The New Federal Endangered Species Act Regulations

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In late summer, 2019, the Departments of the Interior and Commerce announced three sets of changes to their regulations implementing the federal endangered species act (the ESA). Finally published on August 27, the changes are set to take effect on September 26, 2019. All but one of the changes apply to both agencies charged with implementing the ESA, the Fish and Wildlife Service (within DOI) and the National Marine Fisheries Service, part of the National Oceanic and Atmospheric Administration (within DOC).

This memo summarizes these regulatory changes and comments on their importance. While the explanations and comments here stand alone, they make most sense when read along with chapters 12 and 13 of the of the *Wildlife Law: A Primer* (2nd ed., due out October 15, 2019), which explain the ESA in full. Users of the book are encouraged to keep copies of this memo to read in conjunction with the book. Most of the 2019 regulatory changes were issued in draft form in 2018 and were taken into account in the preparation of the second edition. Nearly all were adopted in final form in 2019 without significant change. *Wildlife Law* as published thus draws upon most of the new regulations. The comments here mostly reiterate and expand upon material in the published book, without revising it. The sole exceptions have to do with procedural changes to the interagency consultation process.

On their face, the regulatory changes are mostly minor ones, less significant than many critics have asserted. As *Wildlife Law* explains, the ESA's effectiveness is based not just on the statute and implementing regulations but also, in important part, on discretionary decisions made by agency officials. The identities and knowledge of these officials, and their commitment to preserving species, thus play key roles in the ESA's effectiveness. Who implements and enforces the law is as important as the regulations themselves.

Listing species. The ESA's protections mostly apply to species that one of the two key federal agencies (NMFS for marine and anadromous species, the FWS for all others) has listed as either endangered or threatened. Decisions to list a species are made through a formal, highly prescribed process put in place by the ESA. Under the statute, the listing agency must base a decision to list a particular species solely on the best available scientific and commercial information without considering other facts. (*Wildlife Law* pp. 240-41) Regulations implementing the statute reiterate this narrow scope of review: listings are based on science alone. The prior regulation (50 C.F.R. § 424.11(b)), after quoting the statute, went on to make clear that listing was to occur "without reference to possible economic or other impacts of such determinations." The 2019 regulatory revision deletes this language, which was, the two Services claimed, unnecessary. As the Services explain in their commentary explaining the change, the statute prohibits consideration of economic factors when making listing decisions, and the regulation as revised remains fully consistent with the statute.

Commentary It is difficult to know why the Services made this regulatory change since it neither alters the standard for making listing decisions nor expands the list of relevant

factors. As explained in *Wildlife Law* (pp. 241-42), listing decisions inevitably implicate value choices that go beyond science, so it is not accurate to say that science alone dictates decisions even as it provides the facts needed to make decisions. The fear of critics is that the listing Services will start considering economic implications notwithstanding the statute, refraining from listing a species when the economic effects of doing so seem too high. This possibility seems unlikely, and in any event is just as unlawful now as it has been. A more likely possibility is that the Services will spend precious agency resources studying and publicizing economic effects as a way of stimulating resistance to particular listings, implicitly inviting Congress to overrule a controversial listing (as Congress can do and has done) when the economic costs seem excessive. Also, a Service that spends funds on economic studies has less money to support more listing actions. This regulatory change could thus be a way of slowing the pace of listings. Both possibilities are legitimately troubling for proponents of species protection, even without any change in the legal listing standard. Economic consequences are properly considered when the listing agency goes ahead to designate critical habitat for a newly listed species. Such economic calculations, however, are often highly problematic because they necessarily rest on assumptions that are easily manipulated (see *Wildlife Law* pp. 253-54). Should a listing agency make an economic study of a listing decision, its calculation would not likely be subject to legal challenge, given that the study would have no legal effect. Listing agencies would thus be free, if they chose, to publish economic studies that overstate the costs of species protection.

Threatened species, defined. Under the ESA, a species is considered threatened, and deserves listing as such, if it "is likely to become an endangered species within the foreseeable future." The standard seems clear enough, but what does "likely" mean and how much of the future is "foreseeable"? The issue is discussed, using a case example, at *Wildlife Law* pp. 244-45. (The shortening of the time period deemed "foreseeable" is discussed as a likely ongoing trend in ESA enforcement at pp. 255-56, citing the proposed regulation.) Existing regulations did not elaborate upon the statutory definition of "threatened," leaving the terms "likely" and "foreseeable" to have their ordinary meanings. The revised regulations add a new regulatory subsection (50 C.F.R. § 424.11(d)), which expands upon the statutory language. The term "likely" remains undefined in the regulation; it means, the agencies say in their commentary, more likely than not. It is on the issue of foreseeability that the new regulation offers clarity. Under the new rules,

> the term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.
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> *Commentary:* This new regulation largely amplifies the statutory word "likely," which colors that entire definition of a threatened species. Likely means a greater than 50% chance of occurrence, and it is hard to claim that an event is likely as one looks further out into time and events become less predictable. This change was motivated in part by disputes such as the 2016 ruling highlighted on pages 244-46 dealing with the Pacific

bearded seal and the threats it faces from climate change. Climate change predictions necessarily get less accurate over longer timeframes, and it becomes challenging to estimate how a species will respond to that change over a half-century and longer. The new regulation serves to shorten the period of time considered foreseeable, and no doubt was desired by drafters for that reason. The Services do have the power at any time, as facts become clearer, to list a species as threatened; a decision not to list it is thus always subject to reversal. But the Services lack the resources to monitor populations of all unlisted species. It will be necessary for others to do so and to speak out as a species declines.

Considered in a more positive light, the new regulation, by allowing a Service to forgo listing, empowers a Service to come up with other conservation measures, more flexibly designed, to keep the species off the lists. As *Wildlife Law* explains (pp. 254, 283), the most significant ongoing shift in ESA implementation is the increasing effort by the Services to protect species in the shadow of the ESA, encouraging various parties to implement conservation measures so that species need not be listed. (The chief efforts to do so are considered in chapter 13.) The effect of this regulatory change—whether it harms species, and if so how often and how much—will mostly depend on whether the greater freedom that it leaves the Services is exercised by crafting other conservation measures that work as well or better to protect at-risk species. More than often realized, the ESA protects species not only when they are listed and subject to statutory protections but when various actors (federal, state, private) implement conservation measures, not mandated by law, to keep species from being listed. A fair assessment of the Act's success needs to consider these extra-legal measures as well as those mandated by the Act. And to reiterate, the effectiveness of the ESA is highly dependent on the way Service staff members implement their discretionary authority, a matter governed more by politics and institutional culture than by law.

Threatened species and the ban on taking. The central difference between an endangered species and a threatened species, in terms of legal protections, is that the former but not the latter is automatically protected by ESA's Section 9 ban on the "taking" of a listed species. In the case of threatened species, the listing agency has the power under Section 4(d), at the time of listing or later, to issue such regulations as are "necessary and advisable" for the conservation of the species, including regulations that place the species (in whole or in part) under the Section 9 takings ban. (This agency power is more limited in the case of threatened animals located in states that have a cooperative management agreement with the Fish and Wildlife Service.) For decades, the Fish and Wildlife Service automatically extended Section 9 protections to threatened species unless, by special rule, they said otherwise. The default rule embraced by the NMFS was the opposite: the species enjoyed no protection under Section 9 unless by special rule the Service said otherwise. Under the new 2019 regulations, the FWS has reversed its default rule for all species listed after the regulation's effective date (September 26, 2019). Newly listed threatened species will enjoy Section 9 protections only if and to the extent, by special rule, the FWS so states. The proposed rule of 2018 (discussed in *Wildlife Law* at p. 274), was finalized without change.

Commentary. This regulatory change elicited widespread criticism when announced and was heralded as a significant decrease in protections for threatened species. It may turn out that way, even though the FWS already had the flexibility to treat threatened species

as it saw fit (that is, the regulatory change did not expand the agency's flexibility). Under the revised regulation the agency can, if it chooses, continue applying Section 9 in full to threatened species; its special, Section 4(d) rules for newly listed species could do that in a single sentence. An already ongoing trend (see pp. 255, 274) has been for the FWS to make greater use of the flexibility available in special rules and to craft them for newly listed threatened species, more often than in the past. The new regulation builds on that trend, again highlighting how the discretionary acts of agency staff are as important or more important than statutory and legal language. Crafting special rules, however, takes time and resources, which could be spent (better spent, many would say) listing more species. Further, special rules take up space in the Federal Register and Code of Federal Regulations, to the dismay of those who complain about the massive length of such regulations. State wildlife officials and others will need to spend even more time studying regulations when each species is subject to separate rules. As for the content of the special rules, the only guiding and constraining language is that they must be "necessary and advisable" for conservation. If the past is any guide, decisions about such rules will pay attention to economics and political realities, not just the needs of species. Proponents of species protection may lament that reality but such flexibility, when well used, can undercut public resistance to protection and achieve greater conservation gains.

Delisting and extinction. The aim of the ESA is to enhance the status of imperiled species to the point where they no longer need the Act's legal protections. When a species recovers, the Service that listed it can and should remove it from the protected list or, in the case of an endangered species, move it onto the threatened list. Complete removal (delisting) sometimes happens because new information comes in about a species and its plight seems last dire. Delisting can also happen when a species flourishes to the point, in terms of population size and distribution, that ESA protections are unneeded (although other protections might usefully stay in place). The ESA has no special legal standard for making a decision to delist a species. The only legal standard is the one set for listing, which means that a species qualifies for delisting if it no longer qualifies for listing. That could happen because a species is in fact flourishing. But it could happen also (see p. 255) because other conservation measures have been undertaken to protect the species so that the protections of the ESA itself are not longer essential. A species, thus, could be delisted even if its status is more dire, in terms of population and distribution, than when it was listed! Under the former regulation, delisting was appropriate if a species became extinct, if it recovered, or if the original listing was erroneous in light of new scientific or commercial information about the species. In the case of extinction, a Service could make that determination only after a waiting period; only after allowing "a sufficient period of time . . . to indicate clearly that the species is extinct." As for recovery, the regulation equated that with "no longer endangered or threatened."

The new regulation (50 C.F.R. § 424.11(e)) alters this regulatory scheme in several minor ways. Delisting due to extinction no longer requires a waiting period. All reference to recovery as such is gone; instead, delisting can occur whenever a species no longer meets the definition of endangered or threatened. The new regulation specifically adds that delisting can occur if the listed entity does not meet the statutory definition of a species.

Commentary. These changes are all minor ones and should have little effect. The determination of extinction must be based on sound science, which already includes an adequate waiting period to look for more evidence of the species; a separately described

waiting period seems unneeded. The reference to recovery in the longstanding regulation gave many readers the sense that it was a standard of flourishing higher than the one used for listing, but the term does not appear in the ESA and the regulation did not define it except by reference to listing standards. The revised regulation is thus simply clearer on this point. As for the possibility that a listed entity does not qualify as a species, that possibility was already reason to delist it since, if it an entity is not a species, it does not deserve listing. As for the meaning of "species" (a legal term of considerable complexity), see *Wildlife Law* pp. 238-40.

The move to delist species more rapidly reflects critical trends in the application of the ESA. In some instances, the aim is to get rid of legal limits on altering habitat if there is no species still around to protect. Likely the more important motive for delisting (*Wildlife Law* p. 255) is that it enables the listing agency to work with partners to come up with alternative conservation measures to help a species, outside the ESA, that might be more effective and less resistive than the particular protections prescribed by the ESA. As noted above, a key ongoing trend is to protect species outside the ESA so that they need not be listed. This rationale applies also to species already listed; if other, more flexible conservation measures are possible and if they are undertaken (or promised), then the listing agency can delist a species and turn its fate over to the extralegal conservation measures. So long as such alternative measures seem to provide adequate protection, then the species no longer qualifies for listing and delisting is legally appropriate.

Designating critical habitat. One of the central protections of the ESA for listed species comes from Section 7 of the Act. It prohibits federal agencies from engaging in any activity that is likely to jeopardize the continued existence of a listed species or to destroy or adversely modify habitat for the species that the listing agency has officially designated as "critical." (This protection also applies to state and private actions that are deemed "federal actions" because they rely on federal permits or federal funding; see *Wildlife Law* p. 261.) Critical habitat is designated at the time of listing to the maximum extent prudent and determinable; it need not (and perhaps should not) be designated if not prudent or determinable. As for "critical habitat" (defined in Section 3(5)), it encompasses the areas occupied by a species at the time of listing if the habitat includes "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections." Critical habitat can also include areas not occupied at the time of listing if the areas "are essential for the conservation of the species." Considerable controversy has surrounded the whole process of designating critical habitat—and also on whether the hard work of doing so is worth the effort given that money spent designating habitat is money not available to list more species. The controversy has included clashes on when habitat is not determinable, when it is not prudent to designate habitat, and when it is appropriate to designate as critical habitat lands and waters that are unoccupied. (*Wildlife Law* pp. 250-54) The new regulations deal with the latter two of these issues (prudence and unoccupied habitat). They deal also in minor ways with the definition of critical habitat in terms of the "physical or biological features" that lands and waters must feature to qualify for designation.

As for the "physical or biological features" that habitat must display to qualify for designation, the new regulation makes a minor tweak to the existing regulatory definition by bringing it more clearly in line with the ESA itself. The former regulation stated that such

features must be ones "that support the life-history needs of the species." The revised regulation provides that the features must be ones "that occur in specific areas and that are essential to support the life-history needs of the species." The significant change here is the insertion of the reference to "essential," which comes from the above-quoted statutory language limiting critical habitat to areas "essential to the conservation of the species."

> *Commentary:* The changes are minor, meant to avoid confusion that comes when people read the regulations apart from the statute and the statute includes limits (here, the requirement that the conservation be essential) that the regulations did not include.

As for when habitat designation would not be "prudent," the revised regulations make several minor changes. One change is to give the listing agency more discretion; the former regulation specified particular instances in which habitat designation "is not prudent" while the revision says that, in such instances, "the Secretary may, but is not required, to determine that a designation would not be prudent." The change recognizes that the Secretary has a choice. Second, the former regulation allowed the listing Service to avoid designation when designation "would not be beneficial to the species," citing, as two examples, cases in which habitat loss was not the cause of species decline and when no habitat met the definition of critical. Here the new regulation makes several minor changes. The just-mentioned two examples where designation would not be beneficial are kept. To them are added two more: instances in which species habitat is under threat due to causes that would not be remedied by Section 7 consultation, and instances in which a species habitat exists almost entirely outside the United States. The regulation deletes the "not be beneficial" language, relying instead on a new, more general statement that the listing agency can forgo habitat designation "when designation would otherwise not be prudent based on the best scientific data available." (50 C.F.R. § 424.12(a))

> *Commentary:* These changes, too, are all minor. The first change, recognizing the listing agency's discretion, brings into the regulation the flexibility inherent in the statute, with its express call for the appropriate Secretary to decide what is "prudent" (a judgment call). The reference to "not be beneficial" was deleted mostly because it introduced into the regulations a concept ("beneficial") that did not appear in the statute and thus bred uncertainty; instead, the regulation sticks with the statutory term "prudent." The two new illustrations where designation would not be prudent stem from experiences over the years—cases in which U.S. habitat was trivial for the species and cases where the main threat to habitat was global climate change, a threat that could not be materially diminished through the Section 7 consultation process.

As for designating unoccupied areas as critical habitat, the story is more complex. In the end, the final regulatory changes were relatively minor. The Services, however, had more ambitious plans, which they put forth in their 2018 proposed regulatory changes. They ultimately shied away from their ambitious changes, presumably due to the strong criticism. On page 256 of *Wildlife Law*, we predicted that the Services going forward would designate more unoccupied areas as critical habitat (often on federal land) while refraining from designating currently occupied habitat when designations of current habitat (on private land, usually) would stimulate resistance or backlash. That trend is not likely to unfold in such a pronounced way, given the Services' decision to withdraw its proposed regulation on the subject.

As noted above, the Services may designate unoccupied habitat if its protection is essential to the conservation of the listed species. The new regulations incorporate the ruling of

the U.S. Supreme Court in the *Weyerhaeuser Company* case (pp. 252-53) by making clear that such unoccupied land or water must first qualify as habitat; that is, it must have one or more of the physical or biological features essential to the conservation of the species before the Service can consider whether protecting the unoccupied habitat is essential. Under the proposed regulation, the Services could designate *unoccupied* habitat as critical, and curtail the designation of *occupied* habitat, if doing so resulted in more "efficient" conservation of the species. That option was scrapped in the final regulations. Going forward the old rule will remain in place: a Service can designate unoccupied habitat as critical only if currently occupied habitat, taken alone, is inadequate to ensure the conservation of the species. Moreover, in a further limit on the designation of unoccupied habitat, the new regulations state that Services can designate unoccupied habitat only if there is a "reasonable certainty" that (i) the areas will contribute to the conservation of the species and (ii) the area contains one or more of the key physical or biological features. (The "reasonable certainty" language replaced the term "reasonable likelihood.")

> *Commentary.* The new regulations, particularly read in light of the commentary accompanying them, make clear that the Services going forward will be reluctant to designate unoccupied habitat as critical, even when existing occupied habitat is inadequate to meet a species' need. This reluctance is understandable politically but regrettable biologically. Designated habitat on privately owned land receives very little legal protection; it is protected only against actions by the federal government or by state or private parties acting under a federal permit or with federal funding; it is not protected against state and private actions generally. Critical habitat designated on federal land, in contrast, is far better protected (given that any harm to it would involve federal action) and resistance to it is much less. Efforts to conserve a species might improve, then, if the Fish and Wildlife Service designated unoccupied habitat on federal land and made efforts to expand the population of a species onto that land, where it would enjoy greater legal protection under Section 7. Unoccupied habitat might, in fact, be more suitable for a particular species: it might have more of the physical and biological features that the species needs. With this new regulation, the Services will need to go about this kind of conservation work more indirectly, by helping the species expand into new habitat and, once that expansion occurs, then designating that newly occupied habitat as critical. That indirection, though, may have been needed in any event, given the requirement that unoccupied habitat must be "essential" to the conservation of a species before designation. As discussed on pages 251-52, it is hard to claim that any particular unoccupied habitat is essential if a species in need of expanding its habitat could expand into one or more of various places; some new habitat is essential, but when several options are available it is hard to say that any one of them is essential?

Destruction or adverse modification of critical habitat. Section 7 of the ESA, as noted, bars federal agencies from engaging in any action that is likely to destroy or adversely modify designated critical habitat (or that is likely to jeopardize the continued existence of a listed species). (See *Wildlife Law,* pp. 260-61) The new regulations make minor changes to the definition of "destruction or adverse modification" without altering current agency practices. The changes, particularly with their accompanying commentary in the Federal Register, nonetheless raise important issues. The existing regulation (rewritten in 2016) defined "destruction or adverse" modification as "a direct or indirect alteration that appreciably diminishes the value of

critical habitat for the conservation of a listed species." The definition went on, in a second sentence, to offer two illustrations of how that might happen: it could come from the alteration of the critical physical or biological features of the habitat or instead from an action that precluded or significantly delayed the development of such features. The 2019 regulatory changes delete the second sentence as unnecessary, and add, in the first sentence, that the assessment must look to "the value of critical habit *as a whole*," rather than assessing effects of a federal action on just a piece of the habitat. Thus, if a proposed federal action affects one portion of designated habitat, the assessment cannot look just as the action's effects on that habitat portion; it must look to the consequences for the habitat as a whole and whether the habitat's value overall has been appreciably diminished.

Commentary. The stance of the Services on this issue materially weakens the ESA if one reads the statute literally. Section 7 prohibits an agency from destroying or adversely modifying designated critical habitat. The regulation says that it may do so if the destruction or adverse modification does not "appreciably" diminish the value of the habitat as a whole. Destruction and modification that does not rise to the level of "appreciable" is thus lawful—under the new regulation and its predecessor.

Agency commentary accompanying the revised definition distinguishes between alterations that appreciably diminish the habitat as a whole and those that are "inconsequential." (It does not state overtly, however, that any non-consequential habitat alteration satisfies the "appreciably diminish" standard.) The language added to the first sentence—demanding that the destruction or adverse modification affect the critical habitat "as a whole"—would seem to distance the regulation even further from the literal statutory language. Trivial alterations, to be sure, one can overlook. But the revised regulation would seem to allow a federal agency to alter designated habitat much more substantially than that, perhaps in violation of the statute. The regulatory commentary adds a further chilling note by making clear that federal actions could in fact whittle away at a listed species, bit by bit, without ever running afoul of the Section 7 mandate. (This possibility is discussed on pages 259-60 in the context of the no-jeopardy ban.) A federal action can proceed, even if it degrades critical habitat, so long as the affect is not appreciable. Thus, a series of actions, no one of which is deemed appreciable, could materially degrade habitat. Various federal court rulings have concluded that a species could descend to the point where *any* further harm to it or to its habitat, however slight, ran afoul of Section 7. The Services expressly disagree. At no point is habitat so degraded, they contend, that any further degradation is unlawful; a further alteration of the habitat is unlawful only if the action, taken alone, appreciably diminishes the habitat's value.

This interpretation, no doubt, will face legal challenge to determine whether it is consistent with the language of Section 7. If it is inconsistent, the outcome is not to prohibit all future federal actions in a designated critical habitat. An alternative way to maintain flexibility in such an instance is to require the action agency to offset the harm it causes by expanding and improving critical habitat in some other way—the mitigation-based conservation approach strongly favored by the Services under the Obama administration (see pp. 284-85). A zero-tolerance rule for harm to a species becomes far more flexible, and more sensible, when the Section 7 is applied by looking to the overall effect of an agency action, including its mitigation measures.

Consultation processes under Section 7. Many of the regulatory changes made in 2019 have to do with the processes by which federal agencies consult with the Fish and Wildlife Service, and/or the National Marine Fisheries Services, to keep in compliance with the Section 7(a)(2) bans on jeopardizing the continued existence of a species and destroying or adversely modifying critical habitat. Many of these changes are highly technical and involve refining regulatory language to make it clearer, easier to apply, and more in line with the language of the ESA itself. These changes are covered here in less detail than those above except for the first change, dealing with the meaning of "effects of the action."

As explained in *Wildlife Law*, the consultation process surrounding a proposed federal action looks at *the effects of the action*, indirect as well as direct, to decide whether the action is or is not likely to jeopardize the continued existence of a species or destroy or adversely modify its critical habitat. The new regulation makes minor changes to the definition of "effects of the action," reducing considerably the verbal complexity described in *Wildlife Law,* pages 267-69. The consultation needs to consider, not just the consequences of what the agency plans to do, but also the consequences of actions by others that are stimulated by the agency's action. The prior regulation (as described in *Wildlife* Law) drew fine distinctions between indirect and direct effects and between interrelated and interdependent actions. The new regulation is simpler. What an agency proposes is termed an "action." Behavior by others that might be stimulated by the agency action is now termed an "activity." Landscape changes brought on by either an action or an activity are now termed "consequences" (under a new § 402.17(b)). Put simply, a Section 7 consultation needs to pay attention to all of the consequences of an action to a listed species or critical habitat, including activities and their consequences, so long as such consequences and activities satisfy two tests: they would not have occurred but for the proposed action (the "but for" causation test) and they are "reasonably certain" to occur. A determination that a consequence or activity is reasonably certain to occur must be based on "clear and substantial information" according to a related regulatory change—the newly added § 402.17. The Services claims that these regulatory simplifications merely incorporate longstanding practice and make no substantive change in it.

> *Commentary on "effects of the action."* One of the consequences of writing regulations with clarity is that courts then have an easier job comparing them with statutory requirements to determine their legality. The Services have done that here, and also been quite clear about their existing practices—their reliance on "but for" causation, and their insistence that consequences be "reasonably certain" to occur (not merely possible or even likely) before the Services will pay attention to it. It certainly seems reasonably for an agency consultation under Section 7 to ignore highly speculative consequences. But is it consistent with the statute for an interagency consultation to ignore consequences that are more likely than not to occur, sweeping them aside on the ground that, while likely to happen, they are not "reasonably certain"?
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> In assessing these regulatory changes, it is useful to remember that the Section 7 bans on jeopardizing a species or degrading its habitat apply directly to the federal action agency. The Section 7 consultation process is supplemental to that legal limit. It has long been understood that an action agency that successfully completes its consultation, and that complies with instructions given by the Fish and Wildlife Service (or NMFS), has then successfully complied with Section 7 (at least so long as it fairly described its proposed action to the Service). That understanding might well change going forward.

Particularly under the revised regulation a Section 7 consultation might well ignore expected consequences of a proposed federal action on the ground that the consequences are not reasonably certain to occur. But if the consequences are nonetheless likely to occur, and do occur, then the action agency is responsible for them, and if they jeopardize the continued existence of a species, or destroy or adversely modify critical habitat, then the action agency has violated Section 7. And it has done so even though it has complied with its consultation duty. Put simply, the more consequences that are ignored in the Section 7 consultation, the less protection an action agency gets from a no-jeopardy ruling. In drafting their new regulations, the Services might well have anticipated this risk to federal agencies. The accompanying commentary (Federal Register, vol. 84, p. 44981) makes clear that the regulations do not diminish agency accountability under Section 7(a)(2) for consequences likely to occur, as if to emphasize that the more limited consultation process is no longer a full legal cover.

The consequences of a proposed federal action are assessed (as explained at *Wildlife Law* page 267) by undertaking a before-and-after comparison, looking at conditions as they are and would be without the proposed federal action and then estimating future conditions after the federal action has taken place. The "before" part of this comparison is referred to as the "*environmental baseline.*" That term, used in prior versions of the regulation, now has a definition. The only noteworthy part of the new definition is that the baseline includes the consequences of ongoing activities by a federal agency that the agency has no legal discretion to alter or end. This amendment is in keeping with the understanding (see *Wildlife Law* pp. 261-62) that Section 7 applies only to actions by an agency over which it has discretionary control; Section 7 does not apply if an agency is obligated to perform a task by law. The commentary makes clear, however, that, when an agency proposes a discretionary action, the consultation concerning it must consider *all* of the agency's discretionary operations, not just those that the agency proposes to change with its new action. This clarification resolved a lingering uncertainty and requires a refinement to one sentence in *Wildlife Law* at the top of page 262. The text there states that, when an agency consults on a *discretionary* action, the consultation needs to consider (so "it appears," the text states) the *nondiscretionary* aspects of the action as well as the discretionary ones. That is true under the new regulation, but only in a limited sense: the nondiscretionary aspects, the Services now explain, are considered by adding them to the environmental baseline, not by considering them as part of the agency action itself. The consequences of such nondiscretionary activities are thus not directly considered in the consultation, but their presence in the action area (as part of the environmental baseline) can end up altering the consequences of the proposed discretionary action that are being assessed in the consultation.

As explained in *Wildlife Law* at pages 263-64, Section 7 consultations are often undertaken informally when the evidence makes clear that the proposed action, as originally devised or refined, will not run afoul of the Section 7 prescriptions. This *informal consultation*, under § 402.13 of the regulations, is now subject to clearer guidance as to the information an action agency must submit and is subject to timetables for completion.

The new regulations also include process changes to *formal consultations* under Section 7 (*Wildlife Law, p. 264)*. They prescribe in greater detail the information that an action agency must submit to begin the formal consultation, and consider the forms that such information might

take. They also provide that the Services can work with action agencies, from the beginning, to help them put together their initial submission (their initiation package). The regulations create a new, expedited consultation process by mutual consent, a quicker process that, the regulation suggests, would be particularly appropriate for conservation actions whose primary purpose is to aid a listed species. Of note, the regulatory changes dealing with formal consultation encourage action agencies to highlight, at the beginning of the consultation, the efforts that the agency will take, or have taken, to avoid, minimize or offset the adverse effects of the proposed action on a listed species or its designated critical habitat. The consultation will consider such conservation efforts, and will assume their implementation, without any special evidence of a binding commitment to the efforts. (On this last point, the Services are responding to court rulings under other provisions of the ESA holding that the Services can take into account planned mitigation measures only when and if the measures are legally enforceable against the actor proposing them and only if money is on hand to implement them.)

Over the years, many Section 7 consultations have dealt with either multiple agency actions of a similar nature, often frequently occurring, or with broad programs, regulations, or land management efforts over large spatial scales. That experience has led the Services, in the new regulations, to include a definition of "*programmatic consultation*," to refer to such consultations and to give them greater legitimacy and visibility. Such consultations can be either formal or informal.

As noted in *Wildlife Law,* p. 270, an action agency must *reinitiate consultation* with a Service under Section 7 if material changes in the facts surrounding the federal action (including the listing of a new species, or designation of new habitat) call into question the original outcome of the consultation (the original "no jeopardy" ruling). The new regulations make clear that this duty to reinitiate consultation applies whether or not the initial consultation was formal or informal, and whether it resulted in a biological opinion or, instead, merely a written concurrence. In addition, the regulations now state that the Forest Service and Bureau of Land Management need not reopen consultation over most of their large-scale land management plans simply because a new species is listed, or new habitat is designated, so long as a new consultation is begun whenever an agency undertakes a new, site-specific action on the land that might affect the newly listed species or the newly designated habitat.