



Report to Congress Review of the ESA Interagency Section 7 Consultation Process and Recommendations for Improving the Process

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Executive Summary

One of the most substantive provisions in the Endangered Species Act is the affirmative obligation set forth in section 7(a)(2) that Federal agencies, in consultation with the Fish and Wildlife Service or the National Marine Fisheries Service, ensure that their actions are not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. The interagency consultation process required by the Act and described in our regulations at 50 CFR Part 402 assists Federal agencies with carrying out their agency activities in compliance with the ESA.

Nationally, every FWS regional office and Ecological Services field office is working to adapt to growing consultation workloads and a declining workforce. Since 2003, our environmental review staff has decreased by 20 percent, while the number of species listed as endangered or threatened under the ESA has risen by 39 percent. This degradation of capacity has made it increasingly difficult to achieve our mission and meet the needs of Federal agencies and applicants in a timely manner. The Bipartisan Infrastructure Law (BIL) and Inflation Reduction Act (IRA) are substantially increasing the FWS's environmental review workload, primarily through additional ESA section 7 consultations. Neither the IRA nor the BIL include funding for section 7 consultations for projects funded by Federal agencies other than the Department of the Interior (DOI) (with the exception of the wildland fire management provisions of the BIL), therefore, we are working to address this by engaging with Federal agencies to expand our consultation capacity by pursuing funding from those Federal agencies so that we may review their BIL and IRA projects in a timely manner.

Funding enacted in FY 2023 provided a \$5 million increase for environmental reviews, the equivalent of an additional 30 biologists nationally. Another \$5 million provided under section 50303 of the IRA will support an additional 30 biologists, including 3 additional positions in the West Virginia office, to provide section 7 consultations for projects being implemented by specific DOI bureaus. However, these increases are insufficient to meet demand. Enacting the President's FY 2024 requested budget increase of \$50.516 million will ensure FWS project review and permitting functions are not bottlenecks in the environmental clearance process for priority economic revitalization projects. In the interim, the FWS is aware of, and doing its best to address the consultation workload and will continue our work to protect our nation's biodiversity while supporting the needs of the public.

Congressional Directive: “Section 7 Consultations/Recovery - While the Committees recognize the FWS is working to clear the backlog, the FWS is directed to report to the Committees within 90 days of enactment of this Act on a review of the process and provide recommendations on ways to improve and expedite the process.”

Introduction

When Congress passed the Endangered Species Act (ESA) in 1973, it recognized that our rich natural heritage is of “esthetic, ecological, educational, recreational, and scientific value to our Nation and its people.” It further expressed concern that many of our Nation’s native plants and animals were in danger of becoming extinct. The purpose of the ESA is to protect and recover imperiled species and the ecosystems upon which they depend. The Interior Department’s U.S. Fish and Wildlife Service (FWS) and the Commerce Department’s National Marine Fisheries Service (NMFS) administer the ESA. The FWS has primary responsibility for terrestrial and freshwater organisms, while the responsibilities of NMFS are mainly marine wildlife such as whales and anadromous fish. Under the ESA, species may be listed as either endangered or threatened. “Endangered” means a species is in danger of extinction throughout all or a significant portion of its range. “Threatened” means a species is likely to become endangered within the foreseeable future. All species of plants and animals, except pest insects, are eligible for listing under the ESA. As of February 2023, the FWS has listed 2,375 species worldwide as endangered or threatened, of which 1,678 occur in the United States. In addition, when the Services proposes listing a species pursuant to the ESA, we are required to consider whether there are geographic areas that contain essential features or areas that are essential to conserve the species. If so, we may propose designating these areas as “critical habitat.” As of February 2023, the FWS has designated critical habitat for 812 species.

Section 7 of the ESA

Section 7 of the ESA requires Federal agencies, in consultation with and with the assistance of the FWS (or NMFS for marine species), to ensure any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of endangered or threatened species (together, listed species) or result in the destruction or adverse modification of critical habitat. Federal agencies must consult with the FWS or NMFS (hereafter, the Services) when the Federal agency determines their project may affect a listed species or designated critical habitat. As part of that process, the Services work with the Federal agency and applicants to initiate and complete consultation. This is done either through technical assistance, informal consultation, or formal consultation.

Technical assistance is the act of the Services providing any type of information or assistance regarding listed, proposed, or candidate species or proposed or designated critical habitat to a Federal agency, applicant, or designated non-Federal representative or other interested party. The purpose of technical assistance is to better inform project planning and implementation before, during, and after section 7 consultation. It is a general coordination term, not defined or discussed in the ESA or regulations. It does not have any particular initiation point or required timeline for

conclusion, but typically characterizes the period of time before the Federal agency makes a “may affect” determination. Technical assistance helps Federal agencies and applicants proactively design projects that avoid or minimize impacts to listed species or critical habitats, thus saving time and money in project development and implementation.

Informal consultation is defined in 50 CFR 402.02 as an optional process that includes all discussions, correspondence, etc., between the Services and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation is required. If at any point the Federal agency determines that their action has no effect on listed species or critical habitat, no further consultation with the Services is necessary. Furthermore, at the conclusion of informal consultation, if the Federal agency determines their action may affect, but is not likely to adversely affect, listed species or designated critical habitat, and the Service concurs in writing, then the consultation process concludes. However, if the Federal agency determines their action is likely to adversely affect listed species or designated critical habitat, or the Service does not concur with the Federal agency’s determination the action is not likely to adversely affect listed species or designated critical habitat, formal consultation is required.

Formal consultation is defined in 50 CFR 402.02 as a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the ESA. Biological opinions and their associated incidental take statements perform several functions. They: (1) provide a detailed discussion of the nature and extent of the effects of Federal actions on listed species and designated critical habitat; (2) provide the Services’ opinion as to whether the proposed action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat and, if so, propose reasonable and prudent alternatives to avoid jeopardy or destruction/adverse modification; (3) specify the amount or extent of anticipated incidental take and provide an exemption for “incidental take” otherwise prohibited by the ESA; (4) provide reasonable and prudent measures (and terms and conditions) to minimize the impacts of the anticipated incidental take to listed species; (5) identify ways the Federal agency can help conserve listed species or critical habitat when they undertake an action; and (6) provide a record of effects on species and critical habitat that can help establish the environmental baseline of the species and critical habitat in future biological opinions.

On average, FWS completes about 1,000 formal and 11,000 informal section 7 consultations each year. It is important to note the amount of time FWS staff spend reviewing and advising on a project can vary greatly depending on: (1) the completeness of information we receive from the Federal agency and applicant (i.e., whether we receive adequate information to analyze the effects of the project on listed species and critical habitat); (2) the complexity of the proposed project; and (3) the number and status of listed species and critical habitats in the project area.

Over the past several years, the FWS has undertaken multiple efforts to identify opportunities to improve timeliness of the section 7 consultation process. These efforts have consistently identified

two primary issues: (1) incomplete consultation packages (e.g., incomplete biological assessment) and (2) inadequate staffing to review projects.

When a Federal agency submits an incomplete consultation package, the Service cannot conduct the analyses needed to conduct and conclude consultation in a legally defensible manner. This results in FWS requesting additional information from the Federal agency, which delays consultation. FWS is addressing this issue in three ways: (1) we developed a new biological assessment course to better educate Federal agencies on what information we need to consult; (2) we revised the regulations at 50 CFR 402.14 to better clarify what information is needed to initiate consultation (completed in 2019); and (3) we developed functionality in our web-based [Information for Planning and Consultation \(IPaC\)](#) system to lead Federal agencies through the consultation package development process. Our determinations through both informal and formal consultation are subject to legal challenge, and it is in the interest of both FWS and the Federal agency and applicant to ensure that our section 7 determinations are legally defensible.

Below, we describe challenges with inadequate staffing and how we are addressing them.

History and Staffing

The FWS faces an increasing consultation workload with a declining workforce. Between 2003 and 2022, our environmental review staff decreased by 20 percent while new species have been listed and economic activity, litigation, and the complexity of species analyses have increased. We anticipate that project funding under IRA and BIL will further increase the demand for FWS technical assistance and section 7 consultations, but neither the IRA nor BIL provide funding to the FWS for section 7 consultations for projects funded by Federal agencies other than the DOI (with the exception of the wildland fire management provisions of the BIL). Accordingly, we estimate that we need \$171.374M to adequately fund and staff our field offices to provide timely environmental reviews.

In FY 2022, the Service received an increase of \$2.841 million that only covered fixed costs, which resulted in no appreciable change in staffing. For FY 2023, Congress enacted an increase of \$8.766 million, of which \$3.766 million was provided for fixed costs and \$5 million was allocated as a general program increase. It will support the hiring of approximately 30 positions. Another \$5 million provided under section 50303 of the IRA will support an additional 30 biologists, including 3 additional positions in the West Virginia office to provide section 7 consultations for projects being implemented by specific DOI bureaus.

The FWS is requesting an increase of \$50,516,000 over the FY 2023 enacted funding level in the FY 2024 President's Budget, which would fund an additional 222 full time positions that would significantly bolster the planning and consultation workforce and maximize the productivity and effectiveness of the program. These funds will be invested in additional staff, updated technology and planning tools, and work with Federal agencies to develop programmatic consultations and other consultation streamlining instruments to increase efficiency nationwide. With respect to

investing in updated technology and planning tools, the Service would, for instance, improve and create new functionality in IPaC.

Ongoing Efforts

Environmental review functions constitute a significant workload for the Service, and we are continuously seeking ways to improve their efficiency, consistency, transparency, and effectiveness. In addition to pursuing adequate funding and staffing to address our growing workload, the FWS has worked to update and streamline processes for project proponents, including: (1) working with Federal agencies to develop programmatic consultations; (2) utilizing IPaC to automate portions of the consultation process; (3) developing refined species ranges to better inform project planning and consultations while reducing the need for in-person technical assistance; and (4) revising the regulations governing section 7 consultations. We are also working with Federal agencies to establish transfer funding or reimbursable agreements to support dedicated staff that can address their project reviews in a timely manner.

Programmatic Consultations and other Streamlining Efforts

Programmatic approaches to the environmental review process contribute to more efficient consultations, lower costs, reduce delays, and provide for broader conservation of listed and at-risk species. Actions that establish a predictable long-term plan of action, such as a land and resource management plan or regional transportation plan, or repetitive actions that are similar in nature may provide opportunities for programmatic consultation. When circumstances warrant a programmatic approach and Federal agencies are interested, we work with them to develop programmatic consultations, which significantly streamline the consultation process. For example, in 2017, the FWS finalized a programmatic consultation in Maine that addresses the effects of culvert replacement and other stream crossing repairs on the endangered Atlantic salmon and its critical habitat. Project partners include the Federal Highway Administration, Maine Department of Transportation, U.S. Army Corps of Engineers, and the Maine Turnpike Authority. The programmatic consultation has been very successful, streamlining reviews and improving conservation outcomes for the Atlantic salmon and its critical habitat. The Maine Atlantic salmon programmatic consultation was based upon the FWS's 2016 [*Streamlined Consultation Guidance for Restoration/Recovery Projects*](#).

The FWS seeks to develop programmatic consultations with Federal agencies for their priority projects. For example, we are working with the Forest Service to maximize the utility of programmatic consultations to streamline project-level consultations for their priority BIL-funded wildfire risk reduction projects.

Information for Planning and Consultation (IPaC)

With judicious use of our limited resources, we have been investing in systematic improvements through automation using IPaC, when appropriate, to streamline the consultation process. IPaC is a public-facing web application that can (1) identify listed species, critical habitat, and other trust resources (e.g., migratory birds) within a project area and generate section 7 species lists; (2) provide conservation recommendations that minimize impacts to listed species and other trust resources; (3) deliver concurrence letters for implementation of programmatic consultations through determination keys (DKeys); and (4) assist Federal agencies and applicants in their development of biological assessments needed to comply with section 7 of the ESA. In FY 2022, IPaC delivered 23,425 streamlined consultation documents and generated over 103,500 official species lists in response to user requests, saving taxpayers the equivalent of approximately 40,690 biologist hours.

DKeys in IPaC help implement programmatic consultations and other streamlining measures. They support Federal agencies' determinations of "no effect" for projects they determine will have no effects on all federally listed species and designated critical habitats, as well as provide automated concurrence for certain projects that may affect but are not likely to adversely affect listed species. In November 2022, the Service released a DKey covering projects in the Northeast that is helping address consultation workload. In the West Virginia field office (WVFO) alone, this capability is reducing staff time associated with about 25 percent of requests for technical assistance and low-level environmental compliance review submitted to the office.

Recognizing that one of our biggest challenges is the quality of the Federal agency documents developed to initiate consultation, the FWS recently released a new feature within IPaC called the Consultation Package Builder (CPB). The CPB guides users through the development and creation of biological assessments, documents required of Federal agencies and applicants to comply with section 7 of the ESA. CPB is intended to improve the consultation process by reducing the back and forth often needed for the FWS to obtain a complete consultation package. IPaC's features are integrated with the new ECOSphere platform to improve consultation reporting and save administrative time.

Refined Species Range Maps

The Service has established a consistent methodology for developing listed species range maps in a way that is transparent, repeatable, and based on the best available data and methods. This effort is producing reliable, authoritative species range maps that the FWS utilizes to do its conservation work under the ESA and other authorities. Incorporating advanced and widely accepted ecological methods, data science, and species distribution modeling techniques, the refined range maps are based on occurrence data to create generalized range maps that more accurately depict the current range of a species. Using the best available information about where a species is found or may be likely to be present, facilitates the environmental review process to focus analyses on the most likely impacts of a project on listed species. Over 1,000 refined range maps have been developed

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to date, with a goal to have refined range maps for all listed species within the next 5 years. Improving range maps for listed species further streamlines the environmental review process by helping avoid impacts to listed species, and ensuring environmental reviews focus where listed species are most likely to be affected by proposed projects.

ESA Regulations

FWS is committed to implementing the ESA in an effective way to achieve its goal of recovering species, and to do so without placing undue burden on the public. In September 2019, the FWS and NMFS finalized revisions to the regulations at 50 CFR 402, which implement section 7 of the ESA, to improve the timeliness and efficiency of consultations. Revisions included: (1) simplifying and clarifying key definitions; (2) clarifying the information required to initiate consultation; and (3) establishing a deadline for responding to a Federal agency's request for concurrence that their action is not likely to adversely affect listed species or designated critical habitat. In June 2021, the FWS and NMFS announced plans to revise portions of the 2019 regulations. These targeted revisions will further reduce regulatory uncertainty, thereby increasing efficiency.

Transfer and Reimbursable Funding

The FWS has long had funding agreements with some agencies to support dedicated Service staffing for certain lines of environmental review work, and that tool has been very effective in supporting timely and effective Service participation in project development. Through reimbursable agreements, entities partnering with the FWS are provided priority project reviews by designated staff. For example, the Federal Highway Administration has a long-standing partnership with the FWS through a reimbursable agreement that funds a National Transportation Liaison in the FWS's Headquarters Ecological Services Program. In addition, Federal funding has also supported state level reimbursable agreements between State transportation agencies and FWS Field Offices. For example, the WVFO has a long standing (~11 years) agreement with West Virginia Division of Highways. Benefits of this partnership include managing workload in a separate prioritized queue for the individual biologist funded by the agreement, immediate coordination on projects with usually significant reduced review times, expedited review of formal consultations, agency-specific training, and the development of agency- and action-specific templates and other tools.

Transfer authority to FWS for section 7 consultations has to be authorized in legislation in order to be utilized. Section 365 of the Energy Policy Act of 2005 (EPAAct of 2005), Pub. L. 109-58 and 43 U.S.C. §§ Section 3101-3106 Energy Act of 2020, Pub. L. No. 116-260 (December 27, 2020) authorize the Secretary of Interior, through the Bureau of Land Management (BLM), to transfer funds to the FWS. The FWS annually receives approximately \$3.5 million to support FWS staff and resource needs related to specific energy permits issued by BLM, supporting approximately 25 positions in 11 states.

We are concerned about the FWS's ability to complete timely section 7 consultations and other environmental clearances on what we anticipate will be a large volume of BIL and IRA projects

from other agencies without additional resources. Fortunately, some sections of BIL include transfer funding provisions. Under sections 40803 and 40804, the U.S. Forest Service and the DOI Office of Wildland Fire received funding for wildfire risk reduction. Transfer authority was included in this legislation:

“Provided further, That funds appropriated under this heading in this Act may be transferred to the United States Fish and Wildlife Service and the National Marine Fisheries Service for the costs of carrying out their responsibilities under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) to consult and conference, as required by section 7 of such Act, in connection with wildland fire management activities.”

As a result, we have entered into funding agreements with these programs to establish a dedicated consultation workforce for that work, which includes an investment in programmatic consultations and other efficiencies. In FY 2022, the FWS received approximately \$11 million in FY 2022 from the U.S. Forest Service and the DOI Office of Wildland Fire to address a portion of their workload, supporting approximately 50 biologists. Transfer funding in FY 2023 and future years will continue or increase as the workload increases.

The FY 2024 President’s Budget request includes a legislative provision that would, if enacted, authorize direct fund transfer of BIL funding to the Service to enable this model for all BIL-funded work of other agencies. A significant advantage of transfer authority over reimbursable agreements is the reduced administrative burden and the direct accountability for the funding. Reimbursable agreements can take months to negotiate, complete the administrative paperwork and update the agencies’ financial systems, and are of limited duration, typically 1-2 years, making long-term hiring and staffing predictability uncertain.

Case Study: West Virginia Field Office

West Virginia is home to 31 threatened and endangered species. Requests for section 7 consultation and technical assistance with the WVFO have increased dramatically over the last several years. For instance, between 2016 and 2021, there was a 95 percent increase in natural gas production in the state (<https://dep.wv.gov/oil-and-gas/databaseinfo/pages/default.aspx>). Also, during this period, two nationally significant gas pipeline projects, the Atlantic Coast Pipeline and the Mountain Valley Pipeline, were proposed for construction in West Virginia. The workload at the WVFO has continued to grow and, since the fall of 2021, new projects have increased approximately 200 percent. The WVFO currently has over a thousand submissions submitted for review of varying complexity that include technical assistance, informal and formal consultation. More than 90 percent of the submissions are infrastructure-related, submitted in anticipation of the \$6 billion invested in West Virginia through the BIL. We expect this infrastructure workload to continue to rise as Federal agencies implement the provisions of the BIL and IRA. In addition, the WVFO continues to work with many development sectors across West Virginia that have also experienced growth, including coal and limestone mining, oil exploration, residential and commercial construction, timber harvesting, hydropower, wind energy, and solar power projects.

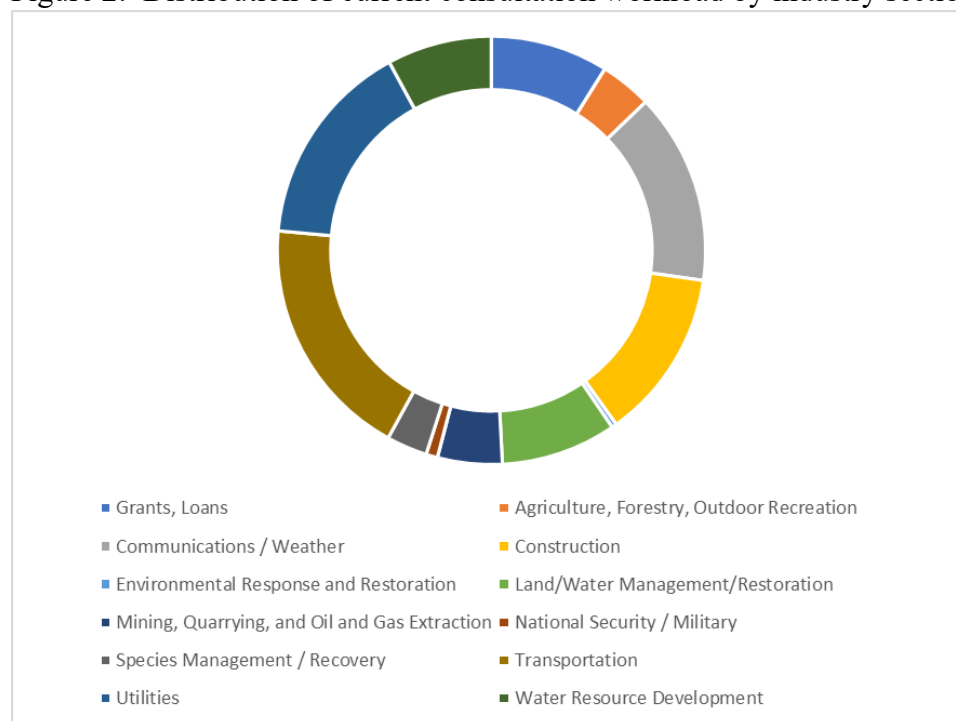
Over the last three years, the WVFO has implemented several processes and tools to improve efficiency and assist developers with processing environmental reviews. For example, as described above, using IPaC, Federal agencies can: (1) document that their actions will have “no effect” on any of the listed species in West Virginia; and (2) receive the FWS’s concurrence that their action may affect, but is not likely to adversely affect listed species. This use of IPaC eliminates staff time for an estimated 10 percent of the projects that normally would have required staff review. Industry specific guidance for using the IPaC system are available on the WVFO’s website as well as instructions for electronically submitting projects to the office for review. Additionally, in coordination with Federal partners, the WVFO is developing programmatic consultations that will streamline the consultation process for similar types of development. Recent examples in West Virginia include a programmatic consultation to cover management activities on WVDNR state wildlife management areas and a programmatic consultation with the U.S. Forest Service that addresses the rusty-patch bumblebee on the Monongahela National Forest.

At the end of FY 2022, the WVFO had 8 employees, including a supervisor, an administrative assistant, a private lands biologist, and 5 fish and wildlife biologists. The Ecological Services program redirected a portion of 9 staff members’ time from other offices to provide short term assistance to the WVFO and, to date, over 500 hours of additional staff time has been invested in West Virginia projects. In addition, the FWS recently filled 3 fish and wildlife biologist positions that will be supported with reimbursable funding. The WVFO is also working with the Office of Surface Mining and Reclamation for a detailee to conduct mining project reviews. Funding provided under section 50303 of the Inflation Reduction Act will support 3 additional biologists at WVFO. For additional support, the office continues to pursue transfer funding or reimbursable agreements with other agencies.

Moving Forward

The Service plays a role in environmental reviews for projects under multiple authorities, including the ESA, National Environmental Policy Act, Clean Water Act, Fish and Wildlife Coordination Act, and the Marine Mammal Protection Act. Since November 2022, the FWS has received over 35,000 requests for project reviews. Many of these projects are infrastructure related. Our current workload is composed of federally funded work related to the full gamut of industry sectors, as depicted in the figure below.

Figure 2: Distribution of current consultation workload by industry section



Source: U.S. Fish and Wildlife Service, number of environmental review requests since November 2022

We expect this workload to continue to rise with implementation of the BIL and IRA, which are rebuilding our roads and bridges; making public transportation accessible; facilitating clean water infrastructure; expanding affordable, high-speed internet; tackling legacy pollution and advancing environmental justice; upgrading the power grid and building more clean energy; and are the largest investments in domestic manufacturing of batteries and the critical minerals that power them. Projects associated with these efforts may affect listed species and require environmental review under section 7 of the ESA and other conservation laws. We need to invest in early coordination and collaboration to stay ahead of demand for energy development, transportation infrastructure, and other economic growth while achieving our biodiversity objectives. In addition, we need the investment in automating tools that help our partners get the resources they need to make informed decisions about the effects of their actions so that we can focus our limited time collaborating on those actions with the most conservation value. Proactive planning and improved mitigation will create, sustain, and enhance habitats. Since habitat loss is a universal threat for most listed species, we must act now to prevent future habitat loss.

FWS has created efficiencies using technology and other streamlining tools for conducting section 7 consultations and other environmental reviews. However, the workload cannot be addressed through streamlining alone; additional staff are also needed to create, adapt, and apply these tools to the work at hand. The greatest potential to improve and expedite the environmental review and consultation process is to provide adequate staffing to deliver the timely environmental reviews

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and consultations that agencies and the public expect, using existing tools and developing new streamlining tools.

The most effective way to improve and expedite our consultation processes would be to fully fund the President's Budget request in FY 2024 and outyears. To reduce backlogs and achieve efficient and thorough section 7 consultations, the FY 2024 Budget requests an increase of \$50.516 million.

In addition, the FWS needs transfer funding to address the anticipated workload surge associated with the BIL and IRA. These large infrastructure investments are rebuilding our Nation and creating healthier communities. That said, many of these infrastructure projects will also affect listed species and require environmental review under section 7 of the ESA. The Service did not receive any funding under these laws to increase staffing to support environmental review of these projects and does not have sufficient resources through appropriated funds to meet the funded agencies' needs. Additional transfer funding would allow the Service to help Federal agencies meet their responsibilities under the ESA and other conservation laws by: (1) hiring staff to consult with Federal agencies on their actions in a timely manner; (2) working with Federal agencies to develop programmatic consultations to streamline the consultation process; (3) automating the decision-making processes where appropriate; and (4) ensuring our decisions are based upon the best scientific and commercial data available.