct and indirect effects, it may be presumed that the reference to *effects* means both. This suggests that the Action Agency would perform some form of an effects analysis prior to deciding whether a consultation is required.

***The Effects of an Action Have a Remote Potential Risk of Jeopardy (§ 402.03(b)(3)(iii)).*** This final part of subsection (b) allows an Action Agency not to consult if it determines that the effects “are such that potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote.” It suggests that an Action Agency has the authority to make its own jeopardy decision. To the extent that is true, it is arguably contrary to ESA § 7(a), which requires the determination to be made in consultation with and with the assistance of the Services. To the extent that this is considered another way for the agency to predetermine effects prior to initiating consultation, it has the same procedural and administrative difficulties described above. The Services indicated that this change is also intended to limit consultations for projects with GHG emissions.<sup>66</sup>

***Consultation for Only Some Effects of an Action (§ 402.03(c)).*** The above factors from subsection (b) are linked by an “or”, suggesting that any one of them could be the basis for not initiating consultation. Proposed subsection (c) discusses what happens if some of the subsection (b) criteria apply and some do 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 suggests that Action Agencies may be performing a complicated effects analysis before the consultation is even deemed necessary. As mentioned above, *effects* as used in this regulation appears to include both direct and indirect effects. The proposed regulation provides no guidelines on the Action Agency’s analysis in that context, leaving open questions such as whether the effects would be divided based on the type of effect or the portion of the project. Based on the plain meaning, it seems subsection (c) would allow agencies to segment their projects and initiate consultation only for those parts that may have an effect that is significant, identifiable, and poses more than a remote risk of jeopardy. Because these

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<sup>66</sup> 73 Fed. Reg. at 47872.

determinations appear to be made without the consultation or assistance of the Services, they are arguably contrary to the ESA.

The case of an agency action where only a portion of a project was advanced to consultation illustrates an internal inconsistency within the proposed regulations. The proposed changes to Section 402.13 — informal consultations — require the Action Agency to consider “the effects of the action as a whole.” Therefore, whatever sections of the action that were not advanced to consultation could be considered during the consultation anyway.

**Informal Consultation (§ 402.13).** The 1986 regulations distinguished between informal consultations and formal consultations. The informal consultation regulation was a procedural rule, 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.”<sup>67</sup> The Service is required to concur with the Action Agency’s determination of “not likely to adversely affect” in writing. The revisions make procedural changes and substantive additions to the informal consultation process.

The first change modifies the scope of what would be reviewed in the informal consultation. The current 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.”<sup>68</sup> The proposed regulation would increase the scope beyond the agency action to include other relevant projects. It reads: “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...” This appears to allow one informal consultation for related projects, which could promote efficiency by allowing one review and one concurrence by the Service. Determining when actions are in fact “similar,” however, could be controversial.

It is also not clear whether the Action Agency would determine unilaterally whether consultation would occur on one action or similar actions, or whether that decision requires the written concurrence of the Service. It appears that the concurrence refers to the “not likely to adversely affect” determination, as that is how it works in the current regulations. However, it is ambiguous in the proposed regulations.

Another significant issue is whether considering only a “segment of a comprehensive plan” could obscure the true agency action and thwart consideration of the adverse effects that may result from it. The Ninth Circuit rejected an attempt

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<sup>67</sup> 51 Fed. Reg. at 19948 (June 3, 1986).

<sup>68</sup> 50 C.F.R. § 402.13(a).

to isolate a portion of a project when considering whether the action would be likely to jeopardize a species.<sup>69</sup>

A second addition to the current regulatory language would alter the substance of the informal consultation review. That proposed addition states: “For all requests for informal consultation, the Federal agency shall consider the effects of the action as a whole, including the effects on all listed species and critical habitats.”<sup>70</sup> As discussed earlier, *effects of the action* appears in the context of an Action Agency’s BA as well as in formal consultations. This would add that evaluation to informal consultations as well. This appears to add to the burden of informal consultations without necessarily offering relief from the formal consultation process.

The proposed regulation appears to create a new document for informal consultations: a request. It is not clear what the *request* is, as neither the current nor proposed regulations have a formal requirement for a request. Currently, according to the Consultation Handbook, informal consultation could consist of a phone call. It is not clear if by *considering* effects, the Action Agencies will be documenting effects of the action in the request or in some other agency record to support the basis for the request.

The informal consultation process would be revised by adding a deadline for the Service to provide a written response with the Action Agency’s determination of not likely to adversely affect. If a Service has not responded within 60 days of the Action Agency’s notification of its NLAA determination, the consultation may be terminated “without the Service’s concurrence.”<sup>71</sup> While this may spur efficiency by forcing a response from the Service, it also could violate the statute’s purpose of the Service and the Action Agency determining a project’s potential harms using the best scientific and commercial data available. As pointed out in the GAO report, staffing is a problem for the Services.<sup>72</sup> The time limit could allow projects that may pose jeopardy to move forward due to default.

As mentioned above, the current regulations do not require a request for informal consultation — a series of phone calls could start the process — making this deadline difficult to calculate. A *request* may need to be defined and its contents explained. When taken with the requirement that the Action Agency must consider the effects of an action, these changes escalate the informal consultation process, making it more like a formal one.

**Formal Consultation (§ 402.14).** The only proposed change to the formal consultation process is a link to the deadline imposed by the informal consultation.

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<sup>69</sup> National Wildlife Federation v. National Marine Fisheries Services, 524 F.3d 917, 933 (9<sup>th</sup> Cir. 2008) (holding that NMFS incorrectly considered only the discretionary actions of a project by isolating the non-discretionary ones in its BiOp).

<sup>70</sup> proposed 50 C.F.R. § 402.13(a).

<sup>71</sup> proposed 50 C.F.R. § 402.13(b). This deadline can be extended by an additional 60 days.

<sup>72</sup> GAO, *ESA: More Federal Management Attention Is Needed to Improve the Consultation Process*, GAO-04-93, p. 4 (March 2004).

The proposed regulation reads that formal consultation is not required under two circumstances: 1) if the Service agrees in writing that the action is not likely to adversely affect a listed species; or 2) if informal consultation is terminated without a written concurrence from the Service.<sup>73</sup>

## Policy Implications of the Proposed Regulatory Changes

**Implementing the Rules: Effects on Agency Practice.** As discussed above, the current regulations establish that when an Action Agency is planning to undertake an action that it decides may affect a listed species, it begins a consultation, either formal or informal. The result at ground level is an on-going conversation between the Action Agency and the Service biologists.<sup>74</sup> A few phone calls may suffice to reassure the Action Agency that there are no listed species in the 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 BA for formal consultation. This process may proceed in days or weeks.<sup>75</sup> There is no deadline for the Service to respond to a request for concurrence in the current regulations.

ESA § 7(b)(1)(A) requires the Services to respond to a consultation initiation within 90 days or on a mutually agreed upon date. 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. 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 lead to great frustration among Action Agencies and the non-federal parties relying on them for permits, loans, sales, licenses, etc. The agencies and non-federal partners may see the consultation as needless delay (of weeks, months, or even a year or more), even if the result is ultimately a “no jeopardy” BiOp (i.e., one that finds that the agency action will not jeopardize the species nor adversely modify designated critical habitat). While the proposed rules are intended to address a variety of issues, imposing deadlines or speeding up a response from the Services is a key part, even though the interval from when the Service receives a complete BA from the Action Agency and it issues a BiOp may be only a few weeks.<sup>76</sup>

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<sup>73</sup> proposed 50 C.F.R. § 402.14(b).

<sup>74</sup> For a detailed discussion of consultation practices, see Consultation Handbook, cited above.

<sup>75</sup> The authors are not aware of any comprehensive studies examining the duration of typical formal and informal consultations.

<sup>76</sup> For examples of complex, but relatively rapid consultations, see CRS Report RL34440, (continued...)

**Revisions to § 402.02 and § 402.03(b): More Consultations or Fewer?** In FY2006, FWS carried out 65,519 informal consultations, and of these, 31,874 were handled informally, with phone calls, emails, teleconferences, etc. The remainder, 33,645, resulted in written opinions, and of these about 1,800 were formal consultations.<sup>77</sup> It is not clear that the proposed regulations would reduce the number of consultations. As explained above, the effect of the proposed changes to § 402.02 and § 402.03(b) (regarding effects of an action and when consultations apply) could influence Action Agencies to break down their activities into smaller units (individual units of timber sales, individual windmills in a wind farm, short stretches of beach erosion projects, etc.). In theory, more projects could mean more consultations. However, the proposal would add a requirement that consultation is required only if the project “is not anticipated to result in take” and five more criteria that an Action Agency could use to decide that the consultation requirements do not apply.

**Take as a New Consideration in Consultation (§ 402.03(b)).** The addition of *take* as a criterion for when a consultation is required (as found in Section 402.03(b)) is a significant change. The current standards for consultation turn on questions of jeopardizing the continued existence of a listed species and/or modification of its critical habitat. Consideration of habitat modification and jeopardy involves reviewing effects that could be at a species or landscape level, and that apply equally to plants and animals. A review of *take*, on the other hand, focuses on effects on individual organisms; the result could be that projects that are highly 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, habitat, etc.) might escape the need for consultation, even if the long-term effects of the action might eventually result in jeopardy. Moreover, if the listed organism is a plant, *take* is not defined as a prohibited act under Section 9(a)(2) of ESA. Thus, when the only listed species at risk is a plant, or when listed plants and animals are both at risk from a federal action, those actions that may effect plants will be excluded from consultation. The take requirement might serve to reduce the number of consultations.

**More Criteria to Reduce Consultation (§ 402.03(b)(1-3)).** The additional criteria also seem targeted at the stated goal of eliminating unnecessary consultations. If projects are broken into smaller components, individual actions may be more likely to meet these criteria because each action may be “an insignificant contributor to any effects on a listed species or critical habitat” or “incapable of being meaningfully identified or detected in a manner that permits evaluation.”<sup>78</sup> To the extent that Action Agencies opt to slice their actions into smaller units to fit the

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<sup>76</sup> (...continued)

*Apalachicola-Chattahoochee-Flint Drought: Species and Ecosystem Management*, by M. Lynne Corn, Kristina Alexander, and Eugene H. Buck.

<sup>77</sup> U.S. Dept. of the Interior, Fish and Wildlife Service. Budget Justification, FY2009. p. ES-20; and personal communication between author (MLC) and FWS Endangered Species Office, Sept. 9, 2008.

<sup>78</sup> proposed 50 C.F.R. § 402.03(b).

criteria for when consultation did not apply, there could be a substantial reduction in the number of consultations, whether formal or informal.

**Revisions to § 402.13 and § 402.14: A New Default for Ending Consultation?** Currently, when an Action Agency consults with either Service informally, and they both conclude that no harm will come to listed species or their critical habitats, the informal consultation ends.<sup>79</sup> If the consultation becomes formal, and the Action Agency receives a BiOp, the Action Agency may also receive an Incidental Take Statement (ITS) from the Service if a prohibited take may occur. A BiOp may specify reasonable and prudent alternatives (RPAs) that are needed to avoid jeopardy. If incidental taking may occur, the ITS will also include any reasonable and prudent measures that are necessary to comply with the ITS. If the Action Agency then proceeds with that action as described, past case law suggests that parties that sue the Action Agency alleging violation of the Act are unlikely to succeed in court.<sup>80</sup>

Current practice for complying with ESA's consultation requirements therefore involves an exchange of information between the Services and the Action Agency. Some Service biologists might argue that they can consult rapidly once information is complete, but that initial submissions may not be adequate for consultation. At the same time, Action Agencies might argue that the requests for more information might seem endless, and note that few deadlines are imposed on the Services.

**Informal Consultation (§ 402.13).** The proposed regulations would represent a significant departure from current practice. Under the proposed changes to informal consultations, it is implied that the Action Agency must make a request for informal consultation.<sup>81</sup> The same proposed section adds a new requirement that the Action Agency must “consider the effects of the action as a whole, including the effects on all listed species and critical habitats.”

The proposed regulation clarifies that informal consultation would end no later than 120 days after the Action Agency requests it, regardless of whether the Service considers the submitted information to be adequate for consultation. In combination with the change in formal consultation proposed in the new Section 402.14 (described below), the effect may substantially lighten the burden on Action Agencies.

Overall, the potential effects of the proposed changes include 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

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<sup>79</sup> 50 C.F.R. § 402.13.

<sup>80</sup> See, e.g., *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006); *Aluminum Co. of America v. Bonneville Power Admin.*, 175 F.3d 1156 (9th Cir. 1999); *Miccosukee Tribe of Indians of Florida v. U.S.*, 528 F. Supp. 2d 1317 (S.D. Fla. 2007).

<sup>81</sup> proposed 50 C.F.R. 402.13(a).

both would have time limits for completion.<sup>82</sup> 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.

**Formal Consultation (§ 402.14).** The proposed rule would leave most of the formal consultation procedures intact, with one substantial exception. If informal consultation has terminated because the Service did not respond in the time allotted, then the Action Agency would not need to initiate formal consultation, regardless of the impacts on listed species or critical habitats.

The processes proposed for informal and formal consultation raise a number of questions. The proposed regulations might create a perverse incentive to provide inadequate information, because an agency would have a new option of submitting 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 contributing to jeopardy, and assuming the risk of taking a species without an ITS excusing the take.) 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 proposed changes might increase the work loads.

**Amended Definition of Effects of the Action (§ 402.02): Indirect Effects and Essential Causes.** 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., spotted owls); both foraging habitat and bioaccumulation of toxins (e.g., polar bears); and both excessive incidental take and loss of nesting habitat (e.g., sea turtles). In these three examples, any one of the pairs of threats, if left uncontrolled, might be sufficient to jeopardize the continued existence of the species, and ultimately lead to its extinction. Would an agency action that exacerbates just one threat and not another be eliminated from both the BA and the BiOp considerations of the *effects of the action*? The proposed changes appear to permit this outcome.

Specifically, the proposed rule states that if the agency action has “an effect [that] will occur whether or not the action takes place, the action is not a cause of the direct or indirect effect.”<sup>83</sup> In practice, it may be extremely difficult for the Services to determine whether an effect will occur regardless of an agency action. The proposed change to the definition of *effects of the action* might take some actions and their effects off the consultation table when a species faces multiple severe threats as the following examples illustrate: Is a lower basin of a watershed going to receive

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<sup>82</sup> 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)).

<sup>83</sup> proposed 50 C.F.R. § 402.02.

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 powerplants can be ignored?

## Effects on Consultation Results

Two case studies of how the proposed regulations may affect agency practice are included as appendices at the end of this report.

## Climate Change and the Proposed Regulations

In the notice of the proposed rule, the Services stated that there is no requirement to consult on greenhouse gas (GHG) emissions' contribution to global warming.<sup>84</sup> Some of the revisions to the consultation regulations appear targeted at separating projects that may affect climate change from the consultation process.

Before discussing climate change in this context, it should be noted that 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 directly emit GHGs. Most 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 connection to the level of reasonable certainty between an action's resulting emissions and effect on species or critical habitat.<sup>85</sup>

The Services point to many changes within the proposed regulations to advance its position that an ESA consultation is not intended to consider the effects of GHG emissions. The Service gives these rationales for why, in their view, GHG emissions from a project would not be 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 (proposed § 402.02);
- GHG emissions may be an “insignificant contributor” to any adverse impacts (proposed § 402.03(b)(2));

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<sup>84</sup> 73 Fed. Reg. at 47872.

<sup>85</sup> 73 Fed. Reg. 28305, 28313 (May 15, 2008) (special rules for polar bears).



- GHG emissions may not be “capable of being meaningfully identified or detected in a manner that permits evaluation” (proposed § 402.03(b)(3)(i)); and
- the potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat from those GHG emissions is remote (proposed § 402.03(b)(3)(iii)).<sup>86</sup>

Most scientists agree that countless sources of GHG emissions are driving climate change. GHG emissions from a particular or narrowly defined agency action, however, may not be considered an essential cause of climate change effects on a species. Under the proposed regulations, an agency action must be an *essential cause* of an effect on a species for it to be considered in the consultation process. 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.”<sup>87</sup> 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 three changes in the proposed rule influence how the Action Agency decides whether consultation applies to an action. The proposed rule provides that if a federal action is an “insignificant contributor” to effects on listed species on their critical habitat, the Action Agency may avoid consultation. Here, in the context of GHGs, the aggregation of actions could be key. A single power plant may have an insignificant impact on climate change as a whole or the altered critical habitat of a species in particular, but an agency action that consists of a permitting process involving hundreds of GHG sources may be significant.

Projects leading to GHG emissions may not require consultation if the effects of the action cannot be meaningfully identified or detected “in a manner that permits evaluation.” It is not clear what might constitute 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 fourth change to the current regulations that the Services have indicated will affect consultations on projects with GHG emissions, is that the effects of the action must be such that the “potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote.” In this instance, “remote” appears to mean “unlikely,” rather than “separated by a great distance.” The complexities of global climate modeling make such an assessment on an individual project extremely 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 proposed regulations would allow agencies to consider not just an agency action but “a number

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<sup>86</sup> 73 Fed. Reg. at 47872.

<sup>87</sup> 73 Fed. Reg. at 47870.

of similar actions, an agency program, or a segment of a comprehensive plan.”<sup>88</sup> 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 proposal whether the decision of whether to submit just one action or a combined program for review is at the discretion of the Action Agency or requires the concurrence of the Service.

Proponents of the proposed 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, though the number of federal agency actions with the potential to affect climate change may be so large as to overwhelm the understaffed Services.<sup>89</sup> At least one federal court required the Services to consider climate change as part of a Section 7 consultation.<sup>90</sup>

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<sup>88</sup> proposed 50 C.F.R. § 402.13.

<sup>89</sup> John Kostyack and Dan Rohlf, *Conserving Endangered Species in an Era of Global Warming*, 38 ELR 10203 (April 2008).

<sup>90</sup> *Natural Resources Defense Council v. Kempthorne*, 506 F. Supp. 2d 322, 369 (E.D. Cal. 2007).

### Table 1. Comparison of Current Regulations to Proposed Regulations

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

Current Version of Title 50 C.F.R.	Proposed Version
<b>402.02 - Definition of Biological Assessment</b>	
<p>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.</p>	<p>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. <b>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.</b></p>
<b>402.02 - Definition of Cumulative Effects</b>	
<p>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.</p>	<p>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. <b>Cumulative effects do not include future Federal activities that are physically located within the action area of the particular Federal action under consultation.</b></p>

Current Version of Title 50 C.F.R.	Proposed Version
<b>402.02 - Definition of Effects of the Action</b>	
<p>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.</p>	<p>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 <b>for which the proposed action is an essential cause, and that</b> are later in time, but still are reasonably certain to occur. <b>If an effect will occur whether or not the action takes place, the action is not a cause of the direct or 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.</b> 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.</p>

Current Version of Title 50 C.F.R.	Proposed Version
<b>402.03 - Applicability</b>	
<p>Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.</p>	<p>(a) Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.</p> <p><b>(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:</b></p> <p><b>(1) Such action has no effect on a listed species or critical habitat; or</b></p> <p><b>(2) Such action is an insignificant contributor to any effects on a listed species or critical habitat; or</b></p> <p><b>(3) The effects of such action on a listed species or critical habitat:</b></p> <p style="padding-left: 20px;"><b>(i) Are not capable of being meaningfully identified or detected in a manner that permits evaluation;</b></p> <p style="padding-left: 20px;"><b>(ii) Are wholly beneficial; or</b></p> <p style="padding-left: 20px;"><b>(iii) Are such that potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote.</b></p> <p><b>(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).</b></p>

Current Version of Title 50 C.F.R.	Proposed Version
<b>402.13 - Informal Consultation</b>	
<p>(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.</p> <p>(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.</p>	<p>(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, [<i>with the written concurrence of the Service,</i>] that the action, <b>or a number of similar actions, an agency program, or a segment of a comprehensive plan</b>, is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary <b>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, including the effects on all listed species and critical habitats.</b></p> <p><b>(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 such determination, the Federal agency may, upon written notice to the Service, terminate consultation without the Service's concurrence. 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.</b></p> <p>(c) 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.</p>

Current Version of Title 50 C.F.R.	Proposed Version
<b>402.14 Formal Consultation</b>	
<p>(a) <i>Requirement for formal consultation.</i> 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.</p> <p>(b) <i>Exceptions.</i> (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.</p> <p>{sections (c) - (k) omitted}</p>	<p>(a) <i>Requirement for formal consultation.</i> 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.</p> <p>(b) <i>Exceptions.</i> (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 [<i>with the written concurrence of the Director</i>], that the proposed action is not likely to adversely affect any listed species or critical habitat, <b>and the Director concurs in writing or informal consultation has terminated under 402.13(b) without a written determination by the Service as to whether it concurs;</b> {sections (c)-(k) unmodified}</p>

## 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).<sup>91</sup> 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.<sup>92</sup> These regulations were issued under the provision for counterpart regulations,<sup>93</sup> 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).<sup>94</sup> 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;

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<sup>91</sup> 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, see CRS Report RL33792, *Federal Lands Managed by the Bureau of Land Management (BLM) and the Forest Service (FS): Issues for the 110th Congress*, by Ross W. Gorte, Carol Hardy Vincent, Marc Humphries, and Kristina Alexander.

<sup>92</sup> 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).

<sup>93</sup> 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).

<sup>94</sup> 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>].



- 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
- use the best available scientific and commercial data.<sup>95</sup>

NMFS and FWS constructed separate analyses of the results. **Table 2** is the summary of the 10 projects involving species under NMFS management; **Tables 3 and 4** 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.<sup>96</sup>

**Table 2. 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 improbable 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.

<sup>95</sup> *ESA/NFP Review*, p. 2.

<sup>96</sup> NMFS found that both Action Agencies succeeded in the sixth criterion: summarizing their own actions clearly.

FWS analyzed 50 projects.<sup>97</sup> (See **Tables 3** and **4**.) 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.<sup>98</sup>

**Table 3. Number of Projects Reviewed by FWS that Did Not Meet Specified Criteria**

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

	<b>Criterion from Evaluation Form (Appendix 3 of Alternative Consultation Agreement)</b>	<b>Forest Service</b>	<b>BLM</b>
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 rocky 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.

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<sup>97</sup> 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.

<sup>98</sup> ESA/NPA Review, p. 21-23.

**Table 4. Total Number of Criteria Missed,  
by Project for FWS Species**

<b>Number of Criteria Missed</b>	<b>Forest Service</b>	<b>BLM</b>
No Criteria Missed	6	0
1 to 5 Missed	19	6
Missed All 6 Criteria	18	1
<b>Total</b>	<b>43</b>	<b>7</b>

**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.<sup>99</sup> 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.

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<sup>99</sup> 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*).

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.

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.