

Committee on Natural Resources

Rob Bishop, Chairman
Hearing Memorandum

July 27, 2015

To: All Natural Resources Committee Members

From: Majority Committee Staff — Michael Freeman, ext. 69750

Hearing: Full Committee Oversight hearing on “*Federal Agencies’ Selective Enforcement of ESA Consultation*”

The Committee on Natural Resources will hold a full committee oversight hearing to hear testimony on *Federal Agencies’ Selective Enforcement of ESA Consultation* on **Wednesday, July 29, 2015, at 10:00AM, in Room 1324, Longworth Office Building.**

Policy Overview

- The Endangered Species Act (“ESA”) requires consultation with the U.S. Fish and Wildlife Service (“FWS”) and/or the National Marine Fisheries Service (“NMFS”) under section 7 of the ESA when any discretionary federal action may affect a listed species or designated critical habitat.
- In Fiscal Year 2010, the FWS assisted federal agencies in more than 30,000 section 7 consultation actions – a large percentage of which were for permit applications.¹ Consultation is also required on many agency rulemakings. The FWS has budgeted for over 650 employees and NMFS has over 450 devoted to ESA and related statutory interagency consultations.²
- While the Environmental Protection Agency (“EPA”) acknowledges it “works closely with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service on consultation for protection of endangered species through a Memorandum of Agreement,”³ the EPA did not consult with the FWS on effects its rules for carbon emissions from new and existing power plants may have on listed species.
- In response to requests, EPA has not explained why it has not begun section 7 consultation with the FWS on these wide-ranging and hugely impactful rules.
- To date, the FWS has not requested that EPA initiate section 7 consultation for the impacts of the rules on listed species.

¹ <https://www.fws.gov/endangered/esa-library/pdf/consultations.pdf>

² www.fws.gov/budget/2015/FY2016_FWS_Greenbook.pdf;

http://www.osec.doc.gov/bmi/budget/FY_2016_CBJ.html

³ <http://www2.epa.gov/file/epa-fy-2016-congressional-justification>, p. 957.

Witnesses Invited

Mr. Michael Bean

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks
U.S. Department of the Interior
Washington, D.C.

Mr. Sam Rauch

Deputy Assistant Administrator for Regulatory Programs
NOAA Fisheries
Washington, D.C.

Ms. Gina McCarthy (Invited)

Administrator
Environmental Protection Agency
Washington, D.C.

Background/Supporting Information/Issues

I. ESA Section 7 Consultation

Section 7 of the Endangered Species Act (“ESA”) requires each federal agency to consult with the Secretary of the Interior or Commerce, as applicable, to insure that any action it carries out is not likely to jeopardize the continued existence of any endangered species or threatened species or to destroy or adversely modify species’ critical habitat. This consultation process imposes an affirmative duty on federal agencies to conserve ESA-protected species, is a fundamental component of the ESA’s statutory scheme, and has been called the “heart of the ESA.”⁴ Consultation is also routine in the context of agency action. In Fiscal Year 2010, the Fish and Wildlife Service (“FWS”) assisted federal agencies in section 7 consultation on more than 30,000 occasions – a large percentage of which were for permit applications.⁵ Consultation is also required on many agency rulemakings.

An agency has a duty to consult under section 7 of the ESA for any discretionary agency action that “may affect” a listed species or designated critical habitat.⁶ “May affect” is a low threshold for triggering consultation.⁷ An agency may only avoid the consultation requirement if it determines that its action will have “no effect” on a listed species or critical habitat. Even then, the agency must obtain the Service’s concurrence on its “no affect” determination.⁸ Any possible effect, whether beneficial, benign, adverse or of an undetermined character triggers the

⁴ *Western Watersheds Project v. Krayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011).

⁵ <https://www.fws.gov/endangered/esa-library/pdf/consultations.pdf>

⁶ 50 C.F.R. 402.10 – 402.16; *see also Karuk Tribe of Cal. v. United States Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012).

⁷ *Id.*

⁸ *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998) (“Formal consultation is excused only where (1) an agency determines that its action is unlikely to adversely affect the protected species or habitat, and (2) the relevant Service (FWS or NMFS) concurs with that determination.”).

requirement.⁹ If a “may affect” analysis triggers the consultation requirement, the next step is to determine whether the required consultation needs to be formal or informal.

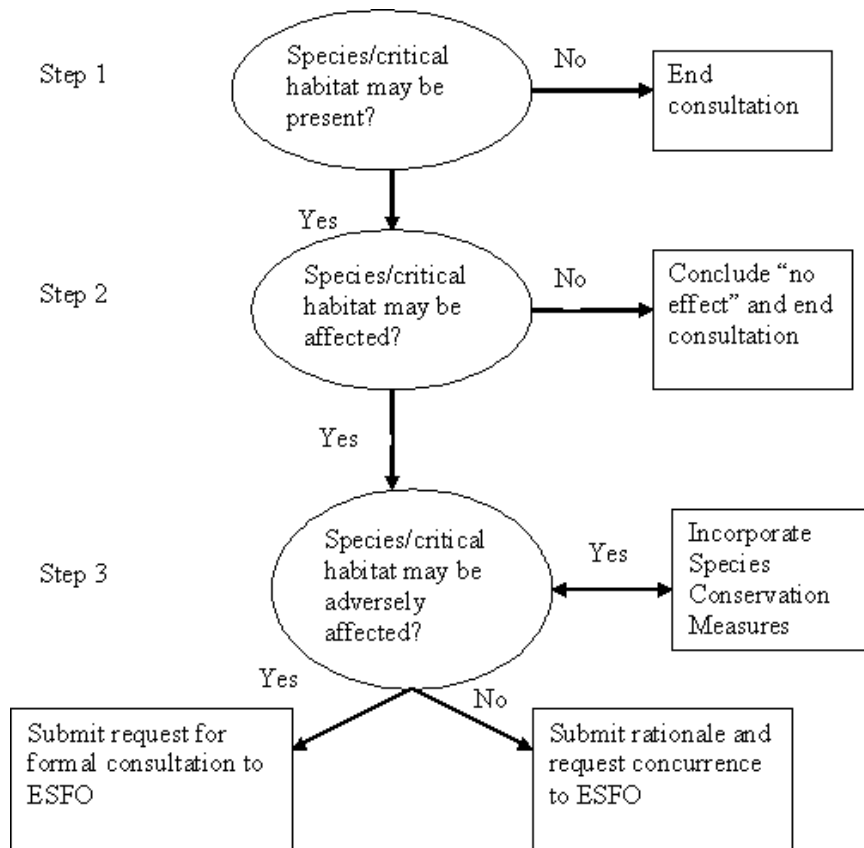


Fig. 1 Consultation flowchart

Most consultations begin as *informal* consultations with the FWS or NOAA Fisheries. If, during this initial informal consultation, the agency determines that the action is “likely to adversely affect” listed species or critical habitat, then a *formal* consultation is required. A *formal consultation* consists of the action agency sharing information with the FWS or NOAA Fisheries (dependent upon the species and which agency has jurisdiction over it) and the appropriate Service formulating a biological opinion on whether the specified action jeopardizes the continued existence of any listed species. The Service must complete the consultation within 90 days and 45 days to write the opinion.

In the biological opinion, the Service looks at all effects of the agency action, including the cumulative effects of other non-Federal actions that may occur in the action area, including state, tribal, local, or private activities that are reasonably certain to occur in the project area. The purpose of the biological opinion is to determine if the effects of the agency action will jeopardize the continued existence of any listed species. Under the ESA, jeopardy occurs when

⁹ *Id.*

an action is reasonably expected, directly or indirectly, to diminish a species' numbers, reproduction, or distribution so that the likelihood of survival and recovery in the wild is appreciably reduced.

II. *EPA Clean Air Act Rules and Section 7 Consultation*

The EPA recently proposed two major rules to reduce carbon dioxide emissions from power plants as part of President Obama's Climate Action Plan. These rules will regulate greenhouse gas ("GHG") emissions from both existing¹⁰ and new¹¹ stationary electric utility generating units and are expected to have wide-ranging environmental and economic impacts. In the proposed rule for existing power plants, the EPA concluded that the rule would not affect any listed species or critical habitat, and in the proposed rule for new power plants, the EPA did not address the issue at all.

On March 6, 2014, a letter was sent to EPA and FWS by members of the Senate Environment and Public Works ("EPW") Committee asking 17 questions about the need for and scope of section 7 consultation for the proposed rule for new power plants. The response from the FWS on May 27, 2014, confirmed that EPA had not requested to engage in ESA consultation. EPA's response, dated June 20, 2014, said only that EPA would comply with the ESA. Neither response explained EPA's omission of a "may affect" determination for the proposed rule for new power plants nor included meaningful information necessary to address the EPW Committee's legitimate oversight concerns.

During a March 19, 2015 hearing before this Committee, FWS Director Dan Ashe testified that EPA had not initiated consultation with FWS on the impacts of the two power plant rules on ESA-listed species, including the endangered manatee.¹² At that same hearing, in response to specific questions about the Big Bend Power Plant in Florida, Director Ashe stated that "it is quite obvious that the warm water discharge from [the Big Bend Power Plant] is having a direct and substantial impact on the manatee."¹³ Following that hearing, a letter was sent to Director Ashe that sought to clarify whether FWS intended to request that EPA enter into ESA consultation with the FWS on the two rules.¹⁴

¹⁰ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (proposed June 18, 2014) ("Clean Power Plan").

¹¹ Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1430 (proposed Jan. 8, 2014) ("NSPS Rule")

¹² *Examining the Spending Priorities and Missions of the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration in the President's FY 2016 Budget Proposal: Hearing Before the Subcomms. on Federal Lands and Water, Power and Oceans of the H. Comm. on Natural Resources*, 114th Cong. (2015). The manatee was first listed under the ESA in 1967. See *Endangered Species*, 32 Fed. Reg. 4001 (Feb. 24, 1967).

¹³ *Id.*

¹⁴ Letter from Rob Bishop, Chairman, H. Comm. on Natural Resources, to Dan Ashe, Director, U.S. Fish and Wildlife Service (Apr. 2, 2015), http://naturalresources.house.gov/uploadedfiles/lettertoashe_4_2_15.pdf.

In his April 20, 2015 response, Director Ashe confirmed that FWS had not requested that EPA initiate consultation on the power plant rules and did not intend to do so “because . . . EPA has full knowledge of their Section 7 responsibilities.”¹⁵

On June 11, 2015, House Natural Resources and Senate EPW Committees wrote a joint letter to EPA Administrator Gina McCarthy requesting additional information and documentation regarding EPA’s compliance with the ESA. On July 13, 2015, the EPA responded to that letter, stating that the EPA proposed to determine that its rule on existing power plants would not have effects on listed species that would trigger the consultation requirement. The EPA also noted that it has not finalized its determinations for either rule, and that it believes that any detailed response to these questions would be premature.¹⁶

The specific example of the ESA-listed manatee highlights the Committee’s concern that federal agencies are selectively enforcing the ESA consultation requirement. According to numerous sources, including the U.S. Geological Survey, endangered manatees rely on power plants as a critical source of warm water during winter months. By all accounts, including analysis by the Energy Information Administration, the EPA’s proposed rule for existing power plants will result in the closure of numerous coal-fired generation facilities across the country, and, according to the EPA’s own modeling, will result in the closure of specific facilities designated as warm water refuges for manatees.¹⁷

But it is not just adverse effects like loss of habitat that trigger consultation; beneficial, negligible, or discountable effects also require consultation. In its proposed rule on existing power plants, the EPA, in considering the requirements of the ESA, noted the positive environmental benefits that it expects would result from the rule.¹⁸ The EPA contends that these positive effects are not beneficial effects, as the EPA concluded that consultation was unnecessary. The EPA argued that data was insufficient to draw a causal connection between the reductions in emissions and the effect on endangered species.

However, it is clear that there are ground-level effects of the rule beyond simply a reduction in emissions, including the reasonably foreseeable closure of numerous coal fired generation facilities throughout the country that the EIA and the EPA have both predicted. Whether EPA or the Services plan to assess any of these potential effects on listed species appears to be an unresolved question - a question the Committee hoped EPA and the Services would answer at today’s hearing. Unfortunately, EPA has declined to attend, saying “EPA does not have a role in implementing the Endangered Species Act. For that reason EPA does not have a witness that could speak thoroughly on this topic.” This statement directly contradicts the FWS’s previous assertion that “EPA has full knowledge of their Section 7 responsibilities” and that “EPA, as the expert agency on the Clean Air Act, is best positioned to understand if their

¹⁵ Letter from Dan Ashe, Director, U.S. Fish and Wildlife Service, to Rob Bishop, Chairman, H. Comm. on Natural Resources (Apr. 20, 2015), <http://naturalresources.house.gov/uploadedfiles/asheresponseletter.pdf>.

¹⁶ July 13, 2015 Letter from Janet McCabe, Acting Assistant Administrator, U.S. Environmental Protection Agency.

¹⁷ Parsed File Base Case, available at: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-0219>

¹⁸ Clean Power Plan, 79 Fed. Reg. 34,830 at 34,933. (“The EPA notes that the projected environmental effects of this proposal are positive: reductions in overall GHG emissions, and reductions in PM and ozone precursor emissions (SOX and NOX).”)

rules will affect listed species or designated critical habitat.” These conflicting statements raise concerns about the accountability of the EPA and FWS with regard to their responsibilities and respective statutory obligations under the Endangered Species Act.

At a minimum, significant unanswered questions remain regarding EPA’s failure to consult with the FWS on the potential impacts of these rules to listed species. This hearing not only seeks to provide answers to these unanswered questions, but also to learn more about the ESA consultation process in general, and whether improvements may be needed in how they are implemented.