

**Statement of Michael J. Bean, Principal Deputy Assistant Secretary for Fish and  
Wildlife and Parks, Department of the Interior**

**Before the House Natural Resources Committee**

**Oversight Hearing**

***Federal Agencies' Selective Enforcement of ESA Consultation***

**July 29, 2015**

Introduction

Chairman Bishop, Ranking Member Grijalva, and Members of the Committee, I am Michael J. Bean, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks at the Department of the Interior (Department). I appreciate the opportunity to testify before you today on section 7 of the Endangered Species Act of 1973 (ESA) and on the interagency consultation process it employs. As I will describe in greater detail below, the interagency consultation process has largely achieved the congressional purpose of ensuring that federal agency actions do not imperil the survival and recovery of endangered species; and it has contributed to the Act's record of success in moving species off the road to extinction and onto the path to recovery.

America's fish, wildlife, and plant resources belong to all Americans, and ensuring the health of imperiled species is a shared responsibility for all of us. In implementing the ESA, the U.S. Fish and Wildlife Service (Service) endeavors to adhere rigorously to the congressional requirement that implementation of the law be based strictly on science. At the same time, the Service has been responsive to the need to develop flexible, innovative mechanisms to engage the cooperation of private landowners and others, both to preclude the need to list species where possible, and to speed the recovery of those species that are listed. The Service remains committed to conserving America's fish and wildlife by relying upon the best available science and working in partnership to achieve recovery.

Some aspects of that record are worth noting at the outset. Already in this Administration, more species have been taken off the endangered list due to recovery than in any prior Administration. Though still endangered, many other species – among them the California condor, black-footed ferret, whooping crane, Florida manatee, Kirtland's warbler, Kemp's ridley sea turtle, and Florida panther – have had their populations increase to or near their highest levels in decades. Scores of other species, like the dunes sagebrush lizard, after having been identified as candidates for federal protection, were ultimately determined not to need that protection as a result of conservation efforts spurred by the potential prospect of listing. Most importantly, nearly all of the plants and animals protected by the Endangered Species Act are still with us. They still have a fighting chance for survival, despite the many threats that beset them.

When Congress enacted the ESA, it envisioned creating, “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] a program for the conservation of such endangered species and threatened species,” and placed the responsibility of conserving species that are in danger of extinction or likely to become so in the foreseeable future upon all federal agencies by establishing a duty of federal agencies to ensure that their actions are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its designated critical habitat.

Section 7 of the ESA - Interagency Cooperation - plays an integral role in accomplishing the goals of the ESA. The Service, one of the agencies responsible for implementing the ESA, assists federal agencies comply with the requirements of the ESA by consulting on thousands of federal actions each year. Through these consultations, unintended and avoidable harm to endangered and threatened species is avoided. And most of these consultations do not lead to substantial changes to project design or implementation. The vast majority of our ESA work consists of technical assistance that usually results in minimal modifications to a project in order to avoid project impacts to listed species or designated critical habitat. In addition, the majority of our informal and formal consultations are completed in a timely fashion.

The Department and the Service are committed to making the ESA work for the American people to accomplish its purpose of conserving threatened and endangered species and protecting the ecosystems upon which they depend. In addition to working diligently to complete consultations in a timely manner, under the statutory timeframes, the Department, through the Service, has created a number of tools such as the use of conference opinions prior to listing to make consultation more efficient and has published regulatory changes that continue the Administration’s broader agenda for improving implementation of the ESA.

### Purpose of Consultation

Congress, with the passage of the ESA, placed the responsibility of conserving threatened and endangered species upon all federal departments and agencies and required them to “utilize their authorities in furtherance of the purposes of this Act.” Congress assigned a special responsibility to federal agencies – to ensure that their actions neither jeopardize the continued existence of listed species nor destroy or adversely modify their critical habitat. Congress also entrusted the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the Services) to implement the ESA, and through section 7, the Services serve as technical advisors on threatened and endangered species, so federal agencies can fulfill their responsibilities of conserving these species.

Consultation is the procedural mechanism by which “action agencies” engage the Services as necessary to ensure compliance with their responsibilities under the ESA. Specifically, section 7 (a)(1) of the ESA charges federal agencies to aid in the conservation of listed species, and section 7 (a)(2) requires the agencies, through consultation with the Services, to ensure their activities are not likely to jeopardize the

continued existence of listed species or destroy or adversely modify designated critical habitats.

Section 7 of the ESA is entitled, “Interagency Cooperation,” and the Services are responsible for working with and assisting all federal agencies in carrying out their duties under the ESA. However, the title of this hearing reflects a misapprehension of the consultation process, as neither the Fish and Wildlife Service nor the National Marine Fisheries Service “enforces” section 7. They advise and assist federal agencies in carrying out their responsibilities under section 7, but it is ultimately the responsibility of the action agency to determine whether to consult and whether to adopt the Services’ recommendations.

#### The Consultation Process – Sec. 7(a)(2)

The scope of federal actions subject to the consultation process is broad – it applies to any discretionary action authorized, funded or carried out by a federal agency. Because of this broad scope, the Service provides technical assistance to tens of thousands of projects each year. Between 2008 and 2014, the Service provided technical assistance on over 100,000 projects; conducted nearly 80,000 informal consultations; and conducted nearly 7,000 formal consultations.

Under regulations that were jointly promulgated by the Services and that have been in place since 1986, consultation begins with the determination, made by the action agency, as to whether a proposed federal action may affect a listed species or its critical habitat. If the action agency determines that its proposed action will not affect a listed species or its critical habitat, it has no further consultation obligation. The concurrence or assent of the Services is not required in order for an action agency to conclude that its action does not meet the “may affect” test.

Although action agencies are solely responsible for making the threshold “may affect” determination, they may find useful the guidance on the consultation process embodied in a 2008 formal legal opinion by the Interior Department Solicitor. That guidance notes that in determining whether a proposed action may affect listed species or designated critical habitat, an action agency must consider both direct and indirect effects of the action. As the Solicitor noted, although “direct effects” are undefined in the regulations, they are commonly understood to refer to “effects that are the immediate and natural consequences of the taking of the proposed action.” Thus, for example, the immediate and natural consequence of closing the gates on a newly constructed dam would be to inundate the reservoir area behind the dam. Indirect effects, on the other hand, are defined in the joint regulations, and they are defined rather narrowly to refer to effects that are both “caused by the proposed action and . . . reasonably certain to occur.” Where future effects upon listed species or designated critical habitats depend upon subsequent intervening actions, such as actions by states, private interests, or both, the task of distinguishing those effects that are reasonably certain to occur from those that are more uncertain and speculative is often not easy. However, the judgment reflected in the joint

regulations since 1986 is that action agencies are the appropriate entities for making such determinations at the threshold “may affect” stage.

### *Technical Assistance and Informal Consultation*

In 2014, the Service provided technical assistance on more than 11,000 projects, completing those actions in a median of 8 days. Technical assistance includes actions such as providing species lists, providing information on potentially affected species, or recommending surveys or conservation measures to reduce adverse effects on species.

In 2014, the Service also engaged in over 9,500 informal consultations. Informal consultation is an optional process in which the Service assists action agencies or a designated non-Federal representative in determining if their projects are likely to adversely affect listed species or designated critical habitat. Oftentimes, the Service is able to help action agencies modify or adjust proposed actions to eliminate any potential adverse effects upon listed species or critical habitat. In these cases, if the action agency subsequently determines that the proposed action is “not likely to adversely affect” listed species or critical habitat, and the Service concurs with that determination, the action agency has no further consultation obligation. The Service completed 79 percent of the 9,500 informal consultations in 2014 within 30 days. Those projects that fall outside of the 30-day range tend to be complex, involving more than one listed species.

### *Formal consultation*

If a proposed action is likely to adversely affect a listed species or designated critical habitat, “formal consultation” between the action agency and the Service is required. The ESA requires that consultation be completed within 90 days, and the regulations allow an additional 45 days for the Service to prepare a biological opinion. The biological opinion provides the Service’s analysis and findings of whether or not the proposed action is likely to jeopardize the continued existence of the species or destroy or adversely modify designated critical habitat. If a jeopardy or adverse modification determination is made, the Service works with the action agency to identify any reasonable and prudent alternatives that would avoid the likelihood of jeopardy or adverse modification and could allow the project to move forward. Between 2008 and 2014, the Service engaged in 6,982 formal consultations. In those years, only 3 of those consultations resulted in a jeopardy or adverse modification final opinion.

If a proposed action is reasonably certain to cause incidental take of a listed animal and the Service concludes that the proposed action (or the implementation of any reasonable and prudent alternatives) is not likely to jeopardize listed species or adversely modify or destroy critical habitat, the Service will issue along with the biological opinion an incidental take statement that exempts the anticipated take from the ESA’s take prohibitions, as long as reasonable and prudent measures and associated terms and conditions to minimize the take are followed. In other words the project can comply with the ESA, even though it will likely take listed species, as long as there is no jeopardy caused and as long as reasonable measures are taken to minimize the take. Service staff,

working through the consultation process, play a key role working with the project proponents to find reasonable ways to minimize take.

A recent example of the Service conducting a challenging formal consultation was in Russell County, Kentucky. The Service completed a biological opinion on the effects of restoring water levels in Lake Cumberland on the duskytail darter, which allowed the U.S. Army Corps Engineers (Corps) to be positioned to capture the spring rains necessary to refill the lake to its normal recreation season elevation after making repairs to Wolf Creek Dam. In this case, the Corps and the Service worked together closely to implement an expedited review and analysis process to complete the consultation in only 45 days - an extraordinary pace - because of the recognized importance of Lake Cumberland to the local and regional economies of Kentucky and Tennessee and citizens who live and work in communities around the lake.

### *Programmatic Consultations*

Programmatic consultation is a generic term referring to consultations on federal programs, plans, or regulations that establish guidelines, provide direction, or impose procedures that control subsequent actions that may affect listed species or designated critical habitat. Determining whether consultation is required for such programmatic actions usually involves consideration of the potential for indirect effects, i.e., effects that, under joint regulations, are caused by the programmatic action, occur later in time, and are reasonably certain to occur. Given the large variety of programmatic actions carried out by federal agencies, some of which are highly complex in nature, assessing causation and reasonable certainty of effects to listed species or designated critical habitats can be challenging and complex. While the Service can assist federal agencies in that assessment, and often does so with agencies that lack experience and expertise in section 7 consultation, we ultimately depend upon the action agencies to establish the effects of their programs, plans, or rules and determine whether their actions trigger the need for section 7 consultation.

An example of a recent programmatic consultation involving a rulemaking was our consultation with the Environmental Protection Agency (EPA) on the promulgation of new regulations governing permitting of cooling water intake structures pursuant to section 316(b) of the Clean Water Act. EPA determined that consultation was warranted, and we worked with them through the formal consultation process to create procedures for EPA, state permitting authorities, and the facilities to follow that would ensure that no permits would issue that were likely to jeopardize listed species or destroy or adversely modify designated critical habitat. This process allowed EPA to move forward with their new regulation while ensuring their action was in conformance with the ESA.

### Section 7(a)(1)

Section 7(a)(1) of the ESA requires all federal agencies to utilize their authorities, in consultation with the Fish and Wildlife Service and the National Marine Fisheries Service

to develop and carry out programs to conserve all species listed under the ESA. The purpose of Section 7(a)(1) conservation programs is to improve endangered and threatened species baselines (population and habitat) within the scope of federal action-agency authorities, thereby contributing to the conservation of all species within that habitat.

Conservation plans developed by federal agencies to meet the goals of Section 7(a)(1) are another example of the flexibility we are using within the ESA to achieve positive conservation results. They are good for our mission, good for conservation, and good for our economy. The plans provide greater predictability and efficiency to federal agency partners and put in place a transparent and continuous process of effective interagency communication, review, and feedback at all levels of management. This ensures a strong adaptive management component of cost-effective conservation program execution that helps streamline the 7(a)(2) consultation process.

The Corps and the Service are committed to improving the efficiency of civil works project operations and the effectiveness of ESA compliance through the integration of conservation planning in development of Operation Plans for Corps projects, using existing Operation and Maintenance authorities. In 2013, the Corps' Mississippi Valley Division released the Conservation Plan for the Interior Least Tern, Pallid Sturgeon, and Fat Pocketbook Mussel in the Lower Mississippi River. The plan outlines a process to conserve the three endangered species within the footprint of the Channel Improvement Program in the Lower Mississippi River. The Service conducted a consultation under Section 7(a)(2) of the ESA with the Corps on their conservation plan.

The consultation process required close inter-agency communication and collaboration during all phases of development. Over the course of the consultation, it became apparent the very programs that most significantly affected the endangered species and their river habitats could be important and effective tools to maintain and enhance its ecological functions. This resulted in the identification of conservation opportunities that could be effectively incorporated into existing channel improvement or maintenance projects, with little to no additional program costs, and with no negative impact to the Corps' primary flood management and navigation safety missions. It also resulted in significantly improved habitat and population baselines for all three endangered species within the Lower Mississippi River portion of their ranges. Largely as a result of this work, the Service recommended in a five-year status review last year that the Interior Least Tern should be delisted. This consultation demonstrates that numerous benefits for species, their ecosystems, and agencies can be derived under section 7(a)(1). It also demonstrates the key role played by Service staff working with the action agencies. Species and projects always benefit when technically competent, innovative, and engaged Service staff are involved.

### Improving Consultations

As part of our ongoing efforts to improve implementation of the ESA, the Services recently finalized the regulations governing Incidental Take Statements for listed species.

The final rule clarified and codified the current policy of the Services regarding the use of “surrogates,” and addressed recent court decisions related to Incidental Take Statements for “programmatic” federal actions. These changes will improve the ESA’s effectiveness and allow for flexibility in how the Services prepare Incidental Take Statements.

The Services also jointly announced on May 18, 2015 a set of initiatives to increase regulatory predictability, increase stakeholder engagement, and improve science and transparency. Among the actions are proposed revisions to interagency consultation procedures to streamline the process for projects, such as habitat restoration activities, that result in a net conservation benefit for the species.

### Conferencing for Candidate Species

The Service and the Natural Resources Conservation Service (NRCS) began a partnership, later named as “Working Lands for Wildlife” (WLFW), in 2009 to confer on the greater sage-grouse and Gunnison sage-grouse. Work began on the conference report for the lesser prairie chicken the next year and an additional five species - New England cottontail, bog turtle northern population, golden-winged warbler, gopher tortoise, and southwest willow flycatcher - were added to the partnership in 2011. WLFW provides landowners with technical and financial assistance to achieve specific conservation goals for at risk species.

The Service and NRCS used a unique process for working together to expedite the section 7 work. For each of the species covered, based upon information from species experts, NRCS and Service staff worked together to “condition” the NRCS practices used by landowners to both conserve the species and increase productivity of the land. A biological opinion or conference report (similar to a biological opinion, but for proposed species and critical habitat) was then developed depending on the status of species.

Agreements between landowners and NRCS are now being implemented that include plans for conservation practices covered under the ESA. To further bolster WLFW, the two agencies developed the term “regulatory predictability” that clarified for participating landowners that they would be provided coverage for incidental take under the ESA as long as they implemented the “conditioned” practices.

### ESA Consultation Budget

The consultation process works to conserve species and allow action agencies to avoid jeopardizing the existence of a listed species and help achieve the imperative goals of the ESA. This highly beneficial, important process depends on having skilled people with training, technical expertise, institutional knowledge, and strong communication ability stationed and working in field offices across the country.

During Fiscal Year (FY) 2014, the Service concluded 9,249 informal consultations and another 323 informal consultations were on going at the end of the fiscal year. Through

April 15, 2015, the Service had concluded 158 formal consultations to date, with another 195 formal consultations on-going.

To address the substantial workload, the President's FY 2016 budget requested an increase of \$10.4 million for consultation and planning activities. The Service needs to have adequate staffing to address the increased environmental reviews and permitting workload associated with projects related to economic recovery, job creation and infrastructure improvements. The Service needs these additional resources and staffing so that we can facilitate environmentally sound development activities through timely consultations and environmental reviews.

### Conclusion

Thank you for your interest in endangered species conservation and ESA implementation, and for the opportunity to testify.