

# Stopping the Conversation: Amended ESA Section 7 Regulations Put Species At Risk

*By Eric Biber and Cynthia Drew\**

The Endangered Species Act (ESA) is the primary legal tool in the United States for the protection of biodiversity. Since its enactment in 1973, it has played a central role in efforts to halt the decline of native species throughout the country. Central to the ESA's regulatory structure is Section 7 of the Act, which requires federal agencies to consult with federal wildlife agencies to insure that their actions do not "jeopardize" the existence of species listed for protection under the Act, or "adversely modify" designated critical habitat for listed species.

The outgoing Bush Administration proposed significant changes to the regulations implementing Section 7 of the Act on August 15, 2008.<sup>1</sup> Those changes greatly reduce the scope of Section 7's application in two major ways. First, they reduce the analysis of federal actions pursuant to Section 7 by making it harder to connect federal actions to potential harm to listed species. Second, they give federal agencies the ability to determine whether their actions might harm listed species and accordingly whether Section 7 consultation should occur at all.

---

Copyright © 2009 by the Regents of the University of California.

\* Assistant Professor of Law, University of California, Berkeley, School of Law and Associate Professor of Law, University of Miami Law School. The professors involved in the drafting of the comments that are the basis of the piece are Hope Babcock (Georgetown University), Rebecca Bratspies (CUNY), Fred Cheever (University of Denver), Dan Farber (U.C. Berkeley), Dale Goble (University of Idaho), Mike Harris (University of Denver), Steve Gold (Rutgers University), Dave Owen (University of Maine), Edward Lloyd (Columbia University), Andrew Long (Florida Coastal School of Law), James May (Widener University), Joel Mintz (Nova Southeastern School of Law), Pat Parenteau (Vermont Law School), Zygmunt Plater (Boston College School of Law), J.B. Ruhl (Florida State University), Leah Russin (former fellow at Stanford University), and Steve Sheppard (University of Arkansas). The opinions expressed in this piece are of the individual authors and participants alone, and institutional affiliations are provided for identification purposes only. Karrigan Börk, a student member of the environmental clinic at Stanford, was also significantly involved in the drafting process. Any errors or omissions in this summary piece are entirely our own.

1. See 73 Fed. Reg. 47868, 47874 (Aug. 15, 2008).

The Bush Administration successfully made every effort to finalize the proposed regulations before the end of this Presidential term in January 2009 and the revisions discussed here were promulgated December 19, 2008. The new rules will be effective January 15, 2009. This piece summarizes the thoughts of a group of environmental law professors who helped draft comments about the proposals, comments that were submitted in October 2008. This piece provides context about the changes, their implications, and the impacts of those changes.<sup>2</sup>

#### BACKGROUND: THE ESA

The overall structure of the ESA is relatively simple. The Act calls for the listing of species based on the threats that they face; species can be listed as either “endangered” or “threatened” depending on the seriousness of those threats.<sup>3</sup> Once a species is listed, it receives two main forms of protection. First, Section 7 of the Act requires federal agencies to insure that their actions will not “jeopardize” the existence of listed species or adversely modify designated “critical habitat” for listed species.<sup>4</sup> Second, Section 9 of the Act restricts actions by any party (whether federal, state or private) that will “take” individual members of listed species<sup>5</sup>—take is defined under the Act and implementing regulations as including killing or harming members of listed species through activities such as hunting as well as through some forms of habitat destruction.<sup>6</sup>

The ESA is enforced by two federal agencies: the U.S. Fish and Wildlife Service (FWS), which is responsible for terrestrial and some marine species, and the National Marine Fisheries Service (NMFS), which is responsible for the remaining marine species. It is these two agencies (hereinafter the “Services”) that are proposing changes to the regulations implementing Section 7.

The process by which Section 7 works is important in understanding the significance of those regulatory changes. The determination of whether a federal agency action will “jeopardize” listed species or “adversely modify” critical habitat is made through a consultation process between the Services and the agency that is proposing the action (“the action agency”).<sup>7</sup> This process often begins with the action agency

---

2. While the Services made some changes to the proposed regulatory changes when they issued the final rules in December 2008, the core of their proposal—and our concerns with the changes—remained the same. *Compare* 73 Fed. Reg. 47868 (Aug. 15, 2008) (proposed rule changes) *with* 73 Fed. Reg. 76272 (final rule changes).

3. *See* Endangered Species Act of 1973, Pub. L. No. 93-20, § 4(a)(1); 16 U.S.C. § 1533(a) (2006).

4. *See* 16 U.S.C. § 1536(a)(2) (2006).

5. *See Id.* § 1538(a)(1)(B) (2006).

6. *See Id.* § 1532(19) (2006); 50 C.F.R. § 17.3 (2008).

7. *Id.* § 1536(a)(2) (2006).

requesting from the Services a list of threatened or endangered species that might be present within the area affected by the proposed action, and the action agency then generally determines whether its proposed action “may affect” those listed species (what the statute calls a “biological assessment”).<sup>8</sup> If the action agency determines that its action “may affect” listed species, consultation with the Services must proceed. That consultation may either be “informal”—in which case the action agency and the Services explore ways to modify the proposed action to avoid impacts on listed species and thus avoid any formal ESA consultation<sup>9</sup>—or it may be “formal,” in which the Services conduct a detailed examination of the impacts of the proposed action on listed species (a “biological opinion”).<sup>10</sup>

If the formal consultation process concludes that the proposed activity will not jeopardize the existence of listed species or adversely modify critical habitat, then the action may proceed (along with a permit for any take of individuals of listed species that might occur).<sup>11</sup> If in the course of the formal consultation process, the action agency has been unable to insure that the action is not likely to cause jeopardy or adverse modification, the Services must (if possible) propose “reasonable and prudent alternatives” to modify or replace the proposed action to avoid jeopardy or adverse modification.<sup>12</sup> If no reasonable and prudent alternatives are available, then the proposed action is barred, absent an exemption issued by the Endangered Species Committee through a complicated hearing process.<sup>13</sup>

The consultation process has been a linchpin of the implementation of the ESA. The importance of the consultation process is symbolized by the famous “snail darter” case, *Tennessee Valley Authority v. Hill*, where the Supreme Court held that, based on FWS’s conclusion that construction of a dam would drive a fish species to extinction, the ESA prohibited the completion of the dam.<sup>14</sup>

#### THE PRE-EXISTING REGULATIONS IMPLEMENTING THE ACT

Regulations promulgated by the Services flesh out the details of the Section 7 process. These regulations define (a) when an action will be considered to have an “effect” on a listed species such that consultation should occur in the first place; and (b) under what circumstances action agencies may conduct analyses of the impacts of their proposed actions

---

8. *Id.* § 1536(c) (2006).

9. 50 C.F.R. § 402.13 (2008).

10. *See* Endangered Species Act of 1973, Pub. L. No. 93-20, § 7(b); 16 U.S.C. § 1536(b) (2006).

11. *Id.* § 1536(b)(4).

12. *Id.* § 1536(b)(3)(A) (2006).

13. *Id.* § 1536(a)(2), (e) (2006).

14. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

without consulting with the Services. These are the two aspects that the Services have changed in their revisions to the regulations.

### *Effects of the Action*

The first aspect is important because the extent to which one narrowly defines the “effect” of a proposed action will narrow the analysis of the consultation process—if an action has no “effect” on listed species, then according to the regulations there is no need to analyze the impact of that action on that species. The pre-existing regulatory definition of “effects of an agency action” is:

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.<sup>15</sup>

This definition is a relatively broad one: it includes “indirect” effects, in other words effects that the proposed action would facilitate in the future, so long as they are “reasonably certain” to occur; and, it has no requirement that the effects be the “sole” cause of any potential harm to the listed species.

### *Scope of the Consultation Duty*

The importance of the second aspect—when can action agencies avoid full consultation with the Services about their proposed activities—is fairly obvious. The broader the regulatory exceptions to the consultation requirement (or conversely, the narrower the regulatory definition of the scope of the consultation requirement), the less consultation that will occur. Reduced consultation increases the risk that a proposed federal action will not receive full, thoughtful, and unbiased analysis about its possible impacts on listed species, and accordingly increases the risk of harm to listed species.

---

15. 50 C.F.R. § 402.02 (2008). With the promulgation of the new regulations, this language is effective until Jan. 15, 2009.

The pre-existing regulations require formal consultation where a proposed action “may affect” a listed species.<sup>16</sup> Formal consultation may be avoided either through “informal” consultation or through a related “biological assessment,” if the action agencies determine that their actions are “not likely to adversely affect” a listed species, and the Services concur with that determination.<sup>17</sup>

#### THE NEW CHANGES TO THE REGULATIONS

The proposed changes by the Services will have a major impact on the scope of the ESA consultation process, both by narrowing the types of effects that might either trigger consultation or should be considered in the consultation analysis, and by also explicitly excluding a wide range of activities from the consultation process.

#### *Effects of the Action*

Through the new regulatory text, the Services have significantly narrowed what qualifies as an “effect” of a proposed action, by adding the following language to the definition of “effects of the action”:

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.<sup>18</sup>

The additional language will result in two major changes. First, “indirect effects” only exist if the proposed action is an “essential cause” of those effects. Relatedly, the revised regulations state that if “an effect will occur whether or not the action takes place,” then the proposed action is not in fact the “cause” of that effect. According to the Services, the goal of these changes is to make the evidentiary burden to show “proposed action effects” stricter than the evidence required for a “but for” causal test.<sup>19</sup> As an example of a type of effect that will no longer qualify, the Services point to a pipeline project that requires a federal permit to cross a river, but otherwise is not a “federal action” that would

---

16. 50 C.F.R. § 402.14 (2008). This piece does not address the question of whether the current regulations are consistent with the text of the ESA.

17. 50 C.F.R. § 402.13 (2008) (“informal consultation”); 50 C.F.R. § 402.12(k) (“biological assessment”). Often in this process, action agencies will modify their action to avoid a finding of adverse affect and the rigors of full consultation. See 50 C.F.R. § 402.13(b) (2008) (allowing the Agencies to “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”).

18. 73 Fed. Reg. at 76272 (changes to 50 C.F.R. § 402.02).

19. See *id.* at 47870 (preamble to proposed rule justifying the changes); 73 Fed. Reg. at 76277 (preamble to final rule expanding on those justifications).

require consultation—the Services claim that the new regulatory language would make sure that the oil and gas wells that the pipeline would allow to occur would not qualify as an effect that should be considered in the ESA consultation process.<sup>20</sup>

Second, the determination of whether an indirect effect is reasonably certain to be caused by a proposed action has to be made by “clear and substantial information”—requiring a heightened quantum of proof. According to the Services, “Our intention is to make it clear that the effect cannot just be speculative and that it must be more than just likely to occur.”<sup>21</sup>

#### *Scope of the Consultation Duty*

The new text includes a list of types of agency actions that are excluded from the consultation process. In particular, the Services exclude from consultation any actions that:

- (a) have “no effect” on listed species;
- (b) are “manifested through global processes and:
  - (i) Cannot be reliably predicted or measured at the scale of a listed species’ current range, or
  - (ii) Would result at most in an extremely small, insignificant impact on a listed species or critical habitat, or
  - (iii) Are such that the potential risk of harm to a listed species or critical habitat is remote “
- (c) produce effects on listed species that are “not capable of being measured or detected in a manner that permits meaningful evaluation”
- (d) produce effects that are “wholly beneficial” for listed species<sup>22</sup>

None of these exclusions will apply if the relevant effect of the proposed action would result in take of a member of a listed species.<sup>23</sup>

While the first item on this list is arguably consistent with the pre-existing regulations,<sup>24</sup> all of the others are substantial changes. According to the Services, the purpose of these changes is “to reduce the number of unnecessary consultations.”<sup>25</sup>

20. See 73 Fed. Reg. at 47870.

21. See *id.*; see also 73 Fed. Reg. at 76277–79.

22. See 73 Fed. Reg. at 76287 (changes to 50 C.F.R. § 402.03).

23. See *id.*

24. See 50 C.F.R. § 402.14(b) (2008) (requiring formal consultation where a proposed action “may affect” a listed species). Again, this piece does not address whether the pre-existing or new regulations are consistent with the statute on this point.

25. See 73 Fed. Reg. at 47871.

## OUR CONCERNS WITH THE NEW TEXT

The core problem with the regulatory changes is that they fundamentally misunderstand the nature of the problem of protecting threatened and endangered species by ignoring the fact that we have very limited knowledge about most threatened and endangered species. The new text lowers the standards for approving proposed federal actions, and shifts the burden of proof in favor of proposed actions and away from listed species, precisely in the situations where information is limited. This change could be devastating to the implementation of the ESA and to listed species throughout the United States.

*Effects of the Action*

The changes by the Services to the definition of “effects of the action” could dramatically narrow the scope of protection under the ESA by making it harder to establish causation between particular federal actions and potential adverse effects to listed species. As noted above, this may mean that fewer actions will go through Section 7 consultation, and even if consultation occurs, this may mean that the analysis will be much narrower in scope, excluding a wide range of potentially harmful impacts. The result will not be just harm to listed species, but also an increased possibility of future “train wrecks” involving major conflicts between protection of listed species and development projects, as the federal government avoids consideration of the harm to listed species until they are on the edge of extinction.

First, consider the requirement that a federal action must be the sole “but for” cause of the adverse indirect effects to the listed species. This change may well mean that species that are in danger because of multiple threats will receive reduced or no protection from Section 7 consultations. For instance, if a species’ habitat will be degraded because of both off-road vehicle use and habitat destruction from private development facilitated by the construction of a highway that is federally funded, the proposed regulation may be interpreted to mean that the impacts from the proposed highway need not be considered in Section 7 consultation, because the habitat degradation would occur in any case. The problem is that this hypothetical situation is not far-fetched. Many listed species face extinction because of multiple threats.<sup>26</sup> Ironically, the regulatory changes could mean that species that face multiple threats that might jeopardize their existence will receive *less* protection than species that face jeopardy as a result of one threat.

Second, consider the requirement that there must be “clear and substantial information” to demonstrate that it is “reasonably certain”

---

26. See, e.g., David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 *BIOSCIENCE* 607, 608 tbl. 2 (1998).

that a federal action will be the indirect cause of adverse effects to the listed species. This second change has the impact of reversing the “burden of proof” for consultation analyses, at least in the context of “indirect effects.” It places the burden on those seeking to protect the species—whether it be the Services or citizen groups—to establish by a “clear and substantial information” standard that an action will be “reasonably certain” to cause adverse effects to a listed species. This change in the burden of proof is inconsistent with the overall spirit and purpose of the ESA, which is to provide protection for listed species on the edge of extinction. It is also contrary to the text of the ESA, which requires action agencies to “insure” that their actions do not jeopardize listed species.<sup>27</sup>

The change is especially problematic because there is often very limited evidence or information about the status of listed species, the threats that they face, or how particular activities will result in particular adverse effects to a listed species.<sup>28</sup> While the new language is limited to “indirect effects,” these are quite common. An example (mentioned above) would be the effects from the real estate development that a federally-constructed highway interchange would produce.<sup>29</sup> And “indirect effects” can be quite important—the potential impacts from thousands of acres of real estate development facilitated by a new highway interchange are far greater than the direct impacts on habitat from the interchange itself. Thus, the regulatory changes are quite significant.

Moreover, the “clear and substantial information” requirement is particularly worrisome because of the limited information that we have about the status of most listed species, and the potential impacts that most proposed actions will have on listed species. Conservation biology as a field has very limited information about most species. The new regulations will put the burden on the Services or outside groups to develop the necessary information about whether or not threatened and endangered species will be harmed by development projects. Given the resources that action agencies pursuing development projects generally have at their availability, and the fact that those action agencies know

---

27. See Endangered Species Act of 1973, Pub. L. No. 93-20, § 7(a)(2), 16 U.S.C. § 1536(a)(2) (2006).

28. See, e.g., Fraser Shilling, *Do Habitat Conservation Plans Protect Endangered Species?*, 276 SCIENCE 1662, 1663 (1997) (stating most conservation plans “lack adequate baseline information about population size of target species and actual habitat use, primarily because of the generalized lack of such information”); Joshua J. Lawler et al., *The Scope and Treatment of Threats in Endangered Species Recovery Plans*, 12 ECOLOGICAL APPLICATIONS 663, 663 (2002) (noting lack of basic information about the magnitude, timing, frequency, and severity of threats facing endangered species).

29. See, e.g., Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359 (5<sup>th</sup> Cir. 1976) (discussing a similar fact pattern).

more about the project they are proposing than any outside group, that shift seems very problematic.

Why are the Services so aggressive in raising the bar required to show that a proposed action may lead to harm to endangered species? According to the Services themselves, it is because they are concerned about the possibility that the ESA will be used as a tool to address climate change.<sup>30</sup> There is no question that climate change has become one of the leading threats to biodiversity in the United States and globally.<sup>31</sup> Since the listing of the polar bear as a threatened species, in large part because of the impacts of climate change on its sea ice habitat, it has become apparent that it is only a matter of time before the ESA is used to challenge various projects that contribute to climate change, such as federal permitting of new coal-fired power plants. Under the pre-existing regulations, the action agency permitting the plants and the Services might be required to consult about the impacts of those power plants on species such as the polar bear. Of course, it is unclear whether consultation would halt those power plants, require significant changes to the projects, or have no impact at all. But the Services apparently do not want to wait to find out: they have explicitly said that the “essential cause” and “clear and substantial information” standards they have written into the ESA are intended to make it impossible for the climate change impacts of a project to be considered in Section 7 consultation.<sup>32</sup> In particular, the “essential cause” standard would make it impossible to prove that any particular project would result in climate change impacts on a particular species, given the relatively small fraction of total global greenhouse gas emissions that most individual projects would contribute.

There is a legitimate debate to be had over how well the current structure of the ESA serves to address climate change in general, or climate change impacts on listed species in particular. However, the Services’ proposed fix is worse than the potential problem because it is overbroad—as noted above, it may have the impact of allowing action agencies to ignore a wide range of other, serious impacts on listed species. If the Services truly believe that the ESA is not a proper tool to address climate change, the solution is not to draft regulations that are both harmful and likely contrary to the text of the Act, but instead to seek changes from Congress to the law. The Services should step back, reach

---

30. See 73 Fed. Reg. at 47872.

31. See THOMAS LOVEJOY & LEE HANNAH, CLIMATE CHANGE AND BIODIVERSITY (2005); Wayne Hsiung & Cass R. Sunstein, *Climate Change and Animals*, 155 U. PA. L. REV. 1695, 1703 (2007); INTERNATIONAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION, VULNERABILITY: SUMMARY FOR POLICYMAKERS 11; Chris D. Thomas et al., *Extinction Risk from Climate Change*, 427 NATURE 145 (2004) (“[O]n the basis of mid-range climate-warming scenarios for 2050, that 15–37% of species in our sample of regions and taxa will be ‘committed to extinction’”).

32. See 73 Fed. Reg. at 47872.

out to Congress and the wide range of relevant stakeholders, and develop a more effective plan to deal with the interaction of the ESA and climate change.

### *Scope of Consultation*

The Services' primary argument in favor of the new exceptions they draw for the consultation process is two-fold: (1) consultation is often unnecessary or has very limited use for large numbers of actions that have very limited impacts on listed species; and (2) action agencies have developed significant in-house biological expertise to be able to determine when consultation is truly necessary. Accordingly, the Services argue that significant time and staff resources can be saved by streamlining the consultation process through exceptions for actions that will have very limited, very speculative, or beneficial impacts on listed species.<sup>33</sup>

It is unlikely that action agencies will be able to take the place of the Services in conducting consultation analysis. In particular, there are serious concerns that action agencies do not have the appropriate incentives to produce accurate information that will result in decisions that are protective of listed species.

The new text by the Services is likely to have a major impact on consultation under the ESA. For instance, the new text would eliminate consultation in areas where the effects of a proposed action “[a]re not capable of being measured or detected in a manner that permits meaningful evaluation.” However, as noted above, situations in which there is sparse high-quality information about the potential impacts of proposed human activities on listed species are common. In such cases, consultation with the Services, who have specialized expertise to evaluate what data does exist, helps to ensure that the limited data that is available is not dismissed based upon policy and economic reasons.

While it may well be that many action agencies have significant in-house expertise in wildlife biology and related fields today—certainly more than in the past—there are questions about the Services' assertion that those agencies will apply that expertise in a manner similar to the Services. As noted above, ample data with respect to most listed species is not always available at the time of consultation. It is no surprise that the perspectives, training, and goals of the individuals interpreting limited data will affect those interpretations, leading to systematic skews and biases.<sup>34</sup> The staff members of action agencies such as the Forest Service

---

33. See *id.* at 47871. The Services have not provided any data to support their claims about the burden that consultation places or its lack of usefulness.

34. See Holly Doremus, *Science Plays Defense: Natural Resource Management in the Bush Administration*, 32 *ECOLOGY L.Q.* 249, 278–79 (2005); see also Michael A. McCarthy et al., *Comparing Predictions of Extinction Risk Using Models and Subjective Judgments*, 26 *ACTA*

(“FS”), Bureau of Land Management (“BLM”), and the Corps of Engineers are employees of large organizations with very different missions and goals from the Services and are subject to very different institutional pressures. Accordingly, it is quite possible, even likely, that the different missions of these action agencies will result in their employees—even in-house biologists—reaching very different conclusions as to the impacts of proposed actions on listed species given the sparse data they often have to work with.<sup>35</sup> One likely outcome of the changes to the consultation process is that the employees of action agencies will either not interpret the limited available data as showing a possibility of adverse effects to listed species, or alternatively might not even develop information in the first place about negative impacts to listed species from proposed actions. This type of information about the adverse effects of proposed actions to listed species interferes with the performance of activities by the action agencies that would advance their missions. Information about potential adverse effects to listed species will be inconvenient and therefore downplayed, ignored, or never collected in the first place absent external review by the Services through the consultation process.<sup>36</sup>

We have already seen evidence of this dynamic in a prior, limited experiment by the Services that allowed several action agencies, including BLM and FS, to conduct their own analyses of impacts of proposed actions on listed species: the “Counterpart Regulations” implemented in 2004 and 2005.<sup>37</sup> A recent assessment by the Services of the implementation of the Counterpart Regulations was quite critical, finding that action agencies regularly failed to provide adequate analyses of the potential impacts of proposed actions on listed species.<sup>38</sup>

Many officials within the Services likely are skeptical of the changes. In a recent Government Accountability Office (“GAO”) report on the consultation process, multiple officials of the Services told GAO that they believed that the consultation process was important precisely because

---

OECOLOGICA 67 (2004) (finding that subjective judgments by scientists as to the risk of extinction of species based on limited data were consistently biased).

35. See Holly Doremus, *Science Plays Defense: Natural Resource Management in the Bush Administration*, 32 ECOLOGY L.Q. 249, 282–87 (2005).

36. See Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple Goal Agencies*, 33 HARV. ENVTL. L. REV. (forthcoming 2009), (noting that mission orientations of agencies will often lead them to ignore or not develop information about the impacts of their activities where that information would interfere with accomplishment of their mission).

37. Joint Counterpart Endangered Species Act § 7 Consultation Regulations, 68 Fed. Reg. 68, 254 (Dec. 8, 2003) (codified at 50 C.F.R. pt. 402.30). The Services relied on nearly identical rationales in proposing the Counterpart Regulations.

38. For instance, the Services found that *none* of the ten biological assessments that had been prepared by the action agencies (FS or BLM) adequately described the area of the proposed action, the effects of the proposed action, the listed species that might be affected by the proposed action, or used the best available science.

officials in action agencies did not bring the same conservation-oriented perspective to their analyses that the Services officials did.<sup>39</sup>

The key problem here is that if action agencies do not develop information about the potential impacts of proposed projects on listed species—or interpret limited data in a way to minimize those impacts—there will never be the kind of information that is necessary to determine whether federal actions are helping or harming listed species. And without that information, the ESA simply cannot be implemented, by action agencies, the Services, or citizens in general.

#### CONCLUSION

The Services received hundreds of thousands of comments on their proposed changes by the close of the comment period in mid-October. The Services moved as quickly as possible to review those comments in order to finalize the regulations before the transition to the new Administration in January 2009.<sup>40</sup>

The new regulations are already the subject of litigation,<sup>41</sup> and there are serious questions of the legality of the changes. For instance, the regulations appear to create exemptions from the consultation requirement of the ESA, exemptions that would be contrary to the plain language of the statute.<sup>42</sup> Whatever the outcome of that litigation, the Services should reconsider the proposed regulations under the guidance of the new Administration.

---

39. See U.S. GEN. ACCOUNTING OFFICE, *Endangered Species: More Federal Management Attention Is Needed to Improve the Consultation Process* at 43–53 (2004); see also *id.* at Appendix II (DOI comments noting that the “bulk of the time in consultations is usually spent working with the action agencies to determine *how* their proposed actions will affect the conservation needs of the species” and adding that while DOI “very much respects the expertise” of many action agencies, “*this expertise, the information available, and the perspective of [action agencies] typically differ from the Services.*” (emphasis added)).

40. See Dina Cappiello, *Inside Washington: Fast Readers Wanted*, INT’L HERALD TRIB., Oct. 21, 2008, available at <http://iht.nytimes.com/articles/ap/2008/10/21/america/Bush-Endangered-Species.php> (noting that the Services plan to review over 200,000 comments on the proposed rules in 32 hours).

41. See Press Release, Cal. Office of the Att’y Gen., Attorney General Brown Sues to Overturn Administration Rules Undermining Endangered Species Act (Dec 29, 2008), <http://www.ag.ca.gov/newsalerts/release.php?id=1644> (lawsuit filed by Cal. A.G.’s office); see also Press Release, Ctr. for Biological Diversity, Bush Administration Finalizes Regulations Gutting Protection for Nation’s Endangered Species: Conservation Groups File Immediate Challenge to 11th Hour Reductions in Protection for Nation’s Wildlife (Dec. 11, 2008), [http://www.biologicaldiversity.org/news/press\\_releases/2008/endangered-species-regulations-12-11-2008.html](http://www.biologicaldiversity.org/news/press_releases/2008/endangered-species-regulations-12-11-2008.html) (lawsuit filed by environmental groups).

42. See Endangered Species Act of 1973, Pub. L. No. 93-20, § 7(a)(2), 16 U.S.C. § 1536(a)(2) (laying out consultation requirement); Cynthia A. Drew, *Beyond Delegated Authority: The Counterpart Endangered Species Act Consultation Regulations*, 37 ENVTL. L. REP. 10483 (2007) (questioning legality of similar changes made for Counterpart Regulations).