Public Comments Received On The Proposed Rule To Amend The ESA Section 7 Regulations At 50 CFR 402

Major Issues

The issues below describe substantive comments that suggested changes or potential strengths and shortcomings in the proposed regulations. In addition to the specific issues identified below, we received an array of comments, which are not further elaborated below, that supported the approach advanced in the proposed regulations.

1) **ESA Legal Issues**
   a) The proposed rule is contrary to the plain language of the statute and Congress' intent that federal agencies consult on any action that "may affect" listed species or critical habitat. The statute allows no exceptions that completely eliminate the need for federal agencies to consult with the Services. A less permissive approach than the one proposed here (pesticide counterpart regulations) was found to be illegal by federal district court.
   b) The proposed rule fails to advance any rational basis for how it advances the purposes of the ESA, while establishing a new regulatory scheme with vague and undefined standards.
   c) The proposed regulations arbitrarily exclude from consideration under section 7 the effects of climate change on listed species and critical habitat. The proposal seems to narrow the definition of impacts to exclude effects of climate change on listed species and advances no explanation of how the current process is flawed or otherwise ill-suited to address the impacts of climate change on listed species and critical habitat.
   d) Others submitted that the scientific limitations of global climate models compel amendments to regulations or that the proposal must ensure the ESA does not become the mechanism to control generation of greenhouse gases.
   e) The proposed rule will thwart the clear intent of Congress in passing the Act, as well as the judgments of numerous courts.
   f) Every agency would now be subject to legal challenges couched in terms of the best available science standard.
   g) The proposed regulations are *ultra vires*—beyond the scope of the agencies' legal authority.
   h) The proposed regulations amount to a back-door attempt to repeal/weaken legislation.
   i) The proposed regulations violate the Services' obligation under section 7(a)(1) to utilize their authorities to further the purposes of the ESA.
   j) The proposed regulations would effectively reverse the historic and court-ordered practice of giving the benefit of the doubt to protected species.
   k) Generally, the proposed changes to the definitions in §402.02 unlawfully limit the scope of the ESA's protections.

2) **Compliance with Other Authorities (e.g., Statutes, Executive Orders, or Rulemaking Procedures)**

a) The Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act determination is wrong. This action *does* meet the definition of a major rule, and therefore must meet these Act's requirements for the rulemaking process.
b) It is unclear how DOI plans to comply with its obligation to consult with the Indian Tribes when natural resources may be affected. Tribes request additional time to review the proposed changes in direct government to government consultation over this issue as required by federal law and policy.
c) Many of the comments requested that the Services hold public hearings before finalizing the changes to the regulations.
d) No NEPA analysis provided—should prepare an EIS.
e) Inadequate public comment period provided.
f) Emails not accepted as means to submit comments.
g) Concern over lack of privacy for commenters.
h) Difficulty using Federal Docket Management System, particularly last-minute submitters.
i) Proposed rule inconsistent with Bible.

3) Effects to the economy

a) The proposed changes will likely result in major increases in costs or prices to consumers, state and local governments, and geographic regions because other federal agencies are ill-prepared to implement the new procedures. It will also significantly and adversely affect employment, investments, and productivity of U.S.-based enterprises.
b) The proposed changes will weaken the economies of communities that rely on tourism or recreation associated with listed species.
c) The proposal will reduce protection of listed species which undermines the web of life that provides ecological services that supports agriculture, pollution remediation on land, air, and water, human health, technical innovation, and pollination. The loss of species is undermining our economy.

4) Implementation Issues for the Services

a) Without the requirement to obtain Service concurrence, the burden of species protection will fall on state, local, tribal governments, and on private industry.
b) The proposed changes eliminate the concept of "independent review" by qualified scientists who provide "checks and balances" and instead leave the "fox guarding the henhouse."
c) Evidence of issue (b) is provided by the Services' review of BLM and USFS implementation of counterpart regulations for the "Healthy Forests Initiative."
d) The proposed changes will greatly reduce the extent of collaboration between the Services and action agencies that results in reducing the amount or extent of adverse effects to listed species or critical habitat.
e) The changes will almost certainly result in detrimental impacts on endangered and imperiled species and a higher propensity to overlook opportunities to avoid such impacts. This will translate to broader impacts affecting other wildlife, their habitats, and ultimately, the human environment.
f) The proposal limits unnecessary consultations, frees up limited Service resources for use on higher priority consultations, and takes advantage of the experience of action agencies.

g) Increasing funding for the Services to do consultations would be a preferable alternative to delegating to action agencies.
h) Will result in fewer species being listed under the ESA.
i) Will result in more formal consultations and litigation over an action agency's failure to consult.
j) Given that the Services are already understaffed and underfunded, they will likely be unable to complete the informal consultation process within the new timeframe (and therefore the action agency will likely go ahead with their project without input from the Services).
k) An oversight process should be incorporated into the final rule to allow action agencies to notify the Services of any applicability or NLAA determination that does not separately require written concurrence from the Services.
l) The Services should, upon finalizing this proposal, allow its use for all pending consultations.
m) Expediency for any reason, political or otherwise, is an insufficient reason to weaken protection.

5) Implementation Issues for Action Agencies

a) Most Federal agencies don't have the scientific expertise to make an accurate assessment of their project's impacts on listed species and critical habitat. Agencies should take advantage of scientists in State natural resource agencies, Universities, and non-governmental organizations to help them make their determinations.
b) A role for permit or license applicant should be provided in informal consultation.
c) Some comments supported the Services' proposal to give federal action agencies greater responsibility for decision-making in the section 7 process.
d) Shifts consultation trigger away from species protection and into the hands of action agencies that have a very different or conflicting mission from the Services. Proposed revisions would create a conflict of interest, erase distinction between scientific review and politics, and provide little incentive for agencies to assess their work as unbiased reviewers.
e) The proposal will create an agency-by-agency "piecemeal approach" that will weaken protection for endangered species; as opposed to coordinated expert agency consultation.
f) Many action agencies have experience in dealing with the existing consultation process but they have no experience implementing the process unilaterally.
g) Agencies without a biological mission will have difficulty attracting qualified reviewers.
h) Action agencies are likely to rely on documents other than their Biological Assessment to analyze the impacts to species and critical habitat, which will increase the complexity of environmental analysis performed by an action agency.
i) The proposed changes fail to indicate how contested determinations among agencies may be resolved.
j) If an action agency's decision is found to be incorrect by the Services, there is no mechanism to overturn it.
k) Fails to provide effective mechanisms for State fish and wildlife agencies or local units of government to interact with Federal agencies making section 7 consultation decisions without involving the Services.

l) Action agencies assuming the effects analyses are facing budget constraints that would challenge them in maintaining the necessary expertise.
m) Two conditions are needed before agencies assume NLAA determinations: 1) agency commitment to an independent and objective evaluation of each action outside of supervisory chain of command for approval of the project; 2) agency commitment to provide adequate resources (such as personnel, funding, etc.) to perform the necessary analyses
n) Action agencies should adopt a program similar to the Alternative Consultation Agreements in subparts C and D that would allow individual agencies to make NLAA determinations.

6) Provisions that should have been included in the proposal but are absent.

a) The proposed rule should address the regulatory definition of "destruction or adverse modification of critical habitat." A specific recommendation was "a direct or indirect alteration that significantly impairs the biological value of the primary constituent elements within the designated critical habitat, after consideration of any mitigation."
b) The absence of a regulatory definition for "destruction or adverse modification" further confounds the process for designation of critical habitat by making it practically impossible for the Services to assess the economic (and other) impacts of designating areas as critical habitat.
c) The proposed rule should further address the responsibilities and procedures to be applied by action agencies under section 7(a)(1) of the ESA.
d) The proposed rule should speak to the relationship between Habitat Conservation Plans (section 10(a)(1)(B)) and section 7 consultations and should specifically exempt the issuance of incidental take permits from complying with the consultation provisions of section 7(a)(2).
e) The proposed rule should provide a preference for use of conservation banks when action agencies need to minimize impacts of their projects. Suggest revising §402.03(c) to specifically require federal agencies to first consider the use of conservation bank credits to offset impacts.
f) Provide for approaches similar to "Nationwide Permits" or "categorical exclusions" to complete section 7 consultations.
g) The limitations on causation described in the proposal should be clarified to also apply to "take" of all listed species that may be affected by global climate change.
h) Real recovery is possible only when protection of endangered species encompasses the historical range rather than the current range.

7) Specific comments regarding proposed changes to §402.02.

a) Clarify that "Biological Assessment" is simply an analysis required for a limited subset of Federal actions that does not need to be a separate document. Also clarify that the content and format of a biological assessment is solely at the discretion of the action agency. Add to proposed definition that biological assessments are only required for "major construction activities."
b) Given that the correct standard for causation is "reasonably certain to occur' based on "clear and substantial information", wouldn't some or all be expected to come from a biolgocial assessment rather than other source documents and doesn't this suggest

continuing with standardized biological assessments would be most appropriate.

c) Wide variety of comments dealing with the definition of "effects of the action.
   i) "Clear and substantial evidence" should be further defined so as to avoid potential conflicts with the statutory requirement to base all determinations on "the best scientific and commercial data available."
   ii) Application of stricter causation standard will lead to duplicative and inefficient reviews because "non-Federal" segments of linear transportation and energy projects will no longer qualify for coverage under section 7 and will then require approval through the incidental take provisions of section 10.
   iii) Currently, the duty to assess the "effects of the action" lies with the Services, not with the action agency and it is unclear where that duty will reside under the proposed regulations.
   iv) Under "effects of the action." causation for direct and indirect effects should be better explained. For instance, clarify that proximate cause or essential cause apply to both direct and indirect effects, or simply use the term proximate cause instead of essential cause. Alternatively, one commenter suggested that the appropriate standard for causation is "a close causal connection. Another comment suggested clarifying that proximate cause or essential cause apply to both direct and indirect effects, or simply use the term proximate cause instead of essential cause. Alternatively, one commenter suggested that the appropriate standard for causation is "a close causal connection.
   v) The proposed use of "reasonably certain to occur" and the statement of "clear and substantial information" are appropriate given the limitations of climate models.
   vi) Particularly in light of the examples cited, the proposal remains unclear as to what constitutes "essential cause." Develop examples to illustrate what constitutes causation.
   vii) Definitions use the wrong standard for determining indirect effects - ESA requires best available scientific and commercial data. Any indirect effects are essentially barred from consideration.
   viii) The proposal is unclear as to what constitutes "essential cause." Develop examples to illustrate what constitutes causation. The proposed changes to the definition "Effects of the action" include the language that indirect effects can only be considered if the proposed action is an "essential cause" of those indirect effects. This places a very stringent burden of proof not on the action agency but on any other agency or party arguing in the interests of the protected species.
   ix) The proposal alters the burden of proof in section 7 of the ESA by replacing "may affect" with "is reasonably certain to affect." The proposed requirement that an effect can be deemed "reasonably certain to occur" only if "clear and substantial information" is available is tantamount to placing the burden of proof of harm on the Services rather than the burden of demonstrating not likely harm on the action agencies.
   x) Add clarification of whether the action agency or the Services determine what constitutes an indirect effect, "reasonably certain to occur," or "clear and substantial evidence."
   xi) Add clarification that the limitations on causation for linear projects described in the

preamble apply also to projects that cross federal lands.

xii) Use of "essential cause" can be read to foreclose consultation on actions, no matter how harmful, if the species is already in jeopardy due to the effects of other actions.

d) Variety of comments regarding cumulative effects—
   i) There is no rational basis to exclude from "cumulative effects" the effects of future Federal actions.
   ii) Under these proposed regulations, not all future federal actions will be subject to Section 7 consultations.
   iii) The proposed definition for cumulative effects would encourage, or at least allow, action agencies to move forward with multiple, small-scale projects.
   iv) Proposed definition of "Cumulative Effects" is a restatement of the existing requirement.

8) Specific comments regarding proposed changes to §402.03

a) The proposed changes to applicability are unnecessary given the Supreme Court decision in National Assoc. of Home Builders v. EPA (127 S. Ct. 2518 (2007)).

b) Clarify that agencies may only avail themselves of the applicability escape when their actions are unlikely to cause take of either listed plants or animals.

c) Clarify whether the provisions of proposed §402.03(b)(3) allow action agencies to fulfill their consultation responsibilities without input from the Services.

d) It is inconceivable to the national AZA community that, under this proposal, there could be significantly less USFWS review and oversight for a proposed logging road or dam in an area designated as critical habitat than there would be for an AZA accredited zoo to obtain a USFWS export permit to move a captive-bred threatened or endangered species from a U.S. zoo to a comparable accredited facility in a foreign country.

e) New language in §402.03(b) is inconsistent w/ESA which requires that determinations are to be made in consultation with the Secretary (i.e., the Services).

f) Not requiring consultation where no "take" is anticipated is lawful, and sets a species-protective threshold.

g) The proposed categories (of applicability) that will not require consultation are appropriate. However, the Services may want to reconsider the fifth category as it could be viewed as confusing the role of an action agency (determining the effects of its proposed action) and the Service's role (assessing the likelihood of jeopardy and of adversely modifying critical habitat).

h) Add a rule providing for Service oversight of action agency decisions that consultation is not required under §402.03(b).

i) Proposed §402.03(6) promotes efficient use of scarce resources by reducing the number of consultations on actions that plainly pass muster under section 7(a)(2).

j) The Services have the legal authority to define when and how consultation will occur. Congress has acquiesced in the Services' authority to establish by regulation the relative roles of the agencies in consultation.

k) The Proposed Rule is actually a form of consultation at a higher level of generality than a specific agency action. (source of comment is AFPA # 27359)

l) The applicability provisions of §402.03b should be clarified to: recognize incidental take authorizations already provided under 7(o)(2) or 10(a); base the exclusion for beneficial

effects on a determination of a "clear benefit" rather than the proposed "wholly beneficial" standard; apply the exclusions where it is "reasonably foreseeable" that take is not anticipated; and clarify that the exclusion for remote impacts covers those effects which are remote in time, space, or in probability of occurrence.

m) The preamble discussion of the Applicability provisions should clarify whether the exclusions enumerated in §402.03(b) act as programmatic determinations of the need for consultation or whether they incorporate into the informal consultation provisions a process by which action agencies make a NLAA determination that does not require the added step of concurrences from the Services.
n) Examples of types of actions that would qualify would be helpful.
o) Inclusion of "no effects" language into §402.03 would be helpful.
p) Revise 402.03(c) to refer to the direct and indirect effects of the specific federal action under consideration to bring it into better consistency with essential cause standard in §402.02.

9) Specific comments regarding proposed changes to §402.13

a) The new timeline allows the action agency to terminate informal consultation and move forward with the project without Service concurrence, which seriously weakens the consultation process.
b) The requirement to consult where the agency is unable to find that its action is "not likely to adversely affect" a species has not changed.
c) Some comments supported the use of informal consultation for review of batched, similar, or grouped actions.
d) The proposed establishment of a time limit for informal consultation is appropriate. Extension of the informal consultation period beyond 120 days requires consent of any applicant.
e) The proposed regulations fail to provide for at least a *pro forma* written opinion of the secretary, which is contrary to the statutory duty.
f) The provisions to allow up to 120 days for informal consultation are not authorized by law and provide an excessively long period of time for resolution of informal consulation.
g) Revise this section to clearly state that termination of informal consultation per proposed §402.13(b) means that the action agency has fulfilled its procedural obligations to consult with the Services.

10) Specific comments regarding proposed changes to §402.14

a) The proposed §402.14 may create an inconsistent and ambiguous standard for consultation because it does not refer to proposed changes at §402.03(b).

11) General Observations

a) The final rule should clarify the relationship between the applicability provisions of §402.03 and the informal consultation program under §402.13 and §402.14. Does this proposal give the federal action agency the authority to make jeopardy determinations?
b) Oppose changes that do not have anything to do with the sustainability of species and weakens that Act.