The Increasing Influence of Endangered Species Act Consultation on Environmental Rulemaking

Andrew Turner, Kristy Bulleit, and John Henson

Federal environmental rulemakings increasingly are undergoing—and in recent cases have been heavily influenced by—formal Endangered Species Act (ESA) § 7 consultation. ESA Section 7(a)(2) consultations require federal agencies to ensure, through consultation with the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) as appropriate, that any action a federal agency authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). This requirement applies to a broad range of agency actions, including the promulgation of regulations, in which the "action agency" has discretionary involvement or control. 50 C.F.R. § 402.03. An action agency must engage in either "informal" or "formal" consultation with the Services in order to satisfy ESA Section 7(a)(2) requirements unless the action agency concludes that its proposed action will have no effect (for good or ill) on a listed species or designated critical habitat. 50 C.F.R. § 402.13; 402.14; 16 U.S.C. § 1536(a)(2)-(3). Otherwise, if the action "may affect" listed species or designated critical habitat, consultation is required. *Id.* at § 402.14.

Recently, wildlife advocacy groups began urging the Services to take new approaches to analyzing the effects of environmental rulemakings in manners that lead to formal consultation. An elaborate process prescribed by 50 C.F.R. § 402.14, formal consultation culminates with the issuance of a "Biological Opinion" (BiOp) by the Service[s]. Action agencies engaged in rulemaking are thus increasingly facing the threat of a "jeopardy" BiOp which, as the Supreme Court noted in *Bennett v. Spear*, has a "powerful coercive effect," on those agencies, 520 U.S. 154, 169 (1997). This trend toward formal consultation on environmental rulemaking, and the resulting influence on the outcome of those rulemakings, has important consequences for regulators and the regulated community alike.

One approach to pressing environmental rulemaking into formal ESA § 7 consultation is to redefine the agency action under review to encompass an agency's overall regulatory "program," instead of the specific rule or standard the agency proposes to adopt. Proponents of conducting programwide (or programmatic) consultation, even where the agency action involves only a discrete proposed rule, may be arguing that such an approach is appropriate because it avoids "segmentation" of the consideration of effects of various actions within an agency's program. *See* Ballast Water Rule Biological Opinion at 4 (noting that the U.S. Coast Guard requested case law on segmentation followed by months of disagreement about the scope of the proposed action). Segmentation concerns, however, more typically arise in connection with agency attempts to divide a single action (e.g., a large project) into separate actions tied to multiple stages. *See, e.g., Conner v. Burford*, 848 F.2d 1441, 1457–58 (9th Cir. 1988). Furthermore, the consultation regulations provide for consideration of separate or future federal actions in separate consultations. *See* 50 C.F.R. § 402.02. Proponents also argue that expanding review to other aspects of an agency's program beyond the precise action proposed allows the Services to more comprehensively review the agency's action and thereby ensure against jeopardy or adverse modification. *See* 316(b) Rule Biological Opinion at 18; 35–36.

Critics of this approach object that the environmental legislation authorizing the proposed rule clearly vests the responsibility for defining and determining the scope of the "action" on the rulemaking agency, not the Services. Indeed, the U.S. Army Corps of Engineers (the Corps) issued guidance in 2013 applying to "every ESA § 7 formal consultation," which emphasizes the importance that the Corps "identify and define the Corps' 'action.'" U.S. Army Corps of Engineers ESA Guidance Memorandum, June 11, 2013, *available at* http://planning.usace.army.mil/toolbox/library/memosandletters/13jun11-esa.pdf.

Efforts by the Services to redefine an agency's proposal to promulgate an environmental regulation to include the agency's overall regulatory program usurp that agency's discretion to define the nature and timing of its action. Although not yet widely tested by the courts, concerns with such usurpation find support in the Tenth Circuit's recent decision in *WildEarth Guardians v. EPA*, 759 F.3d 1196 (10th Cir. 2014). There, the court held that the U.S. Environmental Protection Agency (EPA) was not required to consult with the FWS on a Federal Implementation Plan for regional haze, even though, in the plaintiffs' view, EPA could have used that Plan to accomplish further reductions in mercury and selenium emissions that were indirectly influenced by controls imposed under the Plan, where such emissions were alleged to harm listed species. The court reasoned that requiring consultation on what more

Mr. Turner is a partner at Hunton & Williams in Washington, D.C. He may be reached at aturner@hunton.com. Ms. Bulleit is a partner at Hunton & Williams in Washington, D.C. She may be reached at kbulleit@hunton.com. Mr. Henson is an associate at Hunton & Williams in Washington, D.C. He may be reached at jhenson@hunton.com.

EPA might do to address mercury and selenium emissions, rather than focus on its Plan for regional haze, "would make meaningless the regulation requiring an agency seeking formal consultation to include '[a] description of the action to be considered.'" *Id.* at 1209 (quoting 50 C.F.R. § 402.14(c)(1)). Further, "[t]he duty to consult is bounded by the agency action . . . . [T]he EPA here decided to take action, but bounded the scope of that action." *Id.* at 1208–09. Thus, the court concluded, "requiring consultation on *everything the agency might do* would hamstring government regulation in general and would likely impede rather than advance environmental protection." *Id.* at 1209 (emphasis added).

A second novel analytical approach to requiring formal ESA Section 7 consultation for environmental rulemaking involves manipulating the "environmental baseline." Under the consultation regulations, action agencies and the Services must assess the effects of a proposed rule against baseline conditions. Recently, rather than measure such effects against current baseline conditions actually present at the time of the proposal, the Services substitute a hypothetical, idealized condition. Under this approach, the relevant environmental conditions are deemed to fall within the discretion and control of the federal agency, which is cast in the role of gatekeeper for the activities of states and private parties, even though those activities are not authorized by the rule (and indeed require no federal authorization). Any adverse effects that the federal gatekeeper's proposed rule fails to prevent become the responsibility of the agency, under this approach, despite the fact that the rule itself authorizes no activity, causes no effects, and when eventually applied will improve the status quo.

The history of the Ballast Rule BiOp suggests that the USCG's view of the "action" subject to consultation differed sharply from NMFS's view.

Proponents of the "federal gatekeeper" approach cite cases involving the establishment of operating regimes for federal dams, which allowed or required the responsible agencies to analyze the baseline based on a hypothetical condition in which the dams were in place but operating with the flood gates fully open (run of the river), based on the extent of the agencies' control and discretion over the operation of the dams. *See Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917(9th Cir. 2008) (attributing the existence of dams to the environmental baseline, but including ongoing operation of the dams in the effects of the agency action under review because operation was within the agencies' discretion); *Am. Rivers, Inc. v. U.S. Army Corps of Eng'rs.*, 421 F.3d 618, 625 (8th Cir. 2005) (using a baseline in which "the dams and physical modifications are assumed to be in place, but all the floodgates are assumed to be wide open, with no flow control" based on the Corps' discretion in operating the dams). Critics argue that even if the federal gatekeeper theory is correct with respect to operating regimes for federally controlled dams (a debatable point that goes beyond the scope of this article), extending the theory to national environmental rules is a misapplication of the underlying rationale, departs from long-standing practice, conflicts with the ESA and its implementing rules and guidance with respect to measuring effects against baseline conditions, and misapplies basic principles of proximate causation. Critics also point to the range of practical dilemmas that rulemaking agencies face when forced to proceed down this path. These include (1) the difficulty of collecting sufficiently specific, current information to characterize impacts, a time-consuming task that often falls outside the statutory provisions or statutory or court-ordered deadlines under which the proposal was developed; (2) negotiating changes to a proposal with the Services, outside the notice-and-comment process dictated by the Administrative Procedure Act, 5 U.S.C. § 553; and (3) the risk of ceding to the Services decision-making responsibility delegated to the responsible agency by Congress.

After setting the stage with a brief review of the statutory and regulatory background of ESA § 7(a)(2) consultation, the remainder of this article examines the application of these controversial approaches in two recent proceedings—one involving ballast water rules proposed by the U.S. Coast Guard (USCG), the other involving EPA regulations for cooling water intake structures at existing facilities.

Background of Interagency Consultation under ESA § 7(a)(2)

ESA §7(a)(2) provides: "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." The Services have developed joint regulations (codified at 50 C.F.R. pt. 402) and guidance (e.g., Consultation Handbook) for implementing this provision. The regulations define agency "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies." 50 C.F.R. 402.02 (2014). The rules and the Consultation Handbook require the rulemaking agency to prepare and present to the Services a description of the agency action. 50 C.F.R. 402.02(c)(1); Consultation Handbook at 4-4.

The effects of the action are: "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the *environmental baseline*." *Id.* (emphasis added).

One of the action agency's responsibilities when initiating formal consultation is to provide "[a] description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects." 50 C.F.R. § 402.14(c)(4). The Services' responsibility during formal consultation is, inter alia, to (1) "evaluate the current status of the listed species"; (2) "evaluate the *effects of the action and cumulative effects* on the listed species or critical habitat"; and (3) "formulate its biological opinion as to whether the *action*, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g)(2–4) (emphasis added).

And "jeopardize the continued existence" means "engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." *Id.* at § 402.02. Federal agencies "need not initiate formal consultation if, as a result of the preparation of a biological assessment . . . or as a result of informal consultation . . . the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat." *Id.* at § 402.14(b)(1).

Thus, to assess the effects of the federal "action" on listed species and critical habitat, the agency defines its action, the agency and the Service(s) work together to evaluate the effects caused by that action, and those effects are measured against the "environmental baseline." The environmental baseline as defined by the Services is a "snapshot" of the status of a species and "does not include the effects of the action under review in the consultation." Consultation Handbook at 4-22. Measuring the effects of an agency action against baseline conditions determines what difference—positive or negative, if any—an agency action makes for listed species or designated critical habitat. Nothing in the definition of the environmental baseline suggests that the Services may exclude existing conditions in order to produce a more favorable, albeit artificial, baseline.

Where formal consultation is required, it concludes with a biological opinion that states whether jeopardy to listed species or adverse modification to critical habitat is likely and if so, provides reasonable and prudent alternatives that would not violate § 7. 50 C.F.R. § 402.14(g)(4)–(5). Where the Services conclude that the action will not violate § 7(a)(2), the biological opinion must also provide the action agency with an incidental take statement exempting the agency from § 9 take prohibition provided that the agency complies with "reasonable and prudent measures" and other terms and conditions prescribed by the Services. 50 C.F.R. § 402.14(i).

Recent Consultations Using Novel Analytical Frameworks

Two recent interagency consultations on environmentally protective regulatory proposals illustrate the novel new analytical approaches described above, and the intrusive effects of those approaches on both the rulemaking process and the resulting rules.

The first involved a USCG proposal to reduce introduction of invasive species into waters of the United States through ballast water treatment and other requirements. *See* U.S. Coast Guard National Ballast Water Management Program Biological Opinion (Ballast Water Rule BiOp) at 6. Although the USCG proposed a standard far more restrictive than the *status quo*, the Services urged the USCG to undergo formal consultation not just on the specific treatment requirements but on its program as a whole, in order to evaluate "whether the program allows for the *lowest* probability of a new invasion occurring given the current state of technology, and whether there is anything the USCG could do to *further protect* listed species and their critical habitat that they are not currently proposing to do." Ballast Water Rule BiOp at 353 (emphasis added).

As a result of the consultation, the USCG agreed to "monitor and report to NMFS Office of Protected Resource on various components of the ballast water management program," including the results of USCG practicability reviews, the results of periodic programmatic reviews, the results of inspections and violations found, and corrective actions required. Ballast Water Rule BiOp at 369. If the USCG fails to provide the required information, the protections afforded to the agency by the BiOp's authorization of "incidental take" will not apply. Ballast Water Rule Biological Opinion at 369. The Biological Opinion further requires reinitiation of consultation should any of the situations described in 50 C.F.R. 402.16 occur. *Id.* at 370.

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The history of the Ballast Rule BiOp suggests that the USCG's view of the "action" subject to consultation differed sharply from NMFS's view. Ballast Water Rule Biological Opinion at 2–5. Indeed, negotiations over the nature and scope of the action subject to review required at least five meetings and various correspondence over three and a half months. *Id.* The interagency consultation process as a whole took a remarkable five years of pre-consultation work and seven months of formal consultation to reach agreement—all in the context of a rule designed to improve the environmental status quo. *See id.* Moreover, the procedural measures the USCG committed to take as a result of the consultation place NMFS in the role of overseer of the USCG's day-to-day monitoring and enforcement activities (activities that involve decisions) both to act (for instance, by taking enforcement action, which is not likely to cause adverse effects) and *not to act* (which, unlike agency action, is not subject to consultation under ESA § 7(a)(2)).

The second example involves the Services' Biological Opinion for EPA's Proposed Clean Water Act (CWA) § 316(b) Rule, which "recognize[s] the Rule *may result in* a net reduction of aquatic organisms lost to impingement and entrainment when compared to what has occurred historically." 316(b) Rule Biological Opinion at 35 (emphasis added). Nonetheless, the Services employed a novel interpretation of "effects" and "environmental baseline" in their analysis of the effects of the recently issued CWA § 316(b) rule for existing facilities. Section 316(b) of the CWA specifies that any standard established under CWA §§ 301 (effluent limitations) or 306 (national performance standards) applicable to a point

source "shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. § 1326(b). After a long chain of 316(b) rulemakings, challenges, remands, consent decrees and settlements spanning more than thirty-seven years, EPA published final § 316(b) regulations for existing facilities. *See* 79 Fed. Reg. 48,300 (Aug. 15, 2014)(codified at 40 C.F.R. pts. 122 and 125). EPA determined that the proposed rule, which was designed to minimize adverse environmental impacts from cooling water structure operations by reducing the impingement and entrainment of aquatic organisms, would reduce impacts to listed species, would not cause adverse effects to listed species, and in fact would benefit affected species. Letter from Robert K. Wood, Docket ID No. EPA-HQ-OW-2008-0667-4154. However, after additional discussions with the Services, EPA agreed to formal consultation.

EPA does not authorize the construction of cooling water intake structures or their day-to-day operation, nor could it under its CWA authority.

Despite the environmentally protective nature of the proposed 316(b) rule and its beneficial effect on listed species (through reduction of impingement and entrainment of aquatic organisms), the Services required EPA to include additional measures in the Final Rule in order to avoid a jeopardy finding. *See* 316(b) Rule Biological Opinion at 69. The Services acknowledged that "the Rule may result in a net reduction of aquatic organisms lost to impingement and entrainment when compared to what has occurred historically." *Id.* at 35. Under a traditional effects review, this would have been the end of the analysis. *See, e.g., NWF v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008) ("jeopardize" means to "expose to loss or injury" or to "imperil;" because it implies causation, an "[a]gency action can only 'jeopardize' a species' existence if that agency action causes some deterioration in the species' pre-action condition"). But the Services stated that their analysis "of effects is based, in part on the assumption that all covered facilities must comply with the rule or cease CWIS operations." 316(b) Rule Biological Opinion at 35. As such, the Services viewed effects as "the full extent of impacts to listed species that will occur when facilities operate pursuant to the Rule, rather than an evaluation of the expected net decline versus current operations." *Id.*

EPA's regulatory authority under CWA § 316(b) is to set "best technology available" standards for cooling water intake structures that are designed to minimized adverse environmental impact and that are incorporated into CWA permits that authorize the discharge of pollutants into waters of the United States. 33 U.S.C. §1326(b). EPA does not authorize the construction of cooling water intake structures or their day-to-day operation, nor could it under its CWA authority. Yet, the Services viewed EPA to have broad regulatory control over the operation of cooling water intake structures. On that basis, the Services concluded that any degradation in baseline aquatic conditions caused by past or current operation of cooling water intake structures was attributable to EPA, and, to the extent the Rule allowed those conditions to continue in the future, those conditions were effects of the Rule. The Services thereby removed degraded past and present conditions from the baseline and treated them as "effects" of the agency action. This shift of the effects of the operation of cooling water intake structures (many of which have been operating for decades) from the "environmental baseline" to the "effects" of the proposed rule drastically altered the causation analysis, making the proposed rule the "cause" of effects of the operation of cooling water intake structures nationwide and attributing those effects to the proposed rule despite the fact that it imposed restrictive requirements that reduced impingement and entrainment of aquatic organisms. This novel interpretation inevitably led to a potential jeopardy finding on EPA's otherwise protective rule, and a mechanism for the Services to exert significant influence over EPA's rulemaking.

The Services explained that their approach was based on the "same logic" of two cases involving federal agency operation of dams. In *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917 (9th Cir. 2008), a district court overturned a 2004 biological opinion that the continued operation of the Federal Columbia River Power System would not jeopardize listed species, and the Ninth Circuit affirmed. The biological opinion considered a new operating regime for the dams by measuring the effects of the dam against a "reference operation" consisting of a hypothetical regime for operating the dams that was most beneficial to listed species. *Id.* at 926. The "reference operation" excluded "nondiscretionary" actions like irrigation and flood control. *Id.* NMFS then measured whether the proposed "discretionary" operation of the dams would have an appreciable net effect on listed species. *Id.* In other words, the nondiscretionary actions that were required for continued operation of the dam were included in the environmental baseline, and only discretionary actions were included in the action under review. The court rejected this approach. Instead, the court attributed the existence of the dams to the environmental baseline, but included ongoing operation of the dams as effects of the agency action under review. *Id.* at 930–31. The court concluded, "[a]lthough we acknowledge that the existence of the dams must be included in the environmental baseline, the operation of the dams is within the federal agencies' discretion under both the ESA and the Northwest Power Act, 16 U.S.C. § 839." *Id.*

In another case involving the development of a new master manual concerning federal operation of dams, *American Rivers, Inc. v. United States Army Corps of Engineers*, Nebraska Public Power District argued that the proper baseline should include operations under a previous Corps Master Manual that included flow control operations. USFWS, however, used a baseline in which "the dams and physical channel modifications are assumed to be in place, but all the floodgates are assumed to be wide open, with no flow control." *Id.* at 632. The Court deferred to USFWS. *Id.* The court noted that if the Corps was mandated, for example, to maintain the system at specific depths on specific dates, there would be merit

to including that nondiscretionary action in the environmental baseline. *Id.* at 633. However, the Court concluded that because the Flood Control Act gives a good degree of discretion to the Corps in the management of the River, it was not arbitrary and capricious for the USFWS not to include a specific operational profile in the environmental baseline. *Id.* at 653.

The Services explained that their approach was based on the "same logic" of two cases involving federal agency operation of dams: *National Wildlife Federation v. National Marine Fisheries Service* and *American Rivers, Inc. v. United States Army Corps of Engineers.*

By saying that they are relying on the "same logic" as these cases, the Services appear to reason that EPA's regulatory authority to set best technology available for cooling water intake structures (CWIS) is sufficiently analogous to federal control over federal dams to adopt the approach taken in these cases. Environmental groups have advocated this approach. *See* Comment of Riverkeeper, et al. on ESA Biological Evaluation for CWA § 316(b) Rulemaking at 13, Docket ID No. EPA-HQ-OW-2008-0667-4149, (Oct. 31, 2013). The biological opinion states that "the operation of CWIS is within EPA's discretion. Therefore, for this baseline, we assume the CWIS are in place, but are not in operation," 316(b) Rule Biological Opinion at 28. This determination was "based in part, on the assumption that all covered facilities must comply with the rule or cease CWIS operations." *Id.* at 35. The Services provide no further explanation for their decision to shift effects of CWIS operations from the environmental baseline to the "effects" of the Rule. Opponents of this approach argue that it is in tension with the statutory language of § 7(a)(2), which focuses the consultation requirement on the effects of the federal agency's action, 16 U.S.C. § 1536(a)(2), with the regulatory requirement that the effects of the agency's action be measured against baseline conditions, not hypothetical conditions, and with the fact that EPA does not have regulatory authority over the daily operation of CWIS analogous to federal control over federal dams. 50 C.F.R. § 402.14(g)(4). Taken to its logical extension, the Services' position would now appear to be that when an agency undertakes an environmentally protective rulemaking, all effects produced by activities subject to that rulemaking will be attributed to the agency's rule—at least so long as the activity could be required to "cease operation" for noncompliance with the rule. This approach is in tension with judicial principles of proximate causation and effects that are properly attributable to an agency's action. *See DOT v. Pub. Citizen*, 541 U.S. 752, 767 (2004); *see also Aransas Project v. Shaw*, 756 F.3d 801, 819 n. 11 (5th Cir. 2014) ("The court's equating of proximate cause with government 'authorization' of an 'activity' that 'caused the take' is at best overbroad. It is open to the state's criticism that issuing drivers' licenses will 'cause the take' of endangered species run over by cars.").

Finally, the approach also raises concerns under the Administrative Procedure Act. Consultation often occurs behind closed doors, and public participation in consultation is not invited by the Services or subject to transparency. *See, e.g.*, Riverkeeper FOIA Request Requesting Draft Biological Opinion for Indian Point Nuclear Power Plant (urging transparency and public participation). This lack of transparency and participation has been criticized by all sectors, *see, e.g.*, Statement of the Pesticide Policy Coalition to the House Committee on Agriculture and House Committee on Natural Resources, (May 3, 2011), but it is especially egregious when the opaque consultation process results in major modifications to rulemakings. *See*, *e.g.*, *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1105 (4th Cir. 1985) (Notice is inadequate "if the final rule materially alters the issues involved in the rulemaking or . . . substantially departs from the terms or substance of the proposed rule.") (internal quotes omitted).

The trend toward formal consultation on environmental rulemaking, and the increasing influence of consultation on environmental rulemaking, is likely to continue, at least until directly addressed by the courts.