

# Subcommittee on Oversight and Investigations

Raúl R. Labrador, Chairman

## Hearing Memorandum

March 24, 2017

To: All, Subcommittee on Oversight and Investigations Members

From: Majority Staff, Subcommittee on Oversight & Investigations (x5-7107)

Hearing: Oversight hearing entitled “*ESA Consultation Impediments to Economic and Infrastructure Development*”

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The House Committee on Natural Resources, Subcommittee on Oversight and Investigations will hold an oversight hearing entitled, “*ESA Consultation Impediments to Economic and Infrastructure Development*” on **Tuesday, March 28<sup>th</sup> at 10:00 a.m. in Room 1324 of the Longworth House Office Building.**

### **Policy Overview:**

- This hearing will inform the Committee about challenges created by section 7 consultation processes under the Endangered Species Act.
- Section 7 of the Endangered Species Act requires all federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of [critical] habitat of such species.”<sup>1</sup>
- As a result, literally any federal action, or private action with a federal nexus (such as permits or funding), must “consult” with either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (the Services) about the impact that the project or activity might have upon endangered or threatened species, and/or critical habitat.
- Though the law requires the Services to adhere to a strict timeline (90 days to complete formal consultation and 45 days to complete a biological opinion), often they protract the consultation process for years. Such delays drive up costs, create uncertainty, and impede projects vital to our national interest, to our economy, and to public health and safety. In addition, often unrealistic and unattainable mitigation measures are dictated by the Services in biological opinions that often are not proven to benefit ESA-listed species.
- Delays can be initiated by Service employees at local and regional levels. More oversight at all levels is required to ensure that the Services adhere to timelines as required by law. Delays in the consultation process must not be used to indefinitely prevent projects from moving forward.

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<sup>1</sup> The Endangered Species Act of 1973, 16 U.S.C. § 1536 (1988).

- Litigation (or the threat thereof) can result in additional delays and taxpayer-funded attorneys' fees, even for projects that have completed consultation. Unnecessary litigation and high costs of attorneys' fees - paid to litigants into the hundreds of dollars per hour - makes the law inefficient and ineffective, and can have a chilling effect on future infrastructure and economic development projects.
- The consultation process imposes a substantial financial burden upon the action agency or party, and sometimes projects are cancelled prior to consultation due to the high cost of entry into the process. Attorneys, consultants, and biologists are retained and companies often experience indefinite delays from experiencing a positive return on investments made in the project.
- Inconsistency, increased process and legal costs, and a lack of certainty about the consultation process severely hinders our nation's ability to provide necessary public services and to boost our economy. The Services must strive to increase consistency between regions, adhere to timelines, and hold their employees accountable for completing consultations in an efficient, timely, and effective manner.

**Invited Witnesses:**

*Mr. Doug Stiles*  
 General Manager  
 Hecla Mining  
 Coeur d'Alene, Idaho

*Mr. Jonathan Wood*  
 Staff Attorney  
 Pacific Legal Foundation  
 Arlington, Virginia

*Mr. Ron Calkins*  
 President  
 American Public Works Association  
 Ventura, California

*Mr. Ya-Wei (Jake) Li*  
 Vice President of Endangered Species Conservation  
 Defenders of Wildlife  
 Washington, D.C.

**Background:**

***The Consultation Process***

Any proposed project with a federal nexus (for example, a road that receives federal funding, or a water project that requires a discharge permit) must undergo a section 7

consultation under the Endangered Species Act (ESA). The scope and reach of ESA consultations nationwide are vast. According to the U.S. Fish and Wildlife Service (FWS), in FY 2010 alone, the Service was involved with more than 30,000 ESA consultation actions.<sup>2</sup> The National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) similarly handles so many ESA consultations annually that it has set up a database to track the thousands of actions under its jurisdiction.<sup>3</sup>

To begin the consultation process, the relevant service (either the FWS or NMFS - or both) has **30 days** to determine whether endangered or threatened species and/or critical habitat might be present in the proposed project area, and to relay that information to the action agency or applicant party.

If the Service determines that a species or critical habitat may be present anywhere in the proposed action area, the action agency then has **180 days** to prepare a biological assessment (BA). These are usually prepared by a contractor, with input from the action agency and the services. A BA evaluates the potential effects of the proposed action on the species/habitat, and whether those effects are likely to be adverse.

There are three possible outcomes for a biological assessment:<sup>4</sup>

- *“No effect”*
  - The Service has 30 days after receipt of the completed BA to concur in writing that the proposed action will not affect the listed species or its habitat.
  - Under such circumstances the consultation is considered concluded, though the threat of litigation remains.
- *“Is not likely to adversely affect”*
  - The effects of the proposed action will be “discountable, insignificant, or completely beneficial.”
  - The service has 30 days after receipt of a complete BA to concur with the finding, and at that point the consultation is considered concluded, though the threat of litigation remains.
- *“Is likely to adversely affect”*
  - The proposed action may directly or indirectly result in an adverse effect to a listed species or habitat.
  - Formal Consultation then commences.

If the BA concludes that a proposed action or project is “likely to adversely affect” species or critical habitat, or if the Service fails to concur with the determination reached, the action agency may initiate formal consultation by submitting a written request called an initiation

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<sup>2</sup> <https://www.fws.gov/endangered/esa-library/pdf/consultations.pdf>

<sup>3</sup> <https://pcts.nmfs.noaa.gov/pcts-web/homepage.pcts>

<sup>4</sup> *Id.*

package to the Service. Once initiated, formal consultation must be completed within **90 days**. However, this process is often prolonged far longer than 90 days by the Services.<sup>5</sup>

### *Delays in the Consultation Process*

The Services often claim that the initiation package is incomplete, and thereby delay the start date/time of formal consultation. For example, if the Service claims that there are inadequate studies about the species in question, consultation is delayed until such studies are initiated and completed. Delays of this nature can be indefinite. The Service maintains control over the time period by solely determining when formal consultation has commenced.

The Services may also request extensions to the 90-day timeline after formal consultation has begun. Though the action agency/party must agree to the extension, they are on unequal footing with the Services. In such cases, the party/action agency, in effect, has no alternative other than to agree to the extension, or risk jeopardizing the possibility of approval of their project. Further, the real adverse effects of delay often fall upon project proponents, not upon action agencies and the potential impact of delay, increased costs for example, present threats to project proponents and to the public to which government action agencies are relatively immune.

Much of the consultation timeline and outcome is determined by the Services' local and regional employees. In a 2015 study, the Defenders of Wildlife found that 20% of formal consultations between 2008 and 2015 were delayed longer than the 135 day timeframe.<sup>6</sup> However, this statistic does not account for delays in the Services' commencement of consultation, nor does it account for cases in which the consultations have been subject to an extension imposed by the Services or by agreement.

In addition, some claim that the individual lead biologist on the ESA consultation for a proposed project is the best predictor of variation in duration of the consultation process. It also observed significant variation in the duration of formal consultations among regional service offices.<sup>7</sup>

### *Biological Opinions and "Reasonable and Prudent Alternatives/Measures"*

After formal consultation is completed, the Service has **45 days** to issue a biological opinion (BO). The BO is the documented summary of formal consultation and contains the Service's conclusions as to whether the action will jeopardize the continued existence of a species, and/or result in the adverse modification of critical habitat. Concurrent review of the BO by all relevant agencies is not required, and independent review can further delay the project.

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<sup>5</sup> *Id.*

<sup>6</sup> Jacob W. Malcom and Ya-Wei Li, *Data Contradict Common Perceptions about a Controversial Provision of the U.S. Endangered Species Act*, DEFENDERS OF WILDLIFE (2015) (available at: <https://www.defenders.org/publications/section-7-pnas.pdf>).

<sup>7</sup> *Id.*

If the BO concludes that the action may jeopardize or adversely modify the species or critical habitat in question, then it may require alternative actions in the project's execution that would allow the project to move forward. Such cases are typically referred to as "no jeopardy with reasonable and prudent alternatives." In theory, these actions are tailored to minimize the project's effect on the species or habitat. Some have often criticized measures mandated by the Services in BO's, saying they are neither "reasonable" nor "prudent" in many cases to the successful and timely completion of the proposed action/project. The BO also places limits on takes, and required mitigation measures are put in place.

Projects that the Service finds in a BO may jeopardize or adversely modify habitat most often are stopped by the Services, at their discretion, if no reasonable or prudent alternatives or mitigation options are identified or agreed upon. In such case, the Services force consultation to be reinitiated, even after it is completed, when the "take" of species exceeds that which was authorized during formal consultation, new information becomes available that changes the "may affect/jeopardize" determination, if the action affects species or habitat in a manner not considered in the biological opinion, or, if a new species is listed or a critical habitat is designated in the area in which the project is sited.

### *ESA Litigation*

Litigation can further delay (or even block) a project for months, years or indefinitely, even after it has completed the lengthy consultation process. Such delays can have profoundly negative consequences for a variety of projects, including those that would protect or improve habitat for the species that ESA was designed to protect.

ESA litigation results in tens of millions of taxpayer dollars being spent for attorneys' fees and costs that would more productively be used for the proposed action or species recovery.<sup>8</sup> In addition, several of the most litigious groups that have filed ESA lawsuits against the Services have simultaneously also been awarded federal grants by the very federal agencies they sue. For example, during the Obama Administration in 2012 alone, according to the FWS, the Defenders of Wildlife was awarded three FWS grants totalling \$25,000, the WildEarth Guardians was awarded two grants totaling \$100,000 and the National Wildlife Federation was awarded 11 grants totaling over \$350,000. These groups have filed numerous ESA lawsuits challenging projects under consultation with the FWS or NMFS.<sup>9</sup>

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<sup>8</sup> <http://www.gao.gov/products/GAO-12-417R>

<sup>9</sup> Dan Ashe, response to Question for the Record;

[http://naturalresources.house.gov/uploadedfiles/fy\\_2013\\_budget\\_qfrs\\_to\\_doi\\_km.pdf](http://naturalresources.house.gov/uploadedfiles/fy_2013_budget_qfrs_to_doi_km.pdf)