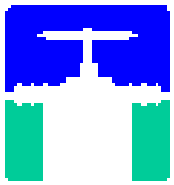

SUGGESTIONS ON HOW TO IMPROVE THE ENDANGERED SPECIES ACT

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Suggestions on How to Improve the Endangered Species Act

"The pipeline industry is willing to partner with the Service and others on the ESA and environmental stewardship, but the industry needs the flexibility to develop the necessary infrastructure for the nation's natural gas needs."

– Industry Survey Response

Executive Summary

Since the Endangered Species Act ("ESA") was enacted, federal agencies and courts have struggled to balance species conservation and recovery with economic and development concerns. Industry often struggles with ESA requirements that delay development projects and increase costs while not necessarily providing commensurate species and habitat benefits. Conservation organizations devote great effort toward ensuring that agencies adhere strictly to the requirements of the ESA, but such efforts can lead to litigation-driven agendas that divert available resources away from other, potentially more beneficial, conservation actions.

Despite concerns from industry, the federal agencies, and conservationists alike, the ESA and its implementing regulations remain largely uninformed by practical experience. Recognizing this shortcoming, the INGAA Foundation, Inc. ("INGAA") commissioned Holland & Hart LLP to study and report on suggestions for improvements to the ESA. The suggestions presented here are aimed at maintaining the sustainable existence of threatened and endangered species while allowing necessary natural gas development projects to be permitted and implemented in an efficient and cost-effective manner.

The Issues

Interstate natural gas pipelines are an integral part of our nation's energy infrastructure. Natural gas constitutes nearly 25% of energy consumption in the United States and domestic natural gas demand is expected to grow substantially over the next 20 years. A recent INGAA study predicted that domestic natural gas consumption could approach 30 trillion cubic feet by the end of the next decade if gas supplies are available. An increase in natural gas supplies and delivery infrastructure is necessary to meet this growing demand.

The Federal Energy Regulatory Commission ("FERC"), pursuant to the Natural Gas Act, must approve all new interstate natural gas pipelines, and any expansions to existing interstate natural gas systems by issuing certificates of public convenience and necessity. The FERC process includes the consideration of effects to endangered and threatened species. To comply with the ESA and other requirements, FERC certificates often include conditions requiring applicants to obtain permits from many other federal, state, tribal, and/or local agencies before construction may begin. The time required to obtain these approvals and to coordinate with the various agencies has increased in recent years, undermining the predictability and timeliness of pipeline permitting.

Construction delays can be costly to pipeline companies and consumers. Beyond economic costs, such delays undermine the industry's ability to provide secure and reliable

energy supplies needed to support economic growth while protecting both human health and environmental concerns. As with other regulatory approval processes, compliance with ESA processes is a factor in accomplishing efficient permitting and implementation of natural gas projects. At the same time pipeline companies and consumers have an interest in helping to achieve the purpose of the ESA to recover endangered and threatened species to sustainable levels.

In considering these dual objectives, this study identified that certain aspects of the ESA's traditional application and administration provide relatively minor conservation benefits to listed species, while consuming substantial agency resources and funds that could be utilized in recovery efforts. This report is the culmination of the study effort.

The report presents a set of concrete recommendations that could be used to improve the ESA's application and administration. The recommendations may be implemented through legislative action, regulatory changes, and policy development.

The Study and This Report

The study was conducted between March and August 2007, beginning with a review of the law and ESA literature to identify issues in the Act's implementation. Holland & Hart prepared an industry survey to solicit suggestions for ESA improvement. Next, INGAA sponsored a natural gas industry workshop in June 2007, at which the survey responses were presented and ideas, suggestions, and possible solutions to common ESA issues were solicited from industry experts with ESA project management experience. The workshop identified uniform industry concerns regarding existing ESA requirements.

The most significant issues identified through the survey and workshop include:

(1) the timing or length of the consultation process;

(2) inconsistent implementation by different regions/offices of the U.S. Fish & Wildlife Service or the National Marine Fisheries Service, or between the two agencies;

(3) critical habitat designation;

(4) reasonable and prudent measures and implementing conditions; and

(5) species listing or delisting.

Overall, the ESA aspect of greatest concern to federally regulated natural gas pipelines is the Section 7 consultation process. Thus, this report gives particular focus to potential strategies to accomplish a timelier and more efficient consultation process. Suggested improvements to the consultation process include:

- creating set timelines and clarifying consultation requirements;
- increasing the roles of the applicant and the action agency; and

- elimination of the use of the "destruction or adverse modification of critical habitat" standard in the consultation process, coupled with the affirmation that the "jeopardy" standard employed in the consultation process is applicable to all habitat essential for the conservation of threatened and endangered species.

These improvements concentrate on eliminating duplication and reducing the administrative time and cost associated with the consultation process, consistent with the Act's conservation purposes.

Suggested improvements to other ESA provisions include:

- imposing options for review of ESA decisions to address inconsistent implementation;

- requiring justification for the data relied upon in decisions to ensure the use of best available data;

- eliminating intra-Service consultation requirements in the context of issuance of Section 10(a)(1)(b) incidental take permits and other permits issued under Section 10;

- allowing the Service to employ cost recovery agreements for reimbursement of costs associated with implementation of the Section 7 process and in the course of Section 10 permitting;

- coordinating Section 10 permits with other wildlife protection statutes; and

- making critical habitat, and the critical habitat designation process, elements of recovery planning rather than elements of the Section 7 process.

The suggestions for improvement presented here are aimed at strengthening the law to achieve greater conservation benefits for listed species while creating a more timely and cost-effective ESA process. These recommendations do not represent all of the opportunities to seek improvement in the Act's administration, but instead reflect the perspectives of the natural gas industry, as identified during the study, on the provisions of greatest concern. The goal of the project is to serve as a catalyst for change to benefit all ESA stakeholders, but most importantly, to benefit endangered and threatened species.

The suggestions presented here are aimed at strengthening the ESA to achieve greater conservation benefits for listed species while creating a more timely and cost-effective ESA process.

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To date, the balance between conservation and other interests has not been easy to achieve.

I. Introduction

The ESA is the most far-reaching biodiversity protection law in the world. Its purpose is to conserve and recover threatened and endangered species of fish, wildlife and plants, as well as to conserve the ecosystems on which threatened and endangered species depend.[1] The ESA applies to actions taken by federal agencies that affect threatened or endangered species or their habitat, as well as to activities by other parties that may result in the "take" of a threatened or endangered species. The Act is principally administered by the U.S. Fish & Wildlife Service ("FWS") in the Department of Interior and the Department of Commerce's National Oceanic & Atmospheric Administration – National Marine Fisheries Service ("NOAA Fisheries").[2]

In implementing the ESA, the Service and courts have sought a balance between species preservation and overly stringent application of the Act. This effort has evolved over time, as can readily be seen in the manner in which the U.S. Supreme Court has addressed the Act in the cases before it. The first case arising under the ESA reached the Supreme Court in 1978. In *Tennessee Valley Authority v. Hill*, the Court identified the congressional intent underlying the ESA as being to reverse the trend of species extinction "whatever the cost."[3] Subsequently, the Supreme Court observed the broad reach of the Act in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, commenting that "as all recognize, the Act encompasses a vast range of economic and social enterprises and endeavors."[4]

More recently, the Supreme Court recognized the Act's purpose to balance species conservation with other economic and technological concerns. In *Bennett v. Spear*,[5] the Supreme Court held that the "'best scientific and commercial data' provision [of the ESA] is . . . intended, at least in part, to prevent uneconomic (because erroneous) jeopardy determinations."[6] The

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[1] 16 U.S.C. § 1531(b).

[2] In general, the FWS is responsible for terrestrial and freshwater species. NOAA Fisheries is responsible for marine species, including anadromous fish such as salmon and steelhead that hatch in freshwater, spend most of their adult life in the ocean, and then return to freshwater to spawn. *See* 50 C.F.R. §§ 17.2(b), 402.01(b). In general, the two agencies follow similar or identical regulations in implementing their ESA responsibilities, although there are both regulatory and policy differences in their approaches. This report uses the term "the Service" when it is not necessary to distinguish between the two agencies. Specific references are made to FWS or NOAA Fisheries where appropriate.

[3] 437 U.S. 153, 172-73 (1978).

[4] 515 U.S. 687, 698, 708 (1995).

[5] 520 U.S. 154 (1997). In *Bennett*, the Supreme Court held that the citizen-suit provisions of the ESA provide access to the courts for those challenging "overenforcement" of the ESA as well as those asserting an interest in the preservation of endangered species.

[6] *Id*. at 177.

Bennett ruling reflected a developing focus on the need for safeguards against government overregulation under the ESA.

The Supreme Court's decision in *Bennett* draws support from the substantive provisions of the ESA and congressional intent that the statute is not an obstacle to development, but instead ensures that species-impact concerns are taken into account as such development proceeds. For example, Congress' 1982 ESA amendments revised the time limits for Section 7 consultations between federal agencies and the Service to "meet the concerns expressed over inordinate delays" in the consultation process.[7] The Service's Section 7 consultation regulations have built-in limitations on the scope of regulatory action available for reasonable and prudent measures to minimize the incidental take of a listed species, and also limitations on reasonable and prudent alternatives that the agencies may suggest to avoid jeopardy.

For example, while reasonable and prudent measures are intended to minimize the level of incidental take, "Congress also intended that the action go forward essentially as planned."[8] Thus, "[s]ubstantial design and routing changes . . . are inappropriate in the context of incidental take statements because the action already complies with Section 7(a)(2)" by avoiding jeopardy.[9] Overall, consistent with the *Bennett* decision, both Congress and the implementing agencies have recognized that species conservation might not be required "whatever the cost," but has to be balanced against other economic and technological concerns.

A. Study Purpose and Need

To date, the balance between conservation and other interests has not been easy to achieve. Agency personnel are too often burdened by regulatory processes and litigation to focus on actions that provide more conservation benefit to listed species. Industry often struggles with ESA requirements that delay development projects and increase costs, while doing little to protect species and their habitat. Conservation organizations devote great effort toward ensuring that agencies adhere strictly to the requirements of the ESA, but often such efforts lead to litigation that diverts available resources away from other, potentially more beneficial conservation actions. Success stories in species recovery due to the ESA are few and far between.

Despite concerns from industry, regulators, and conservationists alike, most provisions of the ESA have effectively remained unchanged since it was enacted in 1973. For more than a decade, Congress has been unsuccessful in its attempts to reauthorize or amend the ESA. Similarly, the ESA's primary implementing regulations have seen little review and revision. For example, the FWS/NOAA Section 7 consultation regulations remain largely unchanged since

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[7] *See* H. Rep. No. 567, 97th Cong., 2d Sess. 27 (1982); S. Rep. No. 418, 97th Cong. 2d Sess. 19 (1982).

[8] Interagency Cooperation – Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19926, 19937 (June 3, 1986).

[9] *Id*.

their promulgation in 1986.[10] As a result, despite widespread dissatisfaction with and debate over the ESA's effectiveness and implementation, the Act and its implementing regulations remain largely uninformed by decades of practical experience.

This report offers a set of concrete recommendations that may be advocated through legislative, regulatory, and policy improvements to benefit species conservation while also improving administration of the ESA.

This report aims to identify reasoned, deliberate, and pragmatic potential solutions for the ESA's practical application and implementation, which respond to the concerns of the natural gas pipeline industry. Given the historical lack of successful efforts to revise the ESA and the current polarization that exists in Congress with respect to environmental regulation in general, efforts to seek ESA process and other improvements must be balanced and even handed. For that reason, this report eschews approaches that have been the subject of many unsuccessful ESA regulatory reform efforts. Instead, consistent with the comments articulated by industry representatives through both the survey and workshop processes, this report's recommendations aim at supporting the sustainable existence of threatened and endangered species while allowing natural gas transportation projects to be permitted and implemented in a timely and cost effective manner.

To do so, this report offers a set of concrete recommendations for consideration by INGAA that may be advocated through legislative, regulatory, and policy improvements to benefit species conservation, while improving administration of the ESA. Given the report's breadth and scope, these recommendation are presented in general terms to allow INGAA and its members to determine which, if any, of the recommendations should be pursued, and to allow the development of a general strategy for addressing the issues of greatest concern. Follow-up efforts will be required to articulate such a strategy, and to refine and present the desired improvements for either congressional or administrative action.

B. Pipeline Infrastructure Development and the ESA

Interstate natural gas transmission pipelines are an integral part of our nation's energy infrastructure. Natural gas constitutes approximately 25% of energy consumption in the United States[11] and domestic natural gas demand is expected to grow substantially over the next 20 years.[12] According to a recent INGAA study, domestic natural gas consumption should approach 30 trillion cubic feet by the end of the next decade if the supply of gas is developed.[13]

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[10] 51 Fed. Reg. 19926 (June 3, 1986).

[11] *See* Energy Information Agency, *Energy Basics 101*, available at http://www.eia.doe.gov/basics/energybasics101.html (last visited August 6, 2007).

[12] *See* Energy and Environmental Analysis, Inc., INGAA Foundation, Inc., An Updated Assessment of Pipeline and Storage Infrastructure for the North American Gas Market: Adverse

To meet the anticipated demand for natural gas, significant additional natural gas infrastructure must be built. By the year 2015, it is estimated that the natural gas industry will need to invest $61 billion (in 2003 dollars) in pipeline transmission and storage infrastructure in the U.S. and Canada.[14] Pipeline companies will need to install almost 50,000 miles of pipe to meet the growing market.[15]

The Federal Energy Regulatory Commission ("FERC"), pursuant to the Natural Gas Act[16] and regulations promulgated thereunder, must approve all new interstate natural gas pipelines, and any expansions to existing interstate natural gas systems. It does so by issuing a certificates of public convenience and necessity to pipeline companies. The FERC approval process includes consideration of effects to endangered and threatened species under the ESA. To comply with the ESA and other requirements, FERC certificates of public convenience and necessity often include conditions that require applicants to obtain permits from numerous other federal, state, tribal, and/or local agencies before construction may begin.[17] The time required to obtain these approvals and to coordinate with the various agencies has increased in recent years, undermining the predictability and timeliness of the pipeline permitting process.

Construction delays can be costly to pipeline companies and consumers. In addition to the economic costs, such delays undermine the industry's ability to provide secure and reliable energy supplies necessary to support economic growth while protecting both human health and environmental concerns. The time required for the FERC certification varies based on the size and type of the project. Although there have been improvements to the timeline, the process can take more than 24 months from the time a company submits an application until FERC renders its decision on a certificate for a project.[18] The Energy Information Agency estimates that an interstate natural gas pipeline construction or expansion project takes an average of about three years from the time it is first announced until the new pipe is placed in service.[19] However, the

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Consequences of Delays in Construction of Natural Gas Infrastructure, 2004 ("2004 INGAA Foundation Study").

[13] *Id*.

[14] *Id*.

[15] *See* Houston Energy Group, LLC, Entrix, Inc., INGAA Foundation, Inc., *FERC NEPA Pre-filing Process: Milestones for Success*, 2003 ("2003 INGAA Foundation Study") (discussing the need for additional pipeline between 2001 and 2015).

[16] 15 U.S.C. §§ 717-717z.

[17] Federal agencies involved in pipeline approvals include U.S. Forest Service, U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, Environmental Protection Agency, U.S. Advisory Council on Historic Preservation, Bureau of Land Management, and others.

[18] 2003 INGAA Foundation Study.

[19] Energy Information Agency, *Natural Gas Pipeline Development and Expansion*, available at http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/develop.html (last visited August 6, 2007).

project can take longer if it encounters environmental constraints or public opposition. A recent INGAA study estimated that a two-year delay translates into a cost of approximately $200 billion (in 2003 dollars) to U.S. gas consumers by 2020.[20] For pipeline companies and their investors, a fixed, predictable, and timely review process is desired since lengthy permitting review periods and delays are costly and may jeopardize the prospects for success of a project.

The timing and expenses associated with ESA processes are significant factors in the efficient and effective permitting and implementation of natural gas projects. Pipeline companies often experience inconsistent application of the ESA between agencies and agency offices, which results in project delays. Further, pipeline companies encounter delays in the consultation process due to disagreement over consultation requirements and insufficient agency resources to prosecute consultations within the timeframes specified by regulation. Companies also must invest greatly in conservation and mitigation measures and share an interest achieving the greatest conservation benefit to species and habitat. The need to reconcile these varied interests led to this study.

Construction delays can be costly to pipeline companies and consumers.

[20] 2004 INGAA Foundation Study.

Since its enactment in 1973, the ESA has been reauthorized and amended eight times, but the overall framework of the 1973 Act remains essentially unchanged.

II. Background of the ESA

A. Brief History

In 1966, Congress passed the Endangered Species Preservation Act, which allowed the listing of only native animal species as endangered and provided limited means for the protection of such listed species.[21] Congress subsequently enacted the Endangered Species Conservation Act of 1969, which provided additional protection to species considered to be in danger of "worldwide extinction" by prohibiting the import and sale of such species within the United States. [22]

The 1969 Act also called for an international meeting to adopt a convention on the conservation of endangered species.[23] In 1973, a conference held in Washington led to the signing of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"),[24] which restricted international commerce involving plant and animal species believed to be actually or potentially harmed by trade. That same year, Congress passed the Endangered Species Act of 1973,[25] which combined and considerably strengthened the provisions of the 1966 and 1969 Acts.

Since 1973, the ESA has been reauthorized and amended eight times, with the more significant amendments occurring in 1978, 1982, and 1988. The 1978 amendments, among other things, added provisions to Section 7 that allowed federal agencies to undertake an action that would jeopardize listed species if the action were exempted by a cabinet-level committee convened for this purpose; required critical habitat to be designated concurrently with the listing of a species, when prudent; and directed economic and other impacts of designation to be considered in identifying critical habitat.[26]

In 1982, Congress amended the ESA by (1) requiring that listing determinations regarding potentially threatened or endangered species be made solely on the basis of biological and trade information, without any consideration of possible economic or other effects; (2) establishing a mechanism under Section 10(a)(1)(B) that authorizes the Service to issue to permits to allow the "incidental take" of endangered and threatened wildlife species; (3) requiring that a final rule to determine the status of a species must be issued within one year

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[21] Pub. L. No. 89-669; 80 Stat. 926 (Oct. 15, 1966).

[22] Pub. L. No. 91-135, 83 Stat. 283 (Dec. 5, 1969).

[23] *Id.*

[24] 27 U.S.T. 1087, T.I.A.S. No. 8249 (March 3, 1973).

[25] 16 U.S.C. §§ 1531-1544.

[26] Pub. L. No. 96-159, 93 Stat. 1225 (Dec. 28, 1979).

of its proposal unless withdrawn for cause; (4) allowing designation of experimental populations of listed species that could be subject to different treatment under Section 4 for critical habitat and Section 7 consultation; and (5) prohibiting the removal and reduction to possession of listed plants from land under federal jurisdiction.[27]

The 1988 amendments added provisions that required monitoring of candidate species with adoption of emergency listing when there is evidence of significant risk. They also made several revisions to the recovery planning process, including the requirements that (1) recovery plans undergo public notice and comment; (2) affected federal agencies give consideration to those public comments; (3) species that have recovered and been delisted be monitored for at least five years; and (4) biennial reports be prepared and submitted to Congress regarding the development and implementation of recovery plans.[28] Despite the various amendments over the years, the overall framework of the 1973 Act has remained essentially unchanged.

B. Overview of Major ESA Provisions

1. Section 4 – Listing, Critical Habitat, and Recovery Planning

The Service is required to make its listing determinations "solely on the basis of the best scientific and commercial data available."

The Section 4 listing process is the mechanism by which the other ESA provisions come into play.[29] Section 4 requires the Service to determine whether species are eligible for listing as "endangered," i.e., in danger of extinction throughout all or a significant portion of its range,[30] or "threatened," i.e., likely to become endangered within the foreseeable future.[31] In determining whether a species should be listed, the agencies must consider the following criteria: (a) the present or threatened destruction, modification, or curtailment of its habitat or range; (b) over-utilization for commercial, recreational, scientific, or educational purposes; (c) disease or predation; (d) the inadequacy of existing regulatory mechanisms; and (e) other natural or manmade factors affecting its continued existence.[32]

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[27] Pub. L. No. 97–304, 96 Stat. 1426 (Oct. 13, 1982).

[28] Pub. L. No. 100–478, 102 Stat. 2315 (Oct. 7, 1988).

[29] 16 U.S.C. § 1533.

[30] *Id*. § 1532(6).

[31] *Id*. § 1532(20).

[32] *Id*. § 1533(a)(1)(A)-(E); 50 C.F.R. § 424.11(c). As previously indicated, FWS and NOAA Fisheries are generally jointly responsible for administration of many aspects of the ESA. However, each agency maintains its own lists of threatened and endangered species. FWS is generally responsible for listing and consultation requirements applicable to terrestrial and freshwater species, while NOAA Fisheries is generally responsible for oceanic and anadromous fish species.

The Service is required to make its listing determinations "solely on the basis of the best scientific and commercial data available," after conducting a review of the status of the species and after taking into consideration protection efforts by other governmental entities.[33] The Service may undertake this listing evaluation on its own initiative or on the basis of a petition filed by any interested person.[34]

When a species is listed under Section 4, the Service generally must also designate "critical habitat" for the species.[35] Critical habitat includes specific areas within the geographic area occupied by the species at the time it is listed that are essential to the conservation of the listed species and that require special management or protection.[36] Critical habitat designations must be based on "the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat."[37] Thus, critical habitat designation is the only part of the listing process where economic considerations play a role in the determination. Nonetheless, the Secretary's discretion is limited by the statutory requirement than an area must be designated as critical habitat where failure to do so would result in the extinction of a species.[38]

Critical habitat designation is the only part of the listing process where economic considerations play a role in the determination.

ESA Section 4(f) requires the development of recovery plans for the conservation and survival of species upon their listing as threatened or endangered.[39] The ultimate goal of recovery plans is the conservation and recovery of listed species so that they no longer need the protection of the ESA and may be removed from the lists of endangered or threatened species. Recovery is to be achieved through meeting "objective, measurable criteria" specified in the species plan in question.[40] Plans must also include estimates of the time required and the costs necessary to carry out those measures.[41] Public notice and comment are required on recovery plans.[42] The Secretary is given broad latitude, however, in giving priority to species

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[33] 16 U.S.C. § 1533(b)(1)(A).

[34] *Id*. § 1533(b)(3).

[35] *Id*. § 1533(b)(2). The Service may decline to designate critical habitat if doing so would not be prudent (*i.e.*, where publicizing the location of a species is likely to lead to illegal collection) or where critical habitat is not determinable. *Id*. § 1533(a)(3)(A); *see also* 50 C.F.R. § 424.12(a).

[36] 16 U.S.C. § 1532(5)(A)(i).

[37] *Id*. § 1533(b)(2) (emphasis added).

[38] *Id*.

[39] *Id.* § 1533(f).

[40] *Id*. § 1533(f)(1)(B).

[41] *Id*.

[42] *Id*. § 1533(f)(4).

deemed most likely to benefit from recovery plans, and in developing site-specific management actions.[43]

Finally, Section 4 provides that a species may be removed or "delisted" from the lists of endangered and threatened species by the Service upon the filing of a petition by any interested party,[44] or review by the Service.[45] The delisting regulations provide that a species may be delisted if the information on the species "substantiate[s] that [the species] is neither endangered nor threatened for one or more of the following reasons:" (1) the species is considered to be extinct; (2) the species has recovered to the point that protection under the Act is no longer required; or (3) the initial classification of the species as endangered or threatened was in error.[46] The Service considers the same five criteria in delisting as species as it considers when listing a species.[47]

2. Section 6 – Cooperation with States

Section 6 encourages cooperation between the Service and the states in the conservation of listed species.[48] Under Section 6, the Service is authorized to enter into cooperative agreements with any state that establishes and maintains an "adequate and active" program for the conservation of endangered and threatened species.[49] Once a state enters into such an agreement, the Service is authorized to assist in implementation of the state's conservation program.[50] Federal financial assistance, provided in the form of grants, can be used to support the development of programs for the conservation of listed species or to assist in the monitoring of recently delisted and candidate species that reside within that state.[51]

3. Section 7 – Consultation

Section 7(a)(1) requires all federal agencies to utilize their authorities in furtherance of the purposes of the ESA, by carrying out programs for the conservation of threatened and

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[43] *Id.* § 1533(f)(1).

[44] *Id*. § 1533(b)(3)(A).

[45] The Service must conduct a review of listed species at least once every five years. *See id*. § 1533(c)(2)(A). On the basis of such review, the Service must determine whether or not a species should be removed from the Federal List of Endangered and Threatened Plants, or reclassified from endangered to threatened, or from threatened to endangered. *Id.* § 1533(c)(2)(B).

[46] *See* 50 C.F.R. § 424.11(d).

[47] *Id*.; *see also supra* at 7.

[48] 16 U.S.C. § 1535(a).

[49] *Id*. § 1535(c).

[50] *Id*.

[51] *Id*. § 1535(d).

endangered species."[52] Section 7(a)(2) requires every federal agency to consult with the Service to ensure that any action it authorizes, funds, or carries out will not "jeopardize" the continued existence of a listed species or "adversely modify or destroy" designated critical habitat.[53] As described further below, consultation under Section 7(a)(2) may be formal or informal.[54]

Before an agency or project proponent takes action or begins construction of any project, the action agency must consult with the Secretary to determine whether any listed species or species proposed for listing may be present in the action area.[55] If such species are present, the action agency must prepare a biological assessment.[56] By regulation, a biological assessment must be prepared for "major construction activities."[57] The data included in the biological assessment may be gathered and analyzed by the applicant or another non-federal representative, but the action agency is responsible for the findings presented in that assessment.[58]

Informal consultation consists of any discussions or correspondence between the federal action agency and the Service designed to assist in determining whether formal consultation is required.[59] If, during informal consultation, the Service determines or concurs with the action agency that the proposed action either has no effect or is "not likely to adversely affect" listed species or critical habitat, the consultation process is terminated, and no further action is necessary.[60] A biological assessment may be prepared at the informal consultation stage as a tool for assisting the action agency in determining whether the proposed action is likely to adversely affect the species or habitat and whether formal consultation is needed.[61]

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[52] *1d.* § 1536(a)(1).

[53] *Id.* § 1536(a)(2); 50 C.F.R. § 402.01(a).

[54] *See* 50 C.F.R. §§ 402.13, 402.14.

[55] 16 U.S.C. § 1536(c)(1).

[56] *Id.* A biological assessment may be also be prepared at the informal consultation phase as a tool for assisting the action agency in determining whether the proposed action is likely to adversely affect the species or habitat and whether formal consultation is needed. *Id.*; 50 C.F.R. § 402.12(a).

[57] 50 C.F.R. § 402.12(b). "Major construction activities" are defined as construction projects (or other undertakings having similar physical impacts) which are a major federal action significantly affecting the quality of the human environment as referred to in NEPA. *Id.* § 402.02. For non-construction projects, the agency still needs to assess the likely impacts of the action and present those findings to the Service so that the Service can determine the likely effects on listed or proposed species. Biological assessments are often used to satisfy this requirement.

[58] *Id.* § 402.08.

[59] *Id.* § 402.13(a).

[60] *Id.*

[61] 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12(a).

The biological opinion must be based on "the best scientific and commercial data available."

Formal consultation results in the issuance by the Service of a biological opinion indicating whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy" or "adverse modification" opinion) or is not likely to result in such effects (a "no jeopardy" or "no adverse modification" opinion).[62] The biological opinion must be based on "the best scientific and commercial data available."[63] A jeopardy or adverse modification opinion must include reasonable and prudent alternatives, if any, that would alter the action to avoid the likelihood of causing jeopardy or adverse modification of critical habitat.[64]

When the proposed activity will result in an incidental taking of a protected species, but will not jeopardize the continued existence of the species, the biological opinion will include an incidental take statement.[65] The incidental take statement must specify: (1) the impact of such incidental taking on the species; (2) the reasonable and prudent measures that the Service considers necessary or appropriate to minimize such impact; and (3) the terms and conditions that must be complied with by the action agency, the applicant, or both to implement such reasonable and prudent measures.[66] The incidental take statement serves as a shield from Section 9 take liability for any take committed during activities that are otherwise lawful and in compliance with its terms and conditions.[67]

4. Section 9 – Take Prohibition

Section 9 of the ESA prohibits the "take" of any endangered species of fish or wildlife by any person.[68] For threatened species, the Act provides that the Service can by regulation adopt a less expansive definition of "take" for such species, recognizing that more flexibility in both the nature of proscribed activities and in the nature of the degree and type of management that can be employed with a given threatened species may be desirable.[69] FWS has promulgated a regulation making the full statutory definition of "take" applicable to a threatened species, absent a special rule to the contrary.[70] NOAA Fisheries, on the other hand, takes a species-by-species

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[62] 50 C.F.R. § 402.14(h)(3).

[63] 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

[64] 50 C.F.R. § 402.14(h)(3).

[65] 16 U.S.C. § 1536(b)(4).

[66] *Id*.

[67] *Id*. § 1536(o).

[68] *Id*. § 1538(a)(1).

[69] *Id*. § 1533(d).

[70] 50 C.F.R. § 17.31. There have been few special rules promulgated to date, with such rules for the grizzly bear, the Louisiana black bear, the Preble's meadow jumping mouse, and the California Gnatcatcher being notable exceptions. *See* 50 C.F.R. §§ 17.40, 17.41. Thus, as a

approach. For NOAA Fisheries-listed species, the protections of the Section 9 take prohibition are applicable to threatened species only if the agency promulgates a regulation extending such protections to the species in question.[71]

Both federal and nonfederal parties, including states and private persons, are subject to Section 9's take prohibition. The statute defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[72] The Secretary of the Interior has issued regulations defining "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[73] The Supreme Court has upheld the "harm" definition as applied to significant habitat modification or destruction that causes actual death or injury to a listed species on federal or nonfederal land.[74]

Section 9 of the ESA prohibits the "take" of any endangered species of fish or wildlife by any person.

With respect to threatened or endangered plants, the ESA makes it illegal to (1) import or export such plants; (2) transport or sells such plants in interstate commerce, (3) remove and reduce to possession such plants from areas under federal jurisdiction; (4) maliciously damage or destroy such plants on areas under federal jurisdiction; and (5) remove, cut up, or damage or destroy such plants on any other areas in knowing violation of any state law or regulation or in violation of state trespass law.[75]

5. Section 10 – Incidental Take Permits and Habitat Conservation Plans

Section 10 authorizes the issuance of "incidental take" permits that allow nonfederal landowners and others to pursue development and other activities without Section 9 liability for any takings that might occur "incidental to, and not [for] the purpose of, the carrying out of an otherwise lawful activity."[76] This section is especially useful for activities under Section 7. The permit applicant must prepare and submit a habitat conservation plan or "HCP," specifying (1) the impact that will likely result from such taking; (2) what steps the applicant will take to monitor, minimize, and mitigate such impacts, the funding that will be available to implement such steps, and the procedures to be used to deal with unforeseen circumstances; (3) what alternative actions to such taking the applicant considered and the reasons why such alternatives

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general proposition, the full scope of the "take" prohibition ordinarily will apply to any listed species of fish or wildlife under FWS jurisdiction.

[71] *Id*. § 223.201.

[72] 16 U.S.C. § 1532(19).

[73] 50 C.F.R. § 17.3 (1994).

[74] *Sweet Home*, 515 U.S. at 687.

[75] 16 U.S.C. § 1538(a)(2).

[76] *Id*. § 1539(a)(1)(B).

are not proposed to be utilized; and (4) such other measures that the Service may require as being necessary or appropriate for purpose of the plan.[77]

To issue an incidental take permit, the Service must determine that (1) the taking will be incidental; (2) the applicant will minimize and mitigate the impacts of such taking to the maximum extent practicable; (3) the applicant will ensure that adequate funding for the plan will be provided; (4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (5) the measures required under the HCP will be met.[78]

One benefit of an HCP for private landowners is the Service's "No Surprises" rule. Under this rule, if there are "changed circumstances," i.e., changes affecting a species covered by the HCP that can reasonably be anticipated and planned for during the development of the HCP, the permittee must implement any additional conservation and mitigation measures deemed necessary to respond to the changed circumstances that were provided for in the HCP.[79] If the changed circumstances were not addressed in the plan, the Service will not require any conservation or mitigation measures beyond those provided for in the plan.[80] When "unforeseen circumstances" occur, i.e., changes in circumstances affecting a species covered by an HCP that could not reasonably have been anticipated and that result in a substantial and adverse change in the status of the covered species, the Service cannot require the commitment of additional land, water, or financial compensation beyond the level otherwise agreed upon for the species covered by the HCP without the consent of the permittee.[81]

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[77] *Id*. § 1539(a)(2)(A).

[78] *Id*. § 1539(a)(2)(B).

[79] 50 C.F.R. §§ 17.2, 17.22(b)(5)(i).

[80] *Id.* § 17.22(b)(5)(ii).

[81] *Id*. §§ 17.2, 17.22(b)(5)(iii).

This study included an industry survey questionnaire to solicit suggestions for ESA improvement.

III. Study Overview

The study began with a review of the law and ESA literature to identify issues in the Act's implementation. Holland & Hart then prepared an industry survey questionnaire to solicit suggestions for ESA improvement. The survey responses identified significant issues, as well as measures that may be beneficial for improving the ESA. The survey was followed by an INGAA-sponsored natural gas industry workshop in June 2007, at which the survey responses were presented and ideas, suggestions, and possible solutions to common ESA issues were solicited from industry experts with substantial experience in managing projects through the ESA regulatory processes. The workshop identified some surprisingly uniform industry concerns regarding existing ESA requirements. This report includes the results of the survey and workshop, as informed by the background of the legal and literature review and the authors' practical ESA experience.

A. Survey Effort and Results

The survey of INGAA members on "Suggestions on How to Improve the Endangered Species Act" was conducted online in May and June 2007. The survey questionnaire was developed using the Tailored Design Method.[82] The questionnaire contained both open- and closed-ordered questions to elicit a broad range of answers from survey respondents and to provide internal qualitative checks on the validity and consistency of the responses on common constructs. For instance, where a majority of the respondents indicated on a closed-order question that the timing or length of the consultation process was a significant issue with the ESA's application and administration, the open-ended responses describing specific timing and consultation issues confirmed the internal validity and consistency of these responses.

The questionnaire was made accessible online by an e-mail invitation from INGAA to a convenience sample of about 100 individuals from approximately 40 INGAA member companies, including over 30 companies in the natural gas pipeline industry and 10 industry supporting organizations (e.g., consultants, engineering firms, law firms). The individuals invited to participate had practical experience in day-to-say work with ESA issues and the federal agencies implementing the ESA. A total of 33 individuals responded. The exact number of responses varied with each question as not every respondent answered every question. Of the company-identified responses (about half (17) of the overall total responses of 33), 13 were pipeline industry companies, and 4 were supporting organizations, about the same proportion (3 to 1) as the overall invitation population.

The purpose of the convenience sample was not to obtain a statistically accurate representation of the entire population of natural gas pipeline industry opinion or even more broadly held opinions or background on the ESA. Instead, the convenience sample is a

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[82] Don A. Dillman, *Mail and Internet Surveys: The Tailored Design Method* (2007).

recognized research method to obtain basic information in a particular area or industry,[83] as was done here, to identify general areas of concern among the responding industry representatives and to identify areas of further inquiry for this study. The complete survey questions and corresponding responses from INGAA members are included in the Appendix.

Survey respondents identified a variety of issues as presenting challenges for the ESA's application and administration, as depicted in Figure 1.

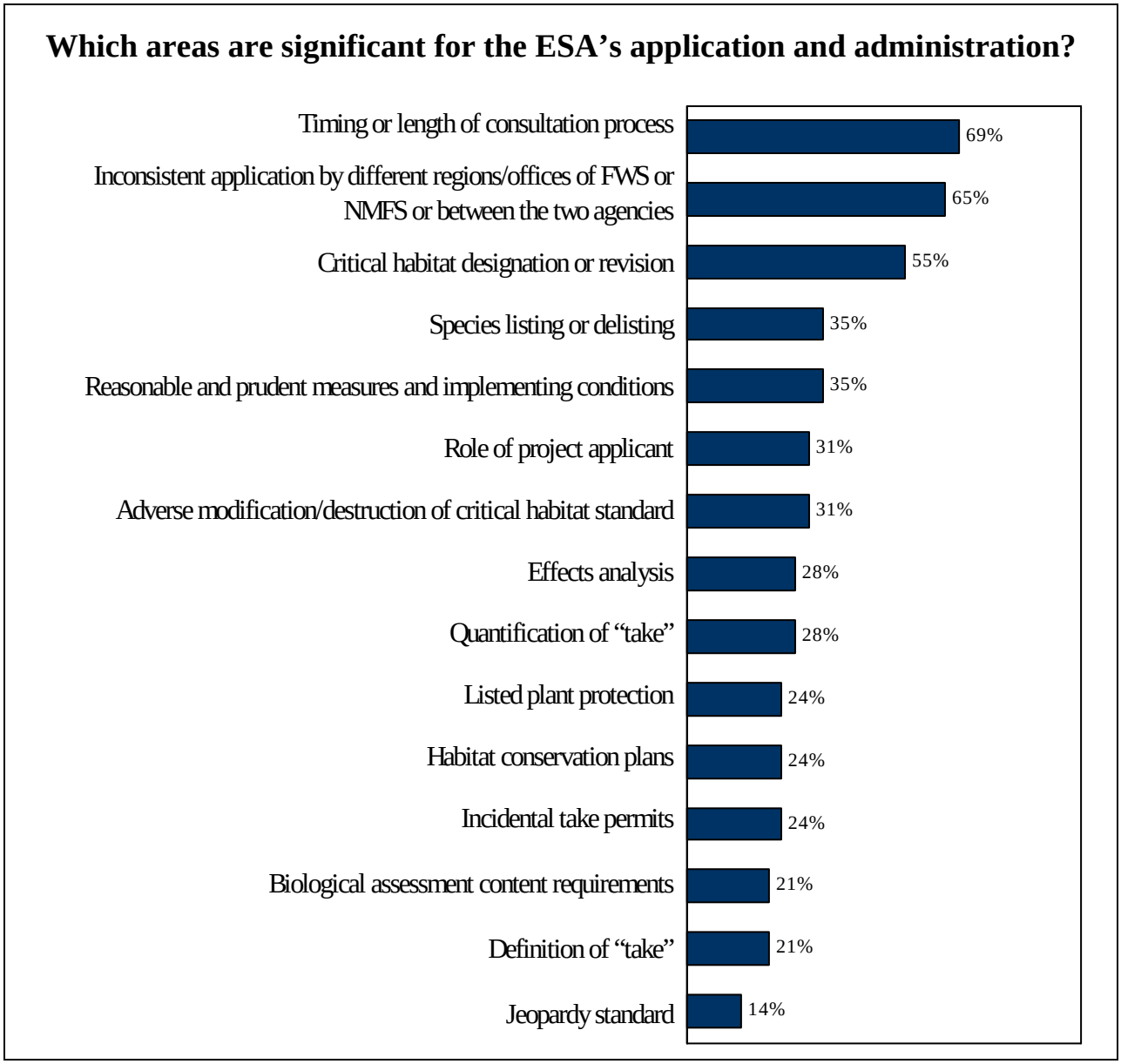

Figure 1: Response frequencies to Survey Question 2.

[83] *Id.*

The Section 7 consultation process is of greatest concern to federally regulated natural gas pipelines.

The responses to open-ended and follow-up questions detailed industry's concerns. Many survey respondents indicated that their company's projects had been affected by delays in the ESA consultation process, and by the inconsistent application of the ESA by different agencies or even different offices within the same agency.

Respondents also identified how their companies have resolved concerns with the ESA's administration. Most indicated that the best approach was to become involved in the ESA process at an early stage, such as through pre-application meetings, and to stay actively involved throughout the consultation process. Direct and frequent communication with agencies, and increased efforts to collect data and educate agencies on project details and potential species effects, were highlighted as key approaches to working with the consulting agencies on these ESA concerns.

The survey also asked which aspects of recent legislative proposals would be beneficial for improving the administration of the ESA. The respondents' opinions are presented in Figure 2.

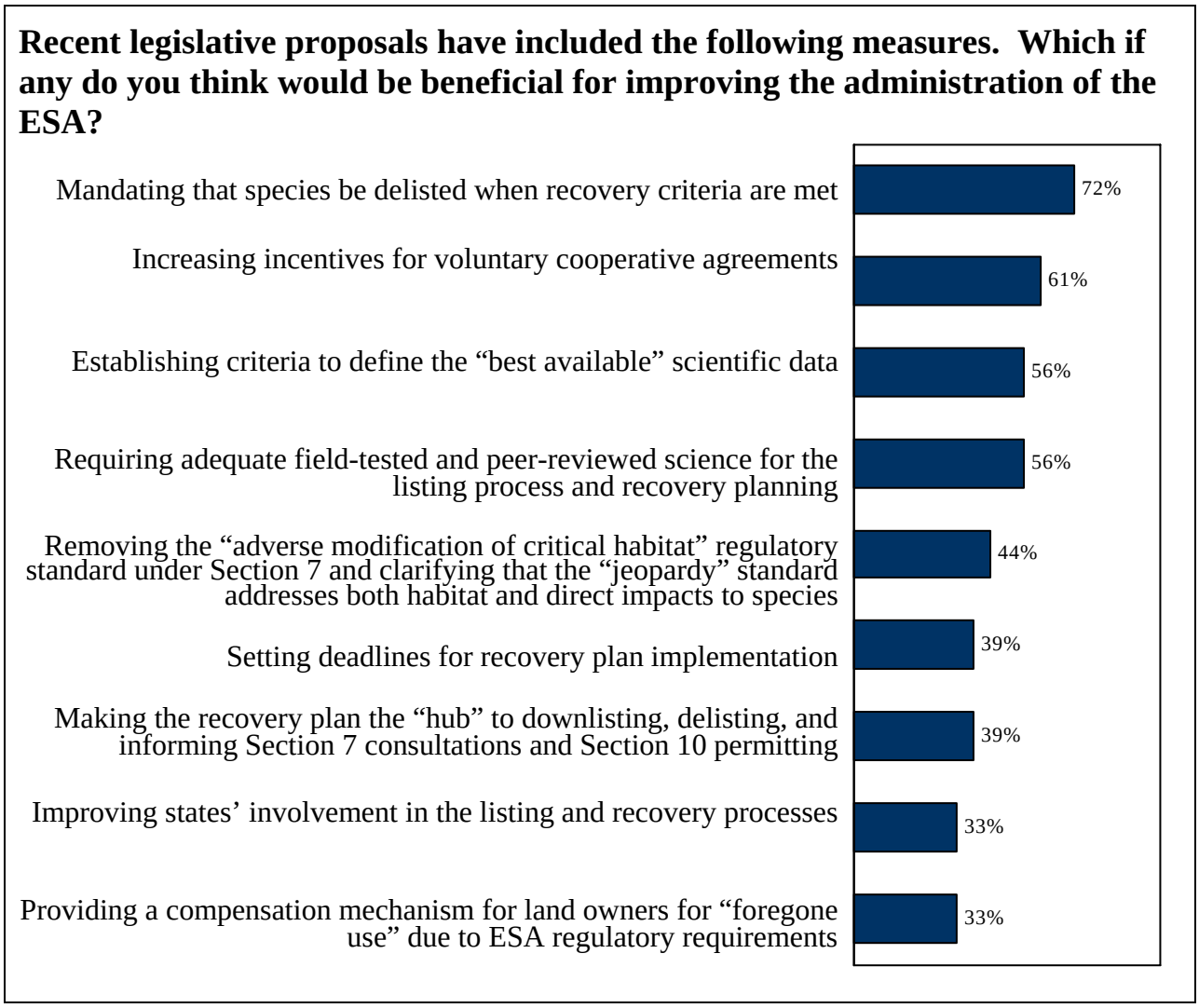

Figure 2: Response frequencies to Survey Question 7.

B. Industry Workshop

On June 11, 2007, an industry workshop was held in Houston, Texas, to follow up on the survey questionnaire and responses, and to consider ESA issues affecting the natural gas pipeline industry in greater depth. Nineteen participants from ten different companies attended and shared their experiences in working with the ESA. These participants broadly supported the goals and objectives of the ESA, while expressing concern regarding various issues raised in its implementation. The dominant concerns expressed related to the participants' perceptions of inconsistent decision-making by the Service in administering the listing and Section 7 consultation processes, and the lack of certainty and predictability regarding the timing of Section 7 consultation. A sample of the points discussed at the workshop is presented in Table 1.

Table 1: Representative Workshop Comments.

"The ESA's requirement to use the 'best scientific and commercial data available' does not address the quantum of information required."
"Does critical habitat designation yield additional species benefits beyond listing of the species?"
"There's a difference in linear utilities versus shopping malls or other projects in terms of potential listed species effects."
"We need to be viewed as conservationists that move natural gas."
"Why isn't six to nine months enough time to conclude an ESA consultation?"
"The ESA regulations do not distinguish between temporary and permanent impacts."
"Inconsistencies between agencies and unduly long and tedious consultations affect our company's projects."
"Our company addresses ESA concerns through pre-application meetings with all agencies, using science and reason, field visits, early informal consultation, blanket clearance letters for minor work, reimbursement agreements with the agency, and regional habitat conservation plans."
"We've found the best approaches for addressing ESA concerns are pre-application meetings, education and communication with the agencies, collecting hard data, and using science and reason."
"Concerns over timing or seasonal limitations on project construction or maintenance include that overlapping conditions may limit a company to one or two months of construction for an entire year, and can increase project costs and planning with shutdown and restart activities."
"The pipeline industry is willing to partner with the Service and others on environmental stewardship, but the industry needs the flexibility to develop the necessary infrastructure for the nation's natural gas needs."
"Key areas for improving the ESA include consistency in the Act's implementation, recognizing the Act's limits in imposing mitigation requirements, and recognizing the temporary nature of many impacts from linear facilities."
"Other steps to improve the administration of the ESA include having mitigation commensurate with project impacts; applying the Act's protections in a balanced, equitable, and scientifically supportable manner; and making the current system work with adequate staffing and funding to administer project clearances."
"ESA administration and policy issues may be more important than legislative changes in improving the Act."

C. Overview of Recent Proposed ESA Amendments

In the course of the study, Holland & Hart reviewed prior efforts to amend the ESA. The purpose of this review was to identify prior proposed amendments to the ESA to determine those elements previously identified for reform.

Prior amendment efforts have been driven by a variety of philosophies and ideological perspectives. Some represented serious efforts to accomplish legislative change to the Act, while others appear to have been introduced for other purposes. None of them made significant progress through the legislative process. The purpose of this study effort was to identify realistic opportunities to effect positive changes to the ESA, including through legislative action. Accordingly, the results of the legislative review were incorporated selectively into the industry survey in the form of a question (Question 7) regarding which proposed measures would be beneficial for improving the administration of the ESA. This report likewise takes a measured approach to identifying potential legislative solutions to ESA problems which may be considered to be viable in the current political climate, rather than incorporating prior legislative reform efforts in any wholesale manner.

1. S.700 / H.R. 1422 – Endangered Species Recovery Act of 2007

The goal of the Endangered Species Recovery Act of 2007, S.700/H.R.1422, was introduced to create incentives for private landowners who take steps to conserve endangered or threatened species on the properties they own. The bill would amend the Internal Revenue Code to allow certain landowners whose property contains the habitat of an endangered or threatened species and who enter into a habitat protection agreement a tax credit for costs relating to habitat protection easements and restoration. Similar bills were introduced in 2006 (S.4087) and 2005 (S.2110).

2. S.658 – Endangered Species Reform Act of 2007

The Endangered Species Reform Act of 2007, S.658, would amend the ESA to require the Service to:

- use empirical, field-tested, or peer-reviewed data in listing decisions;
- make listing decisions only if there is sufficient biological information to support recovery planning for the species;
- notify and provide a copy of a listing petition to the state agencies in states where the species is believed to occur and to solicit the assessment of such agencies as to whether the petitioned action is warranted;
- make publicly available all information used (or not used) to make a listing decision; and
- promulgate regulations that establish criteria that must be met for scientific and commercial data to be used as the basis for listing determination.

Additionally, S.658 specifies information required in a listing. Similar bills were introduced in 2003 (S.369) and 2001 (S.347).

3. H.R.1299 – Critical Habitat Enhancement Act of 2005

The Critical Habitat Enhancement Act of 2005, H.R.1299, was introduced to require strict timelines for the Service's designation of critical habitat and to redefine "critical habitat" to include areas occupied by the species at the time of listing. The bill also (1) specified factors for consideration in determining the economic impact of critical habitat designation; (2) required more notice to local governments affected by critical habitat designation and (3) made critical habitat designations inapplicable to actions authorized by Section 7 and Section 10 permits as well as other conservation programs. A similar bill was introduced in 2003 (H.R.2933).

4. H.R.2602 – Scientifically Identifying the Need for Critical Habitat Act of 2003

The Scientifically Identifying the Need for Critical Habitat Act of 2003, H.R.2602, was introduced to change the authority of the Service to designate critical habitat from mandatory to discretionary. The bill further directed the Service to give greater weight to data that are empirical or have been field-tested or peer-reviewed when evaluating comparable data. The bill also specified requirements for the use of sound science in listing decisions and recovery planning, such as: (1) the establishment of criteria for scientific studies to support the listing; (2) use of data obtained by observation of the species in the field; and (3) use of data from landowners who have observed such species on their land. Additionally, the bill set forth requirements for peer review and use of information provided by states for recovery plans.

5. H.R.1662 – The Sound Science for Endangered Species Act Planning Act of 2003

The Sound Science for Endangered Species Act Planning Act of 2003, H.R.1662, a bill similar to H.R.2602 (2003), was introduced to require the Secretary of the Interior to give greater weight to scientific or commercial data that is empirical or has been field-tested or peer-reviewed. This bill provided for peer review of listing decisions, greater review of data used for listing, and more participation by states and the regulated community in listing decisions. A similar bill was introduced in 2002 (H.R.4840) and 2001 (H.R.2829).

6. S.911 – Endangered Species Recovery Act of 2001

The Endangered Species Recovery Act of 2001, S.911, was introduced to:

- limit the use of data in listing decisions to empirical, field-tested or peer-reviewed data;
- modify the factors considered for such listings;
- repeal the provision requiring the Service to designate critical habitat concurrent with listing;

- provide for a change of status of a species from a previous determination (other than petitions to add or remove a species) and to require specified minimum documentation;

- require (when requested) at least one public hearing to be held in each state that would be affected by a proposed listing decision;

- require publication of relevant information regarding the status of the affected species;

- provide for independent scientific review of a listing determination;

- authorize the Service to enter into a conservation agreement with states for a species that has been proposed for listing (or is a candidate species);

- set forth requirements and schedules by which the Service shall develop and implement recovery plans for listed species;

- require federal agencies to: (1) maintain an inventory of listed species located on agency owned or controlled land or water; and (2) meet specified consultation requirements before commencing an action that may affect such a species;

- authorize the Service to enter into agreements with non-federal persons to benefit the conservation of listed species by creating, restoring, or improving habitat or by maintaining currently unoccupied habitat for such species;

- direct the Service to establish a habitat reserve program;

- establish a Habitat Conservation Planning Loan Program and a Habitat Conservation Insurance Program; and

- direct the Service to develop and implement a private property owners education and technical assistance program.

7. H.R.4579 – Endangered Species Recovery Act of 2001

The Endangered Species Recovery Act of 2001, H.R.4579, was introduced to require the designation of: (1) survival habitat concurrently with making a determination that a species is endangered or threatened; (2) critical habitat concurrently with adoption of a final recovery plan for a species; and (3) survival and critical habitat in the case of a highly migratory marine species. The bill required the Service to designate survival habitat based only on biological factors, giving special consideration to habitat currently occupied by the species. In addition the bill:

- established a schedule for publishing species listing determinations;

- provided for draft and final recovery plans;

- required federal agencies to monitor the status and trends of listed or candidate species on lands or waters under their administration;

- applied provisions regarding interagency cooperation and consultation to species in a foreign country or on the high seas;

- required the Service to: (1) undertake to conserve species where a permittee defaults on permit or plan obligations; and (2) implement a streamlined application and approval procedure for incidental take permits and plans determined to be low effect, small scale plans;

- set forth requirements for the deposit of performance bonds and other financial security by incidental take permit applicants;

- established the Habitat Conservation Plan Fund;

- directed the Service to establish a Community Assistance Program to provide timely and accurate information to local governments or property owners;

- made persons who negligently damage any member or habitat of a listed species liable for the restoration or replacement costs;

- authorized the Service to enter into conservation agreements with owners or lessees of real property on which conservation measures for listed or candidate species are to be carried out;

- amended the Internal Revenue Code to require that the value of a taxable estate be determined by deducting from the value of the gross estate the value of included real property subject to a conservation agreement;

- allowed an additional tax deduction for real property taxes imposed on state and local property subject to conservation agreements; and

- allowed a tax credit for costs incurred in connection with conservation agreements.

D. Other Significant Issues

A number of other significant issues were identified from the literature review, the experience of ESA practitioners, and recent amendments proposed in Congress. These issues are:

- Additional guidance or regulation addressing the identification of reasonable and prudent measures and implementing conditions for use in Section 7 incidental take statements would assist the Service and regulated community in determining which measures are necessary, appropriate, and consistent with the intent of Section 7.

- Additional guidance is needed to implement the "minor change rule," which requires that reasonable and prudent measures and terms and conditions in an incidental take statement be limited to those which require no more than a minor change to the proposed action.

- Better guidance on what constitutes the "best scientific and commercial data available" for various sections of the ESA would be useful.

- Species should be delisted when recovery criteria are met.

- The Service should consider the extent to which threatened species warrant protection of the ESA on a species-by-species basis at time of listing.

- Clarification in the Act that "take" includes actual death or injury would be useful.

- Section 7 or its implementing regulations should contain a mechanism to authorize otherwise prohibited impacts to listed plants.

- The ESA should explicitly establish authority for the Service to issue blanket clearance letters under Section 7.

- Issuance of an incidental take permit under the ESA should constitute or support issuance of a special purpose permit under the Migratory Bird Treaty Act for species covered by both statutes. The Service also should address the interplay of the ESA and the Bald and Golden Eagle Protection Act in light of the delisting of the bald eagle.

- Intra-Service consultation under Section 7 on the issuance of an incidental take permit under Section 10 is redundant and unnecessary.

- The term "maximum extent practicable" requirement in Section 10 should expressly encompass economic feasibility considerations.

- The ESA should provide clear authorization allowing the Service to enter into cost recovery agreements for recovery of processing costs for incidental take permit applications.

Delay in the Section 7 consultation process often results from the agencies' limited staffing and funding.

IV. Suggestions on Measures to Improve the ESA

This section addresses significant issue identified in the study, followed by suggestions on how to improve the ESA to address the issue. The suggested improvements include both regulatory and legislative actions. Many of the improvements suggested here are comprehensive and a detailed explanation of each one is beyond the scope of this report. More detailed analysis of each should be included when specific recommended statutory and regulatory language is be prepared to implement the proposed measures.

A. Section 7 Consultation

Based on the survey and workshop results, the Section 7 consultation process is of greatest concern to federally regulated natural gas pipelines. The most significant area identified for improvement within Section 7 is the length and timing of the consultation process.

Specific survey responses noted, for example, that:

- the length of time to complete a biological opinion created or threatened to create adverse project schedule impacts;
- The length of time of the consultation greatly delayed a project to the point that construction ran too late in the year for revegetation efforts to be successful; and
- the ESA has caused delays in general or created the potential for delays.

Survey respondents also emphasized the need for timely issuance of biological opinions. More detail on the specific elements of the Section 7 process suggested for revision follows, organized first by regulatory improvements and then possible legislative improvements.

1. Regulatory Improvements

a. Date of Initiation of Consultation

By regulation, formal Section 7 consultation must conclude within 90 days of the date of initiation, unless extended, and the Service must issue the biological opinion within 45 days of the conclusion of such consultation.[84] To initiate formal consultation, the federal action agency must submit a request to the Service, which must include specific information about the action, the action area, listed species and critical habitat, and the anticipated effects on those species and

[84] *See* 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e). Consultation may be extended only by mutual agreement of the Service and the action agency, and if an applicant is involved, may not be extended more than 60 days without the applicant's consent. 50 C.F.R. § 402.14(e).

habitat.[85] In practice, however, submission of a request for formal consultation frequently does not start the clock on the 90-day consultation period. One common source of delay is the postponement of the date of initiation of consultation when the initiation request information is considered incomplete and the submission of additional information is required by the Service. Service regulations provide that an agency seeking to initiate formal consultation must "provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat."[86] Beyond the general requirement that the action agency must submit "the best scientific and commercial data … for an adequate review of the effects of" an action, however, the regulations provide no information content requirements or guidance.

One common source of delay is the postponement of the date of initiation of consultation when the initiation request information is considered incomplete and the Service requires additional data.

Under certain circumstances, a request for initiation of consultation may require further information to allow an "adequate review" of the effects of an action where, for example, a potentially affected species is wholly disregarded. However, other circumstances suggest that requests for further information are sometimes interposed for purposes of delay in consultation in response to resource constraints on the part of the Service office involved in the consultation. The lack of specific information content requirements in the regulations make it difficult to objectively determine whether actual information needs are driving the delay in the initiation of consultation or whether other issues, including resource limitations, are at play.

One solution is to amend the regulations (1) to provide greater definition and parameters regarding the information contents required to support a request for formal consultation, and (2) to provide that formal consultation will commence upon receipt by the Service of an initiation request, regardless of any request by the Service for additional information. Furthermore, such an information-content regulation could provide that should additional information be required during the course of consultation, it could be submitted at that time by the action agency, as is currently contemplated by the consultation regulations.[87]

Alternatively, the regulations could provide that if the Service does not respond to the federal action agency's request for initiation within a set number of days, e.g., within 15 days of receipt, the request is deemed complete, formal consultation is initiated, and the consultation clock begins to run. In the event the Service responds to an initiation request by requiring additional information, the regulations could require the Service to detail its reasoning and provide its justification for the request, which would increase accountability for consultation delay decisions.

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[85] *Id.* § 402.14(c).

[86] *Id.* § 402.14(d).

[87] *Id.*

b. Codify and Increase the Applicant's Level of Involvement in Consultation

Currently, an action agency may designate a non-federal representative (usually the applicant) to conduct informal consultation or prepare a biological assessment by giving written notice to the Service of such designation.[88] Beyond advising the Service who it is to communicate with, this requirement has little value, is often overlooked, and can result in delays in addition to creating additional paperwork. The consultation regulations could be enhanced by promulgation of a provision authorizing an applicant, or its consultant, to work directly with the Service during informal consultation and to prepare the biological assessment for review and approval by the action agency.

The consultation regulations could be enhanced by authorizing an applicant or its consultant to work directly with the Service and to prepare the biological assessment.

Once formal consultation has begun, the opportunities provided by the consultation regulations for direct involvement of the applicant are limited. When the consultation regulations were promulgated, the regulatory preamble indicated that the participation opportunities provided therein to project proponents represents the minimum participatory rights that must be afforded the proponent.[89] The preamble stated that the action agency has the prerogative of affording greater participatory rights should it so choose. The regulations should be amended to provide the applicant, or its designee, with the ability to participate more broadly in both informal and formal consultation and to allow it to work directly with the Service. Doing so would allow a project proponent greater opportunity to support expedited consultation by, for example, avoiding unnecessary delays in responding to Service requests for further information concerning the proposed action and its potential impacts to listed species or their habitats, and otherwise would provide greater transparency and accountability in agency management of the consultation process.

c. Third Party Preparation of Biological Opinion

Delay in the Section 7 consultation process often results from the agencies' limited staffing and funding. A recommended approach to address this concern is to allow a third-party contractor, funded by the applicant but responsible to and managed by the Service, to prepare the biological opinion. This approach would be similar to the preparation of an environmental impact statements ("EIS") by third-party contractors under the National Environmental Policy Act ("NEPA").[90] As with the NEPA model, a third-party contractor engaged to prepare a biological opinion could be selected and directed by the Service, not the applicant.[91] Similarly,

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[88] *Id.* § 402.08.

[89] 51 Fed. Reg. 19926 (1986).

[90] 42 U.S.C. §§ 4321-4347.

[91] *Cf.* 40 C.F.R. § 1506.5 (CEQ regulations describing the selection of the third-party EIS contractor). If a federal agency uses third-party contracting, the applicant may undertake the

consultants seeking a third-party contract could be required to disclose the existence of a financial or other interest in the outcome of the biological opinion that might disqualify it from selection.[92] The Service would remain ultimately responsible for the content of the biological opinion. This improvement could be implemented administratively through an amendment to the Section 7 consultation regulations.[93]

d. Contents Required in a Biological Assessment

The scope of a typical biological assessment is considerably broader than mere identification of the potentially affected listed species as specified in Section 7(c)(1).[94] Usually, it not only identifies the listed species residing in a project area, but also contains an analysis of the effects of the proposed project on the species and its critical habitat, and a discussion of available alternatives and mitigating measures.[95] The biological assessment also may contain the views of recognized experts on the identified species, a review of the literature and other information, and the results of any relevant studies.[96]

Although the Service recommends elements to include in a biological assessment,[97] neither the ESA nor its regulations mandate contents for a biological assessment. In the industry's experience, consultations on pipeline projects are sometimes delayed when either the action agency or the Service seeks additional information not included in the biological assessment. Further, to the extent that information-content requirements for a biological opinion are not met in the underlying biological assessment, the Service's workload in preparing a biological opinion is increased and process delays may ensue. Although preparation of a biological assessment meeting the content requirements for a biological opinion represents an industry "best practice" in pursuing Section 7 consultation, prescribing the content requirements

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necessary paperwork for the solicitation of a field of candidates under the agency's direction, so long as the agency complies with 40 C.F.R. § 1506.5(c). Federal procurement requirements do not apply to the agency because it incurs no obligations or costs under the contract, nor does the agency procure anything under the contract.

[92] Under the NEPA process, if an EIS is prepared with the assistance of a consulting firm, the firm must execute a disclosure statement indicating whether it has any "financial or other interest in the outcome of the project" that would cause a conflict of interest. 40 C.F.R. § 1506.5(c).

[93] The Services' current regulations regarding preparation of biological opinions are found at 50 C.F.R. § 402.14(g).

[94] Section 7(c)(1) of the ESA states that the biological assessment is to be conducted "for the purpose of identifying any endangered species or threatened species likely to be affected by such action." 16 U.S.C. § 1536(c)(1).

[95] *See* 50 C.F.R. § 402.12(f) authorizing such contents of the biological assessment at the federal agency's discretion.

[96] *Id*.

[97] *Id.*; *see also* U.S. Fish & Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook at 3-11 (Mar. 1998) ("Consultation Handbook").

for biological assessments in the Section 7 regulations would place applicants and action agencies on notice of what information is required to support consultation, would clarify the Service's information expectations, and would help focus the biological assessment process and bring it to closure within a defined timeframe. This could best be accomplished through an amendment to the consultation regulations codifying the Service's recommended biological assessment contents.[98]

e. Allow the Action Agency to Play a Larger Role in Consultation

Currently, the action agency is authorized to make its own finding that a proposed action is "not likely to adversely affect" ("NLAA") a listed species or critical habitat, subject to concurrence by the Service.[99] If the project is likely to adversely affect a listed species, formal consultation is required, during which the Service is responsible for preparing the biological opinion.[100]

(1) Unilateral Action Agency NLAA Determinations

Presently, action agencies consult with the Service on thousands of proposed actions that ultimately receive written concurrence for NLAA determinations. Many of these projects have only insignificant or beneficial effects on the listed species or pose a discountable risk of adverse effects. For such projects, the concurrence process for such projects can cause project delays and diverts Service resources from projects in greater need of consultation. To improve this process, the consultation regulations should be amended to allow action agencies to make an NLAA determination unilaterally without the need for written concurrence by the Service. A model for this approach is currently being implemented through joint counterpart consultation regulations[101] promulgated by the Service and other federal agencies responsible for implementing the National Fire Plan ("NFP").[102]

The consultation regulations should be amended to allow action agencies to make an NLAA determination unilaterally without written concurrence from the Service.

The joint counterpart regulations under the NFP provide that, where the action agency has entered into an alternative consultation agreement ("ACA") with the Service, it may fulfill its

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[98] *See* Consultation Handbook at 3-11.

[99] 50 C.F.R. § 402.13(a).

[100] *Id*. § 402.14(a), (g).

[101] The Service's consultation regulations provide that the standard consultation procedures may be superseded for a particular federal agency by joint counterpart regulations among that agency, FWS, and the NOAA Fisheries. 50 C.F.R. § 402.04.

[102] The National Fire Plan is an interagency strategy approved in 2000 to reduce the risks of catastrophic wildland fires and to restore fire-adapted ecosystems. *See* 68 Fed. Reg. 68254 (Dec. 8, 2003).

Section 7 obligations by making a NLAA determination for an NFP project without informal consultation with or concurrence from the Service.[103] The ACA must contain provisions that ensure that the action agency has and maintains the skills necessary to make NLAA determinations, that describe the standards the action agency will use to make such determinations, and that provide for monitoring and periodic program evaluation to give the Service a continued level of oversight.[104] If the action agency cannot make an NLAA determination, formal consultation with the Service is still required.[105]

The consultation process could be expedited by allowing the action agency to prepare its own biological opinion subject to Service review and approval.

This alternative consultation approach could be extended to all federal actions, not just those under the NFP. An action agency could enter into an ACA similar to that under the NFP counterpart regulations, which would ensure that the agency has the requisite level of expertise for NLAA determinations and would provide the Service with sufficient oversight to ensure compliance with Section 7. This process would have the benefit of reducing the significant time and effort the Service spends engaging in informal consultation and reviewing and concurring with NLAA determinations, freeing up the Service's resources for other ESA implementation efforts.

(2) Action Agency Preparation of Biological Opinion

Several of the major federal land managing and environmental permitting agencies (e.g., the U.S. Forest Service, the Bureau of Land Management, the FERC, and the Army Corps of Engineers), have as a part of their own statutory missions the charge of protecting wildlife and wildlife habitats. As a result, these and other federal action agencies have their own biologists and ecologists qualified to evaluate the impact of a proposed action on listed species and/or critical habitat. Taking greater advantage of these resources would allow the Service to leverage the resources available to it internally to manage the agency's consultation workload. The consultation process could be expedited by amending the regulations to allow the action agency to prepare its own biological opinion, including a jeopardy/adverse modification determination, subject to Service review and approval.

f. Time Limit on NLAA Concurrences

The current regulations do not impose any deadlines on the Service to concur with an action agency's NLAA determination, without which an agency action may not proceed. If the current concurrence requirement is left in place, this issue could be addressed by amending the regulations to require the Service to respond to a request for an NLAA concurrence within 30

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[103] 50 C.F.R. § 402.33.

[104] *Id.* §§ 402.33, 402.34.

[105] *Id.* § 402.31.

days, or some other specific timeframe, or to provide that failure by the Service to respond within a time certain constitutes concurrence with that determination.

g. Reasonable and Prudent Measures and Implementing Conditions

Where the Service anticipates that incidental take may occur as a result of a federal action undergoing formal consultation under Section 7, the Service will include an incidental take statement ("ITS") as a part of its biological opinion for the proposed action. The ITS must identify "the impact, i.e., the amount or extent, of such incidental taking on the species,"[106] and must specify "those reasonable and prudent measures that the [Service] considers necessary or appropriate to minimize such impact."[107] Reasonable and prudent measures "cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes" to the action.[108]

In the preamble to the Section 7 regulations, the Service explained that while RPMs were intended to minimize the level of incidental taking, "Congress also intended that the action go forward essentially as planned," and "[s]ubstantial design and routing changes . . . are inappropriate in the context of incidental take statements because the action already complies with Section 7(a)(2)" by avoiding jeopardy.[109]

To be consistent with Service regulations and policy,[110] reasonable and prudent measures:

- must be both "reasonable" and "prudent";
- must be necessary or appropriate to minimize the impact of authorized taking on the species;
- must involve "only minor changes to the project;" and
- must be "within the legal authority and jurisdiction of the (consulting) agency or applicant to carry out."[111]

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[106] 50 C.F.R. § 402.14(i)(1)(i).

[107] *Id.* § 402.14(i)(1)(ii).

[108] *Id.* § 402.14(i)(2).

[109] *See* 51 Fed. Reg. 19926, 19937 (June 3, 1986).

[110] The Consultation Handbook provides additional information concerning the allowable parameters of RPMs. *See* Consultation Handbook at 4-50. Unfortunately, the Handbook fails to offer much guidance to either the Service or a project proponent in determining what constitutes an appropriate reasonable and prudent measure.

[111] *See id.*

Whether suggested reasonable and prudent measures will effectively minimize or mitigate the impact to listed species of authorized take, and whether they will result in more than a minor change to the proposed action, are significant concerns of industry and the Service. Occasionally disagreement arises whether reasonable and prudent measures must minimize the impact of take to the potentially affected members of the species (i.e., those for which take is anticipated and authorized), or whether impacts of take are to be minimized with respect to the species as a whole (or affected population). The former interpretation is inconsistent with the Service's practice of assuming that individuals, once taken in any fashion, will not contribute reproductively to the species. The incidental take regulations should be clarified to state that reasonable and prudent measures must be those that the Service considers "necessary or appropriate to minimize the impact of authorized take *to the species*."

Reasonable and prudent measures cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

Determining whether proposed reasonable and prudent measures comply with the "minor change rule" often proves difficult due to the lack of detail and clarity in either Service regulation or policy as to the rule's parameters. Furthermore, Service regulations and policy likewise fail to provide much guidance as to the role economic viability plays in determining whether an RPM is "reasonable" or "prudent." The consultation regulations could be revised to clarify the extent to which economic considerations should be factored in to determining whether an RPM is reasonable or prudent, and whether it constitutes only a "minor change" to the proposed action. For example, to ensure reasonable and prudent measures result in no more than minor changes to a project, the regulations could provide that a project proponent need only minimize and mitigate impacts to listed species to the extent economically practicable considering the costs of implementation compared to the overall costs of the project. Adding such requirements could help avoid overly burdensome changes to projects and promote the selection of those conservation efforts that are cost-effective, yet beneficial for the listed species.

The consultation regulations should be revised to clarify the extent to which economic considerations should be factored into determining whether a measure is reasonable or prudent, and whether it constitutes only a "minor change" to the action.

h. Justification of Reasonable and Prudent Measures

There is currently no requirement that the Service demonstrate how the RPMs will actually benefit the species. The consultation regulations could be amended to require that the Service justify its choice of RPMs and terms and conditions by demonstrating not only that they are based on the best data, but also that they will have an actual benefit to the species. By so doing, the regulations would assist the regulated community and the Service in avoiding the problems highlighted by recent Ninth Circuit case law which found the imposition of an ITS

inappropriate where the Service had no evidence that the species for which the ITS (and its RPMs) was issued existed in the project area.[112]

i. Blanket Clearance Letters

A "blanket clearance" letter sets forth the Service's concurrence with a "no effect" or NLAA determination for specified categories of activities.[113] The purpose is to eliminate the need for case-by-case review of certain categories of minor or routine projects that generally have minimal effect on listed species. This reduces Service staff time and effort during the Section 7 consultation process.

However, neither the Act nor the regulations specifically authorize or discuss the use of blanket clearance letters; they are only addressed in the Service's Consultation Handbook. To ensure that this process continues to be available and can be applied more regularly where appropriate, the consultation regulations could be amended to provide specific authority to the Service to issue blanket clearance letters, and the circumstances under which issuance of such letters is appropriate.

2. Recast the Role of Critical Habitat

Section 4 of the ESA requires the Service, "to the maximum extent prudent and determinable," to designate critical habitat for a species at the time the species is proposed for listing as endangered or threatened.[114] The designation of "critical habitat" under Section 4 is interrelated with the application of the "adverse modification of critical habitat" standard in the Section 7 consultation process, thus critical habitat designation is considered here as part of the Section 7 consultation discussion.

Survey respondents indicated that critical habitat designation is one of the most significant ESA administration issues.

Survey respondents indicated that revision to the requirement of critical habitat designation was one of the most significant issues with the ESA's application and administration. This view is also shared by FWS, which has characterized the designation of critical habitat under the ESA "as the most costly and least effective class of regulatory actions undertaken by the Service."[115] FWS has also taken the position that:

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[112] *Arizona Cattlegrowers' Association v. U.S. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir 2001).

[113] *See, e.g.,* Consultation Handbook at 3-15 (example of blanket clearance letter).

[114] 16 U.S.C. § 1533(a)(3).

[115] *See* Testimony of Craig Manson, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior, Before the House Resources Committee, Regarding H.R. 2933, The Critical Habitat Reform Act of 2003, 108th Cong. (April 28, 2004) (hereinafter "April 2004 FWS Testimony").

> [i]n 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs.[116]

The courts have recognized that the FWS long has held the policy position that designation of critical habitat is unhelpful, duplicative, and unnecessary.[117] In *New Mexico Cattle Growers Ass'n*, the Tenth Circuit noted that between April 1996 and July 1999, more than 250 species had been listed under the ESA, but critical habitat had been designated for only two.[118] Thus, while designation of critical habitat is mandatory once a species is listed, the FWS typically has put off doing so until forced to do so by court order.[119]

FWS has taken the position that the ESA's prohibition against "adverse modification" provides little or no added benefit to the species because the adverse modification and jeopardy standards are nearly identical.[120] Section 7 prohibits federal agencies from taking actions that jeopardize the continued existence of a listed species or that adversely modify or destroy critical habitat.[121] Often the effects considered within a jeopardy analysis are the effects of habitat impacts that are likely to result from a proposed action. By regulation, the term "jeopardize the continued existence of" means "to 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."[122] The term "destruction or adverse modification of critical habitat" is defined as "a

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[116] Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover, 70 Fed. Reg. 56970 (Sept. 29, 2005); *see also* April 2004 FWS Testimony. *See generally* Murray D. Feldman & Michael J. Brennan, *The Growing Importance of Critical Habitat for Species Conservation*, 16 Nat. Resources & Env't 88 (Fall 2001).

[117] *New Mexico Cattle Growers Ass'n v. United States Fish & Wildlife Service*, 248 F.3d 1277, 1283 (10th Cir. 2001).

[118] *Id.*

[119] *Id.*; Feldman & Brennan, *supra* note 116, at 88.

[120] Feldman & Brennan, *supra* note 116, at 88-89.

[121] *Id.* § 1536(a)(2).

[122] 50 C.F.R. § 402.02 (emphasis added).

direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species."[123]

Although several courts have expressed concern over the regulatory definitions of "adverse modification" and "jeopardy,"[124] as a practical matter, for most federal actions the results of application of the adverse modification of critical habitat standard and the jeopardy standard are the same.[125] Critical habitat designation and evaluation, and application of the destruction or adverse modification standard through Section 7 consultation, thus duplicates the protection already provided by the jeopardy standard.[126] Furthermore, the existence of the critical habitat designation process leads to erroneous conclusions within the regulated community that listed species habitat impacts are not of concern where no critical habitat has been designated or where such impacts occur outside of critical habitat.

In spite of the lack of conservation benefit that designation of critical habitat provides, for well over a decade, the Service has been embroiled in litigation over its implementation of the critical habitat provisions of the ESA.[127] Former Secretary of the Interior Bruce Babbitt wrote that "in its struggle to keep up with court orders, the Service has diverted it best scientists and much of its budget for the ESA away from more important tasks like evaluating candidates for listing and providing other protections for species on the brink of extinction."[128] Since most lawsuits are designed to compel critical habitat designations for species that are already listed and are receiving the full protection of the ESA, litigation to designate critical habitat and

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[123] *Id.* (emphasis added).

[124] *See Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) (The Ninth Circuit Court of Appeals invalidated FWS' regulation defining "destruction or adverse modification."). In response to *Gifford Pinchot*, FWS is reviewing the regulatory definition of adverse modification in relation to the conservation of the species. 70 Fed. Reg. at 56970.

[125] *Id.*

[126] *Id.* FWS believes that the protection conveyed by designation of critical habitat is duplicative of the prohibition against jeopardy for most species. *See, e.g.*, Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover, 70 Fed. Reg. 56970 (Sept. 29, 2005) (Service has "consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources").

[127] Feldman & Brennan, *supra* note 116, at 88-89; *see also* April 2004 FWS Testimony.

[128] *Id.* Noting similar concerns, the court in *Center for Biological Diversity v. Norton*, 163 F. Supp. 2d 1297, 1300 (D.N.M. 2001), observed that a legislative solution is necessary; otherwise "tax dollars will be spent not on protecting species, but on fighting losing battle after losing battle in court."

eventual critical habitat designation are of little benefit to listed species and create a huge drain on Service resources.[129]

For many, if not most, federal actions, the results of the adverse modification of critical habitat analysis and the jeopardy analysis are the same.

The elimination of the use of critical habitat as a regulatory tool, by removing the prohibition against agency action which destroys or modifies critical habitat from Section 7(a)(2) and eliminating the use of the "destruction or adverse modification of habitat" standard in Section 7 consultation, would reduce a significant resource drain and allow the Service to devote its limited resources to activities providing greater conservation benefits to listed species. Such an amendment would reduce redundancy and increase efficiency in the consultation process by creating a single regulatory standard by which to measure agency action. Concurrently, clarification that the jeopardy prohibition applies to agency actions affecting listed species habitat, and that such affects are considered in application of the jeopardy standard through Section 7 consultation, would ensure that habitat impacts currently addressed in the redundant adverse modification analysis are indeed subsumed into the jeopardy analysis.

The identification of critical habitat, or an analogous effort to identify and assess the relative importance of particular areas or habitats utilized by a listed species, can assist in habitat management activities. The assessment and characterization of relative habitat values, importance, and needs for a given species could play a significant role in the development and implementation of recovery plans. Because the complex biological needs of many species are not well documented at the time of listing, much is learned about a species' habitat and needs for survival during the recovery phase of the conservation process. The critical habitat designation process could be recast and used in the determination of habitat necessary for the recovery of listed species, and to assist in identifying habitat management objectives for species recovery through the recovery planning process.

Eliminating the use of critical habitat as a regulatory tool would reduce a significant resource drain and allow the Service to devote its limited resources to activities providing greater conservation benefits.

B. Inconsistent Implementation of the ESA

Many survey respondents noted the lack of consistency in the implementation of the Act between FWS and NOAA Fisheries, or between different offices within the same agency, or even within an office. There are a number of reasons contributing to such inconsistency, starting with the reality that in making listing decisions and evaluating the effects of agency actions on listed species through the Section 7 consultation process, the Service must necessarily rely upon the use of best professional judgment to evaluate complex factual and scientific issues.

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[129] *See* 70 Fed. Reg. at 56970 (discussing the procedural and resource difficulties in designating critical habitat); *see also* Feldman & Brennan, *supra* note 116, at 88-89.

Achieving consistency is a greater challenge when regulatory decision-making proceeds on a qualitative and professional judgment basis.

Listing decisions are highly fact-specific, and require difficult determinations concerning the probability a particular species is in threat of extinction. The challenge underlying such decisions, and in making them consistently, is compounded by the paucity of data that may be available with respect to species status and trends, and the Service's obligation to proceed with listing determinations even in the face of limited data. On the other hand, the centralized nature of the listing process contributes to greater consistency in listing decisions. No administrative review process exists for listing determinations, which instead are reviewed only through the federal courts.

Many survey respondents noted the lack of consistency in the implementation of the ESA.

In the context of Service decision-making under the Section 7 consultation process, the challenge of obtaining consistent application of the jeopardy and adverse modification standards is compounded by the fact that such decision-making is highly decentralized and generally lacks centralized review within the agency. Given the sheer number of consultations and the timelines required for completion of the consultation process, establishing a requirement that all consultations and biological opinions undergo centralized review is impractical. However, certain regulatory changes could help reduce inconsistency in Section 7 decision-making.

1. Administrative Appeal of Section 7 Consultation and Listing Decisions

An administrative appeal process for Section 7 determinations and biological opinions would provide one avenue for seeking consistency in agency decision-making. Currently, under a policy statement issued by the Secretary of the Interior in 1993, the Department of Interior's Office of Hearings and Appeals ("OHA") does not have the authority to review a biological opinion issued by FWS, or other agencies' implementation of the mandatory terms and conditions of an incidental take statement.[130] Similarly, the jurisdiction of NOAA Fisheries Office of Administrative Appeals is limited to programs outside the ESA.[131] Thus, the only way to challenge a Section 7 determination is in federal court.

Currently, the only way to challenge a Section 7 determination is in federal court.

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[130] *See* Secretarial Memorandum, Office of Hearings and Appeals Authority on Biological Opinions Issued by the U.S. Fish and Wildlife Service Under Section 7 of the Endangered Species Act, Secretary Lujan (January 7, 1993); reaffirmed by Secretary Babbitt (April 20, 1993).

[131] NOAA Fisheries Office of Administrative Appeals hears appeals arising under administrative appeals process including Individual Fishing Quota Program for Pacific halibut and sablefish, the Crab Rationalization Program, the License Limitation Program, the American Fisheries Act, the North Pacific Groundfish Observer Program, and the Western Alaska Community Development Program. *See* http://www.fakr.noaa.gov/appeals/ (last visited Sept. 8, 2007).

The lack of an administrative appeal process could potentially be remedied by issuance of regulations that provide the OHA, the NOAA Fisheries Office of Administrative Appeals, or some other body within the Interior and Commerce departments with jurisdiction to hear challenges to determinations under Section 7. The regulations could be modeled after the detailed regulations of other agencies within the Department of Interior, such as the Bureau of Land Management, that govern the appeal of agency decisions to an administrative law judge or board of appeals.[132] Establishment of such review processes may require, or could be facilitated by, legislative authorization for administrative review procedures. Listing decisions could likewise be brought within the purview of such administrative review bodies. Oversight by an administrative appellate board would help ensure that the Act's requirements are being implemented in a consistent fashion.

Greater availability of previously issued biological opinions would assist project proponents to design projects to reduce species impacts.

2. Electronic Database for Biological Opinions

The absence of a centralized database for previously issued biological opinions impedes the ability of a project proponent (and perhaps of agency staff) to obtain examples of potentially relevant prior agency decision-making. It is difficult to obtain copies of biological opinions prepared by the Service with respect to like projects, and it appears that Service field offices are not necessarily aware of what other field offices are requiring during consultation. This makes it challenging for the regulated community to identify areas of inconsistency between biological opinions. It also reduces the ability of a project proponent to design a particular project to meet previously identified concerns or species conservation requirements. Greater availability of previously issued biological opinions would assist project proponents in designing projects in ways that reduce species impacts and thus reduce the issues that must be confronted during Section 7 consultation. It also would assist both project proponents and agency staff in reviewing proposed consultation decisions for consistency with other, similar consultation activities. FWS and NOAA Fisheries could establish a centralized electronic database that would include copies of all biological opinions prepared by the agencies. To be effective, this database would have to be easily accessed by the public through the Internet. This effort could be accomplished by policy or regulation.

3. Elevated Review of Biological Opinions

Under current agency policy, FWS Regional Directors must obtain approval from the FWS Director before signing any draft and final biological opinions, preliminary biological opinions (early consultation), and conference opinions of regional or national significance likely to result in findings of jeopardy or adverse modification.[133] NOAA Fisheries Regions must provide the Chief of the Endangered Species Division and the Director, Office of Protected Resources, with advance notice of any biological opinions that may result in a jeopardy or

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[132] *See, e.g.,* 43 C.F.R. § 4.1.

[133] Consultation Handbook at 1-9.

adverse modification conclusion and any biological opinion that is potentially controversial whether or not it results in a jeopardy or adverse modification conclusion.[134] This practice helps ensure consistency in the issuance of jeopardy opinions. This policy could be codified by regulation to ensure that the practice is enforceable and followed in the future.

A related change would be to require by regulation that FWS regional offices issue all biological opinions, rather than the agency's current practice of issuing non-jeopardy biological opinions at the field office level.[135] Although this would raise obvious concerns regarding agency resource impacts, it would help promote a level of consistency in FWS biological opinions, at least within a given FWS Region. Similarly, NOAA Fisheries' current policy of having the Director, Office of Protected Resources, sign the majority of the agency's biological opinions[136] could be codified as a regulation. Limits on elevated review, such as restricting review to biological opinions that expand upon established FWS mitigation procedures, could be provided to curtail the drawback of additional review time.

C. "Best Scientific and Commercial Data Available" Standard

The ESA requires the Service to use the "best commercial and scientific data" available when (1) making listing and critical habitat determinations under Section 4, (2) preparing biological opinions under Section 7, and (3) determining that unforeseen circumstances exist with respect to an HCP under Section 10. However, neither the Act nor the Service's regulations define what constitutes the "best commercial and scientific data." In practice, the evaluation of scientific data under the ESA is hamstrung by two factors: (1) the ESA's lack of definitional terms, and (2) the fact that species data is, by its very nature, often vague, ambiguous, frequently subjective, best-professional-judgment-based rather than objectively quantifiable, and of uncertain scientific reliability. The resulting case law that has emerged regarding the best scientific data available standard is at times equally ambiguous and lacking in consistency.

Neither the Act nor the Service's regulations define what constitutes the "best scientific and commercial data."

In the ESA's legislative history, Congress noted that "[i]f a Federal agency proceeds with the action in the face of inadequate knowledge or information, the agency does so with the risk that it" will violate Section 7(a)(2).[137] At the same time, the Supreme Court has observed that the "obvious purpose" of the best scientific and commercial data requirement "is to ensure that the ESA not be

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[134] *Id*. at 1-12.

[135] *Id*. at 1-4 to 1-5.

[136] The NOAA Fisheries Director, Office of Protected Resources, signs all formal consultations, except that the Northwest and Southwest Regional Directors have the authority to sign all biological opinions for anadromous species that do not involve an activity of the Department of Commerce. *Id*. at 1-5.

[137] H.R. Rep. No. 96-167, at 12 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2557, 2576.

implemented haphazardly, on the basis of speculation or surmise . . . [and] to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives."[138]

The "best science" standard does not require perfect data. It "permits the [FWS] to take action based on imperfect data, so long as the data is the best available."[139] The Service generally may rely on the reasonable opinions of its own qualified experts, even if a reviewing court or a challenger might find a contrary view more persuasive.[140] Moreover, data flaws, inconclusive data, weak information, or peer review criticism all may be generally insufficient to show that the data was not the best available.[141] The ESA does not require that scientific data meet an objective standard. If a party challenges a best scientific data available determination, "[a]bsent a showing that [the agency] failed to consider relevant, available, scientific data, plaintiffs are unlikely to prevail."[142] And the best scientific data available standard "does not obligate the [FWS] to conduct new, independent studies."[143]

Not surprisingly, the lack of statutory or regulatory definitions, the paucity of congressional guidance, and the range of court decisions enunciating practical guidelines applied on a case-specific basis have all led to varying interpretations of the "best scientific data available" standard by the Service, conservation organizations, and the regulated community. And the debates over the adequacy of the data used to support various ESA decisions at times have a decidedly political dimension.

1. Codify Service Policy on Information Standards

In 1994, FWS and NOAA Fisheries issued an interagency policy statement "to provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Services under the authority of the [ESA] represent the best scientific and commercial data available."[144]

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[138] *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

[139] *Nat'l Wildlife Fed'n v. Babbitt*, 128 F. Supp. 2d 1274, 1300 (E.D. Cal. 2000).

[140] *Aluminum Co. of Am. v. Adm'r, Bonneville Power Admin.*, 175 F.3d 1156, 1162 (9th Cir. 1999).

[141] *E.g., Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir. 1993). *See generally* Michael J. Brennan et al., *Square Pegs and Round Holes: Application of the "Best Scientific Data Available" Standard in the Endangered Species Act*, 16 TUL. ENVTL. L.J. 387, 412-32 (2003).

[142] *Kandra v. United States*, 145 F. Supp. 2d 1192, 1210 (D. Or. 2001).

[143] *Am. Wildlands v. Norton*, 193 F. Supp. 2d 244, 251 (D.D.C. 2002). *See also Southwest Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000) ("The 'best available data' requirement makes it clear that the [FWS] has no obligation to conduct independent studies.").

[144] Interagency Cooperative Policy on Information Standards Under the Endangered Species Act, 59 Fed. Reg. 34271 (July 1, 1994).

The qualitative review of scientific data, which forms the core of the 1994 Information Policy, can be succinctly summarized in the following general principles:

1. Biologists must evaluate all scientific and other information to ensure that it is "reliable, credible, and represents the best scientific and commercial data available."[145]

2. The biologist must "gather and impartially evaluate biological, ecological, and other information that disputes official positions, decisions, and actions proposed or taken by the Services during the implementation of the [ESA]."[146]

3. The biologist must document its evaluation "of information that supports or does not support" the agency's position. The biologist's evaluation must "rely on the best comprehensive . . . [and] technical information."[147]

4. Primary and original sources of information are the preferred sources of information.[148]

5. Documents developed by Service biologists are subject to a "management-level review" for purposes of verifying and assuring "the quality of the science used."[149]

To ensure that this policy is consistently followed by the various Service field offices, it could be codified in the Service's regulations. This codification would raise the level of awareness, both within the Service and among the regulated community, of the Act's information quality requirements. It would also make the policy's requirements enforceable, rather than merely guidance.[150]

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[145] *Id.* The 1994 Information Policy provides that this standard of review applies to information that will be used to (a) determine the status of candidate species; (b) support listing actions; (c) develop or implement recovery plans; (d) monitor species that have been removed from the list of threatened and endangered species; (e) to prepare biological opinions, incidental take statements, and biological assessments; and (f) issue scientific and incidental take permits.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *See Building Industry Ass'n of Superior California v. Babbitt*, 979 F. Supp. 893, 905 (D.D.C. 1997) (holding that the Service's data quality policy was nonbinding and not enforceable against the agency).

2. Service Justification for Data Relied Upon

To provide consistency in the application of the "best scientific and commercial data" standard, the regulations could be amended to require the Service to include in each listing decision, biological opinion, and unforeseen circumstances determination a justification of why the data it relied upon were the best available and why the Service believes such data were accurate and reliable. For instance, if the Service relies on "gray literature" (unpublished and not widely available information) or anecdotal information, it should explain why it was unable or chose not to cite published sources of information and why it believes reliance on the gray literature or anecdotal information is appropriate and sufficient to support the Service's conclusion. These regulations could also provide a hierarchy of information sources that identifies which sources should be given the most weight.

The regulations could provide a hierarchy of information sources that identifies which sources should be given the most weight in ESA decision-making.

D. Section 4 Listing and Delisting

The Section 4 listing and delisting process is frequently controversial. One issue is that the Service's listing decisions are often perceived to be based on inadequate or incomplete scientific data. Another objection is the perception that once a species is on the list, it remains there with little evaluation of whether continued listing is warranted. Finally, FWS has promulgated a regulation that applies the Act's full protections to threatened species, without the requirement of a species-specific evaluation of whether a more flexible rule would be appropriate. Potential solutions exist for each of these issues.

1. Regulatory Improvements

a. Codify Peer Review Requirements

Decisions regarding what species warrant the Act's protections could be subject to peer review. In 1994, FWS and NOAA Fisheries issued an interagency policy on peer review in listing and recovery plan decisions.[151] This peer review policy requires the Service to solicit expert opinions of three appropriate and independent specialists for listing decisions and to summarize in the final decision the opinions of all independent peer reviewers. The policy also requires independent peer review for draft recovery plans, where appropriate.

The peer review policy requires the Service to solicit expert opinions of three appropriate and independent specialists for listing decisions and to summarize in the final decision the opinions of all independent peer reviewers.

The courts have held that the Service's peer review policy constitutes nonbinding guidance that is

[151] Interagency Cooperative Policy for Peer Review in Endangered Species Activities, 59 Fed. Reg. 34270 (July 1, 1994).

not enforceable.[152] To overcome this limitation and ensure that the Service consistently obtains peer review of listing decisions, the 1994 policy could be codified as a regulation. In addition, a number of provisions could be added to improve the 1994 peer review policy.[153] For instance, although somewhat unclear, it appears that the peer review policy pertains only to decisions to add a species to the list. The peer review requirements could be extended to decisions to list, delist, or reclassify a species, as well as the issuance of special rules for threatened species under Section 4(d) (discussed further below). Also, a listing or recovery plan decision may include a variety of disparate issues that would make it difficult to find three experts qualified to address all such issues. Thus, the Service could be allowed to segregate the key issues and identify three specific reviewers for each issue. This would also have the effect of reducing the delay that is often associated with peer review.

The regulations could require the Service to provide peer reviewers with decision standards required under the ESA, since many experts may be unfamiliar with the Act's structure and requirements. The Service could also direct the peer reviewers to differentiate between their evaluation of decisions that must be made on the best available information and those areas where additional research would be beneficial. To ensure that the peer review is not based on incomplete information, the regulations could include a requirement specifying the type of information that the Service must make available to the peer reviewers.[154] The Service could also establish a mechanism to allow compensation of peer reviewers to ensure that the review is completed efficiently.

FWS has promulgated a regulation that applies the Act's full protections to threatened species, without the requirement of a species-specific evaluation of whether a more flexible rule would be appropriate.

b. Consideration of Section 4(d) Rules at Listing

The statutory Section 9 take prohibition applies only to endangered species.[155] Section 4(d) directs the Service to issue regulations as it deems necessary and advisable to provide for the conservation of threatened species, which may include Section 9's take prohibition.[156] By regulation, FWS has made virtually all the prohibitions regarding endangered

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[152] *See Building Industry Ass'n*, 979 F. Supp. at 905 (like the data quality policy, the Service's peer review policy was nonbinding and not enforceable against the agency).

[153] A number of improvements discussed in this Section were first suggested in Hecht, A., and M. J. Parkin, *Improving Peer Review of Listings and Recovery Plans under the Endangered Species Act*, 15 Conservation Biology 1269-1273 (2001).

[154] The availability of information was an issue in *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1106-07 (D. Ariz. 2004), where the court found that FWS solicited the input of others without providing them all of the information necessary to make any such input meaningful and informed.

[155] 16 U.S.C. § 1538(a)(1).

[156] *Id.* § 1533(d).

species applicable to all threatened species upon listing, unless it otherwise promulgates a specific 4(d) rule for a particular species.[157] FWS has not issued many Section 4(d) rules to date. NOAA Fisheries, on the other hand, does not have a blanket rule for threatened species, but rather promulgates a regulation for each threatened species when listed that provides the restrictions applicable to that species.[158] Under this approach, NOAA Fisheries creates a rule tailored to each species that contains take restrictions and exemptions appropriate for the conservation of that species. Absent such a special rule, the "take" prohibition does not apply to NOAA-listed species. This approach recognizes the differences in status among threatened and endangered species and allows flexibility in the implementation of the Act.

Because of the FWS approach to application of the "take" prohibition to threatened species, there is no particular urgency, and perhaps little incentive, for FWS to consider the appropriate application of take prohibitions to a given species. To ensure that issue is actively considered upon listing, and more generally to ensure that this flexibility is available for threatened species under FWS jurisdiction, FWS's regulations could be amended to eliminate the blanket rule for threatened species and to direct FWS to issue a Section 4(d) rule for each species upon listing.

2. Mandate Delisting upon Recovery

Under Section 4, a recovery plan must have objective, measurable criteria which, when met, would result in a determination that the species be removed from the list.[159] However, neither the Act nor the regulations require the delisting of a species once the recovery plan criteria have been met. In addition, the courts have recognized that recovery plans are merely guidance and are not binding on the Service.[160] And the Service often does not meet its non-discretionary five-year review obligations, with some species receiving no review despite having been listed for decades.[161]

The delisting requirement could be imposed by regulation, but may be more suited to a legislative amendment.

One potential solution is to mandate that the Service remove a species from the list once the species has satisfied the objective, measurable criteria for delisting identified in the recovery plan. The Service's determination that the species has met the recovery plan criteria need not necessarily be tied to the five-year status review. Instead, the regulations could require both implementation and periodic monitoring of the success of the recovery plan so that it will be able to determine when the criteria have met.

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[157] 50 C.F.R. § 17.31.

[158] *Id*. § 223.201.

[159] 16 U.S.C. § 1533(f).

[160] *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996) (recovery plans are for guidance purposes only and do not have the force of law).

[161] *Florida Homebuilders Ass'n v. Norton*, 496 F. Supp. 2d 1330 (M.D. Fla. 2007) (ordering status reviews for 89 listed species for which such review was overdue).

Similarly, if this monitoring of a recovery plan's effectiveness demonstrates that the recovery criteria are not being met or the plan is otherwise unsuccessful, the regulations could require the amendment the plan as appropriate to help ensure species recovery. The delisting requirement could be imposed by regulation, but may be more suited to a legislative amendment.[162]

E. Section 9 Take Prohibitions

1. Redefine "Take" to Include Actual Death or Injury

The Supreme Court has upheld the FWS's regulatory interpretation of Section 9 as applying the take prohibition to significant habitat modification that causes actual death or injury to a listed species.

Section 9 of the ESA prohibits the "take" of any listed species of fish or wildlife by any person.[163] The statute defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct."[164] By regulation, "harm" is defined to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering."[165] The Supreme Court has upheld this interpretation of Section 9 as applying the take prohibition to significant habitat modification or destruction that causes actual death or injury to a listed species on federal or nonfederal land.[166] The definition of "take" in Section 3 of the ESA could be updated to reflect the Supreme Court's ruling and agency interpretation, and to clarify that the take prohibition only applies to actions that result in actual death or injury to a listed species.

2. Provide Authorization for Impacts to Listed Plants

Section 9 does not specifically prohibit the "taking" of an endangered or threatened plant species.[167] The provision does make it unlawful to remove and possess any endangered plant

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[162] A bill currently pending before Congress, S. 658, would add the following language to Section 4(f) of the Act "REMOVAL FROM LISTING- If the Secretary finds that the criteria of a recovery plan have been met for the removal of the species covered by the recovery plan from a list published under Subsection (c), the Secretary shall promptly publish in the Federal Register a notice of an intent to remove the species from the list." This language could be improved by adding a provision that requires the Service to monitor the success of recovery plan implementation.

[163] 16 U.S.C. § 1538(a)(1). The statutory prohibition applies only to endangered species, but has been extended to threatened species by regulation. *See* 50 C.F.R. § 17.31(a).

[164] 16 U.S.C. § 1532(19).

[165] 50 C.F.R. § 17.3.

[166] *Sweet Home*, 515 U.S. at 687.

[167] *See* 16 U.S.C. § 1538(a)(2).

species from areas under federal jurisdiction.[168] With certain exceptions, the regulations also proscribe the removal and possession of threatened plant species from such areas.[169] A permit authorizing the removal of an endangered or threatened plant can generally be obtained for scientific purposes, for the enhancement of propagation or survival, or for economic hardship.[170]

However, the ESA does not provide a legal mechanism for the removal of a listed plant species resulting from development activities. Unlike the incidental take statement for fish and wildlife species under Section 7, there is no corresponding authorization for incidental "take" of listed species of plant. In practice, it appears that the Service uses its enforcement discretion when listed plants have been removed as a result of development activities that have been subject to Section 7 consultation, or else requires the project proponent to obtain a separate Section 10 permit authorizing such work. The use of enforcement such discretion does not preclude a third-party lawsuit for violation of the ESA's prohibition against removal of listed plant species; requiring the proponent to obtain an ancillary permit simply adds an additional step and set of paperwork.

The ESA does not provide a legal mechanism for the removal of a listed plant species resulting from development activities.

To reduce the potential liability for removal of a listed plant species incidental to an otherwise legal development activity, Section 9 could be amended to exempt removal of listed plants from take liability when such removal is conducted pursuant to an ESA Section 7 incidental take statement. Alternatively, the Act could be amended to authorize the use of incidental take statements to authorize the incidental take of listed plants.

F. Section 10 Permits

When a private party proposes to conduct an activity that does not have a federal nexus and that may affect listed species, such as a federal permit or federal funding, it may avoid Section 9 take liability by developing an HCP and obtaining a Section 10 incidental take permit from the Service.

A non-federal party may avoid Section 9 liability by developing a habitat conservation plan and obtaining a Section 10 incidental take permit from the Service.

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[168] *See id.* § 1538(a)(2)(B).

[169] The exceptions concern seeds of cultivated specimens. 50 C.F.R. § 17.71.

[170] *See* 50 C.F.R. § 17.62, 17.63 (permits for endangered plants); 50 C.F.R. § 17.72 (permits for threatened plants). A permit for threatened plants may also be issued for botanical or horticultural exhibition, educational purposes, or other activities consistent with the purposes and policy of the ESA. 50 C.F.R. § 17.72.

1. Regulatory improvements

a. Clarify that "Maximum Extent Practicable" Includes Economic Considerations

Before issuing an incidental take permit, the Service must determine that the applicant will minimize and mitigate the effect of the incidental take to the maximum extent practicable.[171] Neither the Act nor the regulations provide any definition or guidance regarding the manner in which this standard should be applied.

The Service's Habitat Conservation Planning and Incidental Take Permitting Handbook ("HCP Handbook") provides some direction, noting that:

> This finding typically requires consideration of two factors: adequacy of the minimization and mitigation program, and whether it is the maximum that can be practically implemented by the applicant. To the extent maximum that the minimization and mitigation program can be demonstrated to provide substantial benefits to the species, less emphasis can be placed on the second factor. However, particularly where the adequacy of the mitigation is a close call, the record must contain some basis to conclude that the proposed program is the maximum that can be reasonably required by that applicant. This may require weighing the costs of implementing additional mitigation, benefits and costs of implementing additional mitigation, the amount of mitigation provided by other applicants in similar situations, and the abilities of that particular applicant. Analysis of the alternatives that would require additional mitigation in the HCP and NEPA analysis, including the costs to the applicant is often essential in helping the Services make the required finding.[172]

Neither the Act not the regulations provide a definition or guidance regarding how to minimize and mitigate the effect of the incidental take to the maximum extent practicable.

The language in the HCP Handbook leaves room for significant discretion and differing interpretations regarding what should be required. To address this point, the Service could issue regulations that provide better sideboards on what is considered "reasonably practicable." These regulations could incorporate the two-factor approach outlined in the HCP Handbook. They could also impose monetary limits on the mitigation required, related to the project's cost and

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[171] 16 U.S.C. § 1539(a)(2)(B).

[172] Habitat Conservation Planning & Incidental Take Permit Processing Handbook, U.S. Fish & Wildlife Service and National Marine Fisheries Service, at 7-3 to 7-4 (1996).

anticipated impacts. At a minimum, the regulations could explicitly state that economic factors are relevant to the maximum extent practicable standard and could indicate when an economic analysis would be required to demonstrate that the mitigation required was the maximum extent practicable from a financial standpoint.[173]

b. Coordinate Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act Authorization

The Migratory Bird Treaty Act ("MBTA") prohibits the take of migratory birds.[174] Neither the MBTA nor the ESA addresses the extent to which a permittee remains legally liable for the incidental take of listed species protected by the MBTA, if take of the same species is authorized by an ESA incidental take permit. Although the MBTA does not have an incidental take permitting process, it does allow FWS to issue a "special purpose permit" for take of a migratory bird upon a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.[175]

The HCP Handbook provides that an ESA incidental take permit issued pursuant to Section 10 is sufficient to relieve a permittee from liability under the MBTA for a species that is listed under the ESA and protected by the MBTA if that species is covered in the incidental take permit and HCP.[176] This is accomplished by having the ESA incidental take permit double as a special purpose permit under the MBTA.[177] FWS has indicated that it believes that this approach is warranted because the permittee already would have agreed to a package of mitigation measures designed to minimize and mitigate the take of the listed species of migratory birds to the maximum extent practicable.[178] The approach set forth in the HCP Handbook could be codified by regulation to ensure that a Section 10 incidental take permit holder is protected from both ESA and MBTA liability for take of a threatened or endangered migratory bird.

A similar issue exists with respect to the issuance by FWS of an incidental take statement pursuant to consultation under Section 7, by which the take of bird species protected under both the ESA and the MBTA is insulated from liability for take under Section 9 of the ESA, but not the MBTA. In such circumstances, FWS appears to rely on enforcement discretion not to

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[173] Such an economic analysis would help avoid the issue in *National Wildlife Federation v. Babbitt*, 128 F. Supp. 2d 1274, 1292-93 (E.D. Cal. 2000), where the court found insufficient evidence in the record to support the conclusion that a higher mitigation fee ratio would have been impracticable.

[174] 16 U.S.C. §§ 703-712.

[175] 50 C.F.R. § 21.27. See also 16 U.S.C. § 704 (authorizing the Secretary to issue regulations governing the take of migratory birds).

[176] HCP Handbook at 3-40 and App. 5.

[177] *Id.*

[178] *Id.*

prosecute for MBTA take.[179] FWS regulations should be drafted to extend MBTA take authorization under these circumstances as well.

The Bald and Golden Eagle Protection Act ("BGEPA") prohibits the take of bald and golden eagles.[180] Prior to the delisting of the bald eagle, the BGEPA did not provide any authority for the incidental take of bald eagles, so it was unclear to what extent the holder of permit under the ESA to incidentally take a bald eagle would still be liable under the BGEPA for that take. FWS addressed this situation by using its discretion to not refer any take of a bald eagle for prosecution under the MBTA or BGEPA provided the take was accordance with a Section 10 incidental take permit.[181]

Now that the bald eagle has been delisted, FWS has issued draft regulations that establish an incidental take permitting process for bald and golden eagles under the BGEPA.[182] These proposed regulations include a provision to allow persons with a valid ESA incidental take permit that covers multiple species in addition to the bald or golden eagle (and is therefore still a valid permit even if though the bald eagle is delisted) to continue to use that permit as the BGEPA authorization for the same activity as it relates to bald or golden eagles. This provision would also apply to the take of bald and golden eagles that are covered as non-listed species in future HCPs.[183] If these regulations are finalized as drafted, they should provide adequate coverage from liability under the BGEPA for holders of ESA incidental take permits that authorize the take of bald eagles. FWS could also include a cross-reference to such regulations in its ESA incidental take permit regulations for purposes of clarity and consistency.

c. Establish a Maximum Incidental Permit Term

As more large-scale HCPs are prepared to cover multiple activities and multiple species, there has been some debate as to the appropriate duration for an incidental take permit. FWS's permit-duration regulation, which are essentially identical to NOAA Fisheries',[184] provide that

> The duration of permits issued under this paragraph shall be sufficient to provide adequate assurances to the permittee to commit funding necessary for the activities authorized by the permit, including conservation activities and land use restrictions. In determining the duration of a permit, the Director shall consider the duration of the planned activities, as well as the possible positive and negative effects associated with permits of the proposed duration on listed species, including the extent to which

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[179] *Id.* at App. 5.

[180] 16 U.S.C. §§ 668-668d.

[181] HCP Handbook at 3-40 and App. 5.

[182] 72 Fed. Reg. 31141 (June 5, 2007).

[183] *Id*. at 31142.

[184] *Id*. § 222.307(e).

> the conservation plan will enhance the habitat of listed species and increase the long-term survivability of such species.[185]

The HCP Handbook recognizes additional factors that are appropriate for the Service to consider in establishing a permit's term:

> The duration of planned activities, the potential positive effects to listed species provided under the permit, and the potential negative effects to the species that may result from premature permit expiration should be considered in determining permit length. Also, local government agencies may wish to tie the permit expiration date to local land use plans. Development or land use activities and the conservation program proposed in the HCP may require years to implement. The Services must assure the applicant that authorizations under the permit will be available for the life of the project, and the public that conservation measures under the permit will remain in effect for as long as necessary to implement the conservation program.[186]

In 2000, the Service issued an addendum to the HCP Handbook, referred to as the five-point policy guidance, which further discusses the factors to consider in establish a permit's duration.[187] The addendum explains that, in addition to those factors identified in the regulations, the Service will consider (1) extent of information underlying the HCP, (2) the length of time necessary to implement and achieve the benefits of the operating conservation program, and (3) the extent to which the program incorporates adaptive management strategies.[188]

To address the issue of the appropriate term of an incidental take permit, FWS and NOAA Fisheries could include a maximum permit duration, for example 50 years, in their regulations. This would have the benefit of providing support for the issuance of a permit with a longer term because the regulations would specifically recognize that such a term is appropriate. The regulations could also indicate that the other factors identified in the HCP Handbook and addendum, such as the potential negative impacts to species from premature permit expiration, the fact that the permitted activities and associated conservation measures may take years to implement, and the use of adaptive management, should be considered when establishing a permit's term.

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[185] *See* 50 C.F.R. § 17.32(b)(4).

[186] HCP Handbook at 6-25.

[187] *See* Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. 35242 (June 1, 2000).

[188] *Id*. at 35256.

2. Legislative Improvements

a. Codify Cost Recovery Agreements

Cost recovery agreements, also known as reimbursable agreements, are agreements between a non-agency party and an agency where the non-agency party reimburses the agency for services that the agency provides.[189] These agreements are useful in the permitting context, especially where the agency has limited resources to process permit applications.

The difficulty in recovering application process costs exacerbates agency resource limitations and contributes to permit processing delays.

Unlike other agencies, FWS and NOAA Fisheries do not have an effective mechanism for entering into cost recovery agreements. In the Department of Interior's annual appropriations act for fiscal year 2000, Congress provided that "notwithstanding any other provision of law, in fiscal year 1999 and thereafter, sums provided by private entities for activities pursuant to reimbursable agreements shall be credited to the 'Resource Management' account and shall remain available until expended[.]"[190] This language provides the Service with the authority to retain and spend money obtained through reimbursable agreements, but there is no express corresponding authority to actually enter into the reimbursable agreements. This difficulty in recovering application processing costs exacerbates agency resource limitations and contributes to permit processing delays due to staffing and funding constraints.

The ESA could be amended to provide the Service with the authority to enter into reimbursable agreements with project proponents.

To rectify this situation, the ESA could be amended to provide the Service with the authority to enter into reimbursable agreements with project proponents whose projects are the subject of Section 7 consultation and with applicants seeking a Section 10 incidental take permit, which would allow more efficient consultation, review of habitat conservation plans, and issuance of incidental take permits. The Service could then promulgate regulations to implement its reimbursable agreement authority. These regulations could be modeled after the regulations of other agencies, such as BLM, that have well-established cost recovery programs.[191]

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[189] FWS defines a reimbursable agreement as "a contractual relationship under which [the Service] provides a product or service to a non-Service party, the costs of which are paid by the recipient." 267 FW 1, ¶ 1.2.

[190] Department of the Interior and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501A-135 (1999), now codified at 16 U.S.C. § 754b.

[191] *See, e.g.*, 43 C.F.R. § 2804.14 (BLM regulations requiring the applicant to pay the agency's full reasonable processing costs for any application for a right-of-way grant that will require 50 or more hours to process).

While FWS has promulgated a number of manual provisions that describe the policies and procedures that the agency must follow when entering into reimbursable agreements, those manual provisions contain internal inconsistencies that make them unworkable.[192] In particular, the manual states that FWS may enter into reimbursable agreements with private entities, provided such entities are not "prohibited sources," which include any entity that (1) has litigation pending with, or has or is seeking to obtain a contract, lease, grant, or other business, benefit, or assistance from the FWS; or (2) appears to be offering funding with the expectation of obtaining advantage or preference in dealing with the Department or any of its agencies. [193] The problem with this limitation is that, if a private party is offering to reimburse the agency for its services, it would seem that, by definition, it is seeking assistance from FWS. And the reimbursable agreement itself is a contract, so the private party is necessarily seeking to obtain a contract with FWS. Thus, current policy is not well-suited for use in cost recovery. The FWS manual should be revised to be consistent with reimbursable agreement regulations.

b. Eliminate Intra-Service Consultation

The Service has acknowledged that considerable confusion exists as to the role of an incidental take statement issued in a biological opinion on an incidental take permit.

Because the issuance of an incidental take permit is a federal action, it is subject to the consultation requirements of Section 7(a)(2). Before issuing an incidental take permit, the Service consults with itself to ensure that the action is not likely to result in jeopardy to listed species or the adverse modification of its critical habitat. This intra-Service consultation requires the preparation of a biological opinion and an incidental take statement. The Service has acknowledged that considerable confusion exists as to the role of an incidental take statement issued in connection with an incidental take permit, because the take proposed under an HCP ultimately is authorized by the incidental take permit, not the incidental take statement.[194]

The intra-Service consultation on an incidental take permit is an unnecessary step that could be eliminated since jeopardy considerations are already part of the incidental take permit issuance criteria. The statute requires the Service to ensure that the taking to be permitted "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild,"[195] which, in light of the regulatory definition of jeopardy, is equivalent to a finding that the taking will not "jeopardize" the continued existence of any endangered species. Thus, the Service does not need to take the extra step of consulting and preparing a biological opinion, with a superfluous incidental take statement. Section 7(a)(2) could be amended to expressly exempt the issuance of an incidental take permit from stand-alone consultation requirements.

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[192] *See* 267 FW 1; 264 FW 1, 2, and 5.

[193] *See* 267 FW 1, ¶ 1.11.

[194] HCP Handbook at 6-16.

[195] 16 U.S.C. § 1539(a)(2).

To implement these practical changes, industry, members of Congress, the Service, federal action agencies, and conservation organizations alike must be engaged and educated on the issues with current ESA implementation.

V. Conclusion

The ESA plays a significant role in interstate pipeline permitting and development and can be a significant factor to the timely and cost-effective permitting and implementation of natural gas projects. Delay and inconsistency resulting from the ESA process can be costly to pipeline companies and consumers. Despite widespread recognition of issues in the implementation of the ESA, little has been done to address them. This report identifies areas of the ESA in which there is substantial opportunity for improvement. It also identifies recommendations that may be used for a more effective and efficient administration of the Act, consistent with the Act's conservation requirements. These suggestions are summarized in the accompanying Table 2.

To implement these practical changes, industry, members of Congress, the Service, federal action agencies, and conservation organizations alike must be engaged and educated on the issues with current ESA implementation. Improvements to the ESA can be made that benefit all stakeholders. To be a success, these recommendations must be adopted by the Service in the case of regulatory improvements, or by Congress in the case of legislative improvements. These efforts should be pursued to better achieve conservation benefits for listed species, while allowing natural gas development projects to be permitted and to proceed in an efficient manner. This INGAA report can be a catalyst for change, not only to address the concerns of industry, but also to strengthen the ESA to better protect listed species and their habitats.

Table 2: Summary of suggested ESA regulatory and legislative improvements.

ESA Regulatory Improvements	ESA Legislative Improvements
Section 7 Consultation	
• Clarify date of initiation of consultation. • Codify and increase the applicant's level of involvement in consultation. • Allow third party preparation of biological opinion. • Specify contents required in a biological assessment. • Allow the action agency to play a larger role in consultation. • Set a time limit on concurrences. • Clarify that reasonable and prudent measures must be economically practicable. • Permit the use of blanket clearance letters.	• Remove adverse modification of critical habitat standard.

ESA Regulatory Improvements	ESA Legislative Improvements
Critical Habitat	
	• Remove adverse modification of critical habitat standard.
Consistent ESA Implementation	
• Allow temporary impact flexibility. • Allow an administrative appeal of Section 7 consultation decisions. • Establish an electronic database for biological opinions. • Codify elevated review of biological opinions.	
Best Scientific and Commercial Data Available Standard	
• Require Service justification for data relied upon. • Codify Service policy on information standards. • Require justification of reasonable and prudent measures.	
Section 4 Listing and Delisting	
• Codify peer review requirements. • Require consideration of Section 4(d) rules at listing.	• Mandate delisting upon recovery.
Section 9 Take Prohibitions	
	• Redefine “take” to include actual death or injury. • Provide authorization for impacts to listed plants.
Section 10 Permits	
• Clarify that “maximum extent practicable” includes economic considerations. • Coordinate Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act authorization. • Establish a maximum incidental take permit term.	• Codify cost recovery agreements. • Eliminate intra-Service consultation.

APPENDIX A

INGAA Survey Instrument Questionnaire

Exit this survey >>

The INGAA FOUNDATION, INC.

INGAA Survey on Endangered Species Act

Welcome to the INGAA survey on 'Suggestions on How to Improve the Endangered Species Act.'

Completion of this web-based survey should take just 10-20 minutes of your time.

Please begin the survey by clicking below. Each of the 6 screens contains navigational tools that will allow you to navigate forward or back, and to allow you to revisit and edit your prior responses until you have completed the survey.

Thank you for your help.

Continue >>

The INGAA FOUNDATION, INC.

Q-1. Which of the following agencies have you dealt with most often in working on Endangered Species Act issues? (select all that apply)

Consulting agencies:

- [ ] National Marine Fisheries Service (NOAA-Fisheries or NMFS)
- [ ] U.S. Fish and Wildlife Service (FWS)
- [ ] Both of the above agencies

Action agencies:

- [ ] Bureau of Land Management
- [ ] U.S. Forest Service
- [ ] Federal Energy Regulatory Commission
- [ ] Other (please specify)

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The INGAA FOUNDATION, INC.

Q-2. Based on your experience with the Endangered Species Act, please tell us which of the following areas you see as significant issues with the ESA's application and administration. (select all that apply)

- [ ] Species listing or delisting
- [ ] Critical habitat designation or revision
- [ ] Biological assessment content requirements
- [ ] Timing or length of consultation process
- [ ] Role of project applicant
- [ ] Effects analysis
- [ ] Jeopardy standard
- [ ] Adverse modification/destruction of critical habitat standard
- [ ] Quantification of "take"
- [ ] Reasonable and prudent measures and implementing conditions
- [ ] Listed plant protection
- [ ] Habitat conservation plans
- [ ] Incidental take permits
- [ ] Definition of "take"
- [ ] Inconsistent application by different regions/offices of FWS or NMFS or between the two agencies

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Q-3. How have the ESA implementation issues that you identified in the previous question affected your work on these issues and your company's project(s)?

Q-4. How did you or your company address or resolve these concerns with the ESA's administration for your company's project(s)?

Q-5. Of the approaches that you have described, please tell us which approaches worked best and which approaches were the least satisfactory.

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Q-6. Has your company been subject to timing or seasonal limitations on construction or maintenance activities to protect a listed species? If so, please describe those limitations briefly below and how they did or did not affect your company's ability to pursue its project or activity.

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Q-7. Recent legislative proposals have included the following measures. Which if any do you think would be beneficial for improving the administration of the ESA? (select all that apply)

- [ ] Making the recovery plan the “hub” to downlisting, delisting, and informing Section 7 consultations and Section 10 permitting
- [ ] Setting deadlines for recovery plan implementation
- [ ] Mandating that species be delisted when recovery criteria are met
- [ ] Improving states’ involvement in the listing and recovery processes
- [ ] Removing the “adverse modification of critical habitat” as a regulatory standard under Section 7 and clarifying that the “jeopardy” standard addresses both habitat and direct impacts to species
- [ ] Establishing criteria to define the “best available” scientific data
- [ ] Requiring adequate field-tested and peer-reviewed science for the listing process and recovery planning
- [ ] Increasing incentives for voluntary cooperative agreements
- [ ] Providing a compensation mechanism for land owners for “foregone use” due to ESA regulatory requirements

Q-8. Considering either the above or any other ESA areas that you think might be changed, please describe below the key areas where improving ESA administration is important to the natural gas pipeline industry.

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Q-9. Is there anything else that you would like to tell us about improving the administration of the ESA?

Please provide the name of the company you work for. This information will be used only to track survey responses.

May we contact you to follow up for more information concerning your experiences and thoughts? Names of individual respondents will not be associated with individual answers in any publicly-available report. This information is being gathered for the INGAA Foundation's internal research purposes only.

- Yes
- No

If yes, please provide us with your name and contact information below:

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The
INGAA FOUNDATION, INC.

Exit this survey >>

Thank you for your time in completing this survey for the INGAA Foundation. For more information about this survey or to receive a summary of the survey responses, please contact Sandra Snodgrass.

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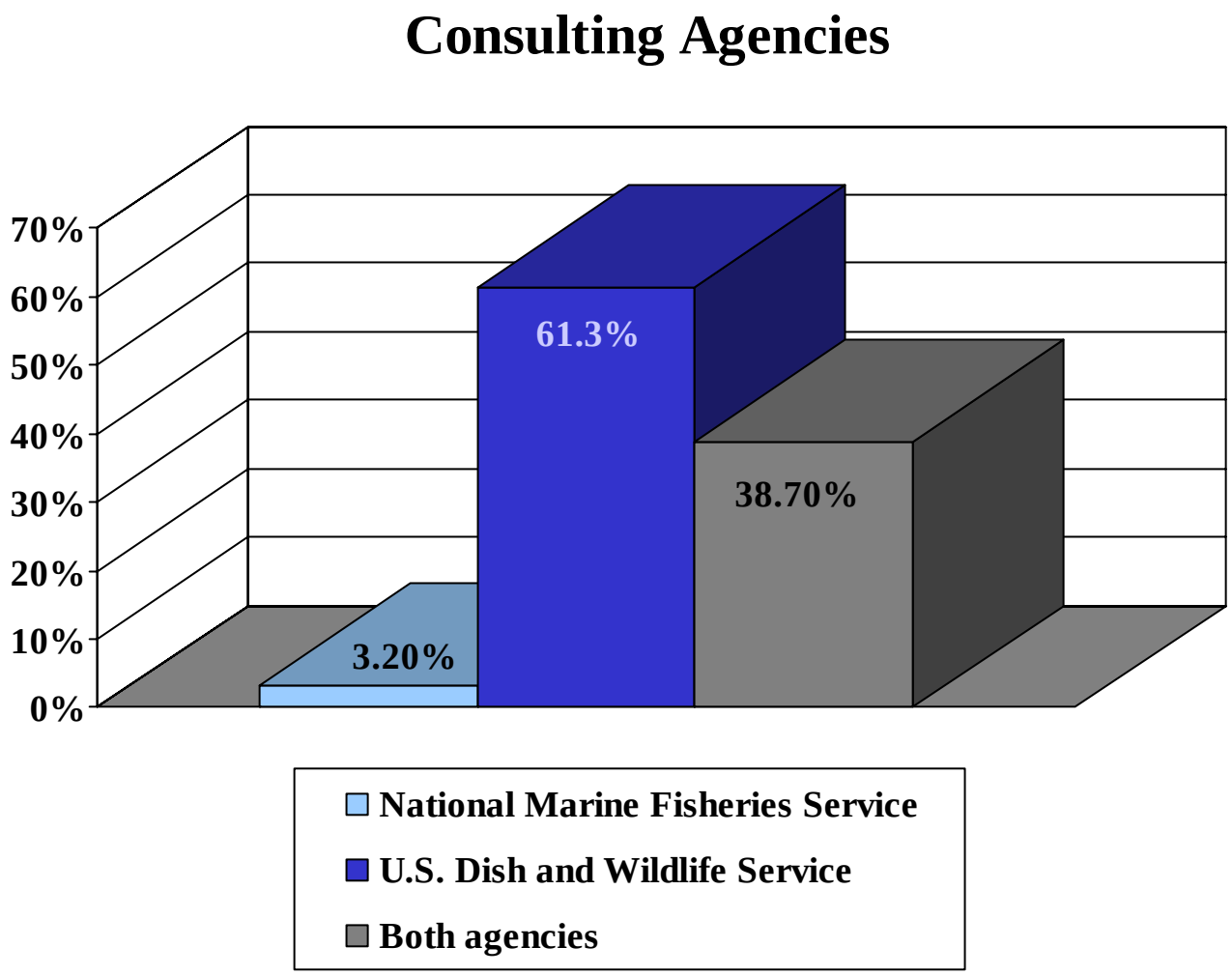
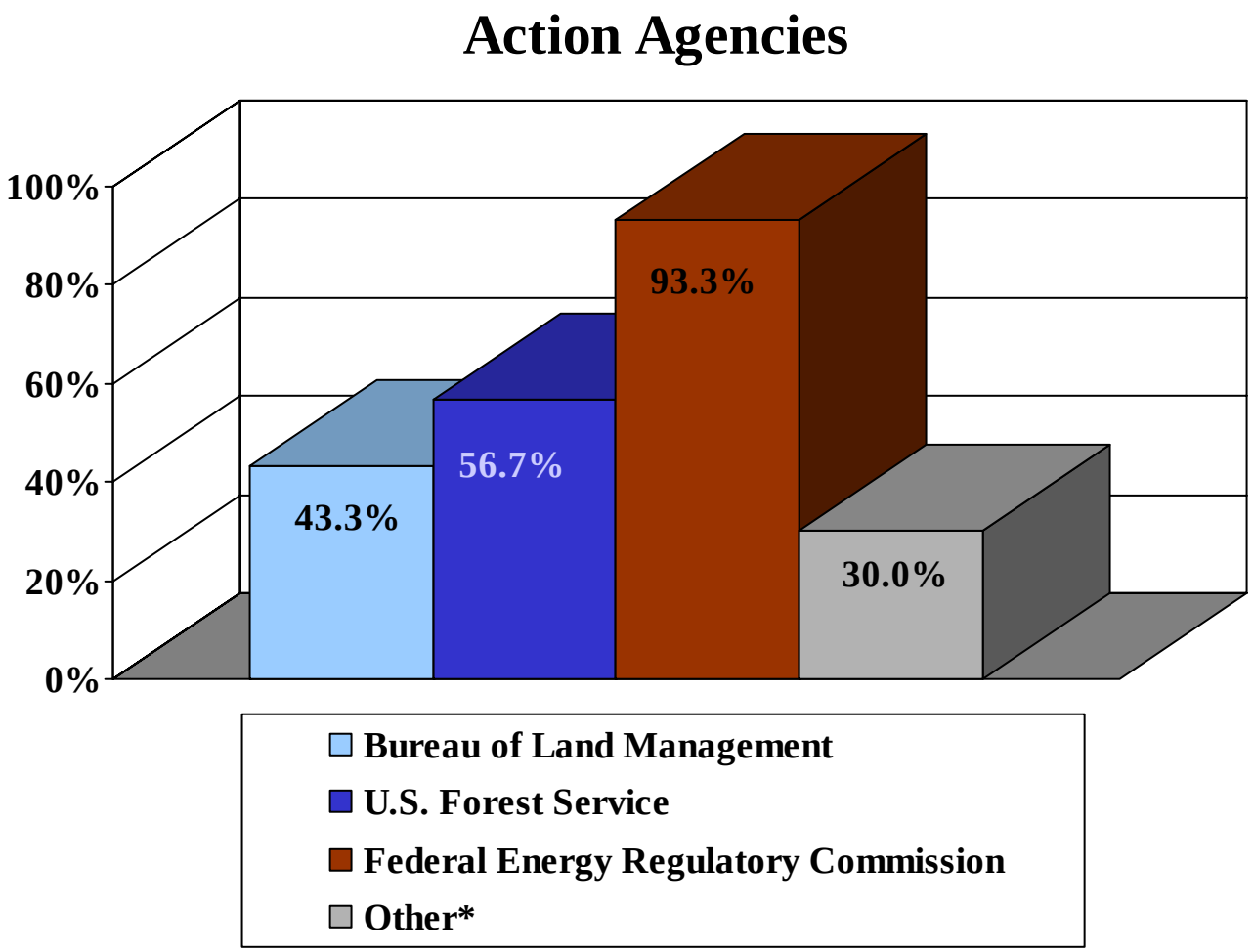
APPENDIX B

INGAA Survey Responses

Q-1a. Which of the following agencies have you dealt with most often in working on Endangered Species Act issues?

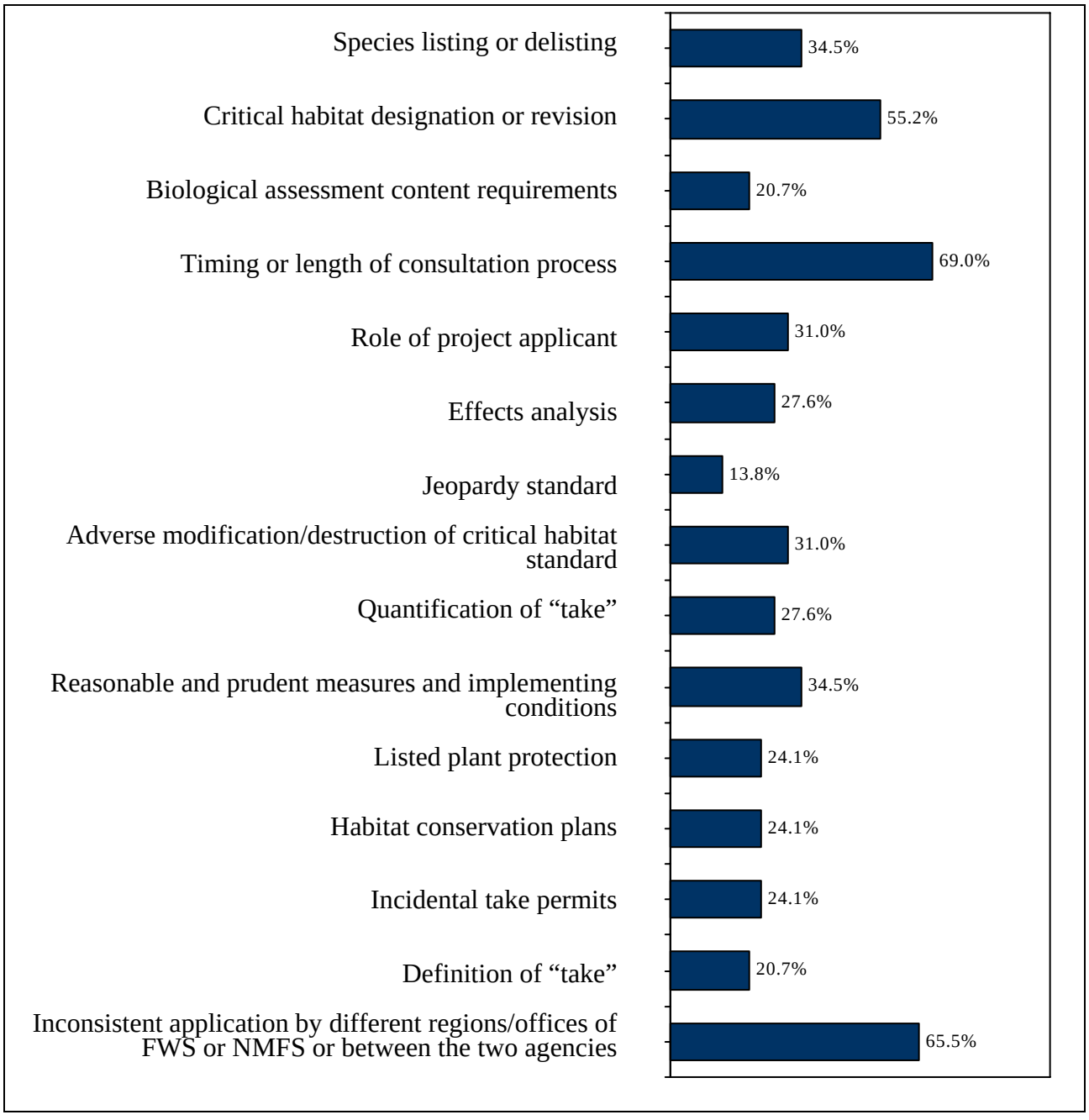


Q-1b. Which of the following agencies have you dealt with most often in working on Endangered Species Act issues?



*** Other:** US Fish and Wildlife Service, DEP (PA), DEC (NY), EPA, US Army Corps of Engineers, State agencies and Corp of Engineers, State Fish & Wildlife, National Park Service

Q-2. Based on your experience with the Endangered Species Act, which of the following areas do you see as significant issues with the ESA's application and administration?



Q-3. How have the ESA implementation issues that you identified in the previous question affected your work on these issues and your company's project(s)?

On both the federal and state levels, the inconsistencies between agency offices, and sometimes even with agency offices, has created numerous situations where project approval has been delayed. Species listing and delisting creates problems in that the federal agency may remove the species from the list but it remains on the state list. There needs to be some sort of communication and coordination between the two levels of government.

Probably the biggest issue that we have seen is inconsistent handling of issues by the USFWS. Regions handle issues differently and in some cases, local biologists are given the authority to make calls on survey methods and/or mitigation methods that are difficult or impossible for project proponents to implement.

Consistency among FWS offices and even among people with offices is sometimes lacking. One office's idea of what a reasonable and prudent mitigation measure sometimes is not acceptable to another.

Two agencies in conflict

The length of time to complete a B.O. has created or threatened to create adverse project schedule impacts. The effects analysis and mitigating measures go hand in hand. The reasonableness of the outcome is largely dictated by the experience/temperament/competence of the agency staff person assigned to the project. Compared to other federal agencies, these staff seem to be given full autonomy regardless of their experience level; there appears to be weak oversight, if any at all. Consequently, if the project draws an inexperienced or less competent agency staff member, it usually results in a poor outcome. The ESA is written in a way that enables FWS/NOAA Fisheries to upset attempts at achieving balanced solutions; i.e. too much weight is afforded T&E species at the expense of other natural and human resources.

During the ESA process, it has been difficult to get the informal process started with NOAA, where NOAA is reluctant to provide comments on the applicant consultations and on the draft EIS or EA. NOAA continues to wait until the last minute on the FEIS to provide their comments. The issues that result are project delays, finding less efficient or cost-effective solutions to issues that cold have been dealt with early in the process. Furthermore, NOAA refuses to participate in the NEPA prefiling process actively other than wanting to receive the information. USFWS participates, but sometimes does not understand the over-reaching implications of their actions and often, does not provide conclusive comments which extend the process.

Working thru complicated requirements and survey window time restrictions have resulted in project delays and increased cost.

Overly burdensome habitat mitigation requirements. Delays and move arounds during construction. Non-responsiveness from agencies regarding impacts and applicability of conservation measures. Inclusion of conservation measures for impacts outside the scope of the ESA.

While no work has been held up, we have had to expend considerable resources to assist USFWS or we have been required, as part of the mitigation process, to map critical habitat along our pipelines.

LENGTH OF TIME - This greatly delayed project to the point that construction lasted too late in the year to have as successful of revegetation in the first year that we would have had. This was not solely related to the length of time from actual initiation of formal consultation to BO, but as much the length of time required to negotiate with the Service in order to get to a point where FERC would initiate formal consultation EFFECTS ANALYSIS - Service seemed very unclear about what could be included in effects analysis as cumulative effects and interrelated/interdependent actions and attempted to delay initiation of consultation because information was not provided on things that could not be evaluated as cumulative and inter related/interdependent actions. QUANTIFICATION AND DEFINITION OF TAKE - Service reinitiated consultation as they stated take was exceeded, when the level of take was not clearly defined and quantified in the BO. This has cost the Company Over $1 Mil in "settlement/mitigation" costs and legal fees. INCIDENTAL TAKE PERMITS - Service used water quality monitoring as a surrogate for take which was entirely unrealistic and not scientifically justifiable, and ended up providing worthless data. The standard/threshold used by Service was not researched and not scientifically founded. This requirement cost the Company over $350K to implement for no benefit.

We have a high volume of projects and tight schedules and we deal with different USF&WS branch offices (or NOAA) but on similar issues. For example, there's a lack of consistency on what types of mitigation measures might be required for the same species or same type of habitat. If there was more consistency, we could plan and take steps to minimize or project impacts. Agency staff has no incentive to meet proponent schedules is another problem.

Constraints to project timelines and costs due to impact or take.

delayed project to met critical habitat issues. Modified projects by reroute, etc

No real impact; just another layer of regulatory bureaucracy to navigate; more of an annoyance.

They have caused delays or created the potential for delays. They have created last-minute conditions of questionable benefit to species/habitat and adverse impact to projects.

In one case, both a Federal and State Only listed plant species was identified within

pipeline R/W which of itself created the very habitat for the listed species to exist. Although the issues were eventually resolved without schedule conflict, conceptually the idea that suitable habitat created by a pipeline R/W is then potentially "discouraged" by the act seems to fly in the face of the purpose of the act. In a second case, the company was faced with the potential of finding "immediate digs" along a single line under the Pipeline Integrity Act within protected habitat. Although no immediate dig was required, it potentially placed the company in a position of three bad choices: Shut the line in and cutoff service; violate the ESA; violate the Pipeline Safety Integrity Act.

In general the standards change dramatically from one region to the next creating inconsistency in the process. The consultations have been unduly long and tedious when the habitat cannot be clearly determined. Therefore we are forced to conduct additional surveys without proper information.

This observation can be somewhat subjective.

Q-4. How did you or your company address or resolve these concerns with the ESA's administration for your company's project(s)?

For issues of inconsistency, our policy has always been to conduct pre-application meetings with all of the agencies present in the same meeting, if possible. This process serves to minimize any inconsistencies between the agencies up front so that the approval process can be completed in minimal time.

We have been largely successful in negotiating reasonable alternatives, construction methods, and mitigation by educating the agency as much as possible regarding our construction methods and the potential impact of our activities. This enables the agency staff to be more comfortable that they understand the activity when they agree to a certain construction method, type of mitigation, or post-construction restoration. We also benefit by receiving approval to use a construction technique or alternative route that is feasible and also adequately protects the resource at risk.

The best solutions are usually arrived in face-to-face meetings.

Pushed for one agency to become lead

1)Our company addresses these issues by communicating frequently and clearly, by ensuring information is timely and thorough, and by variously persuading through science and reason, cajoling, harping, harassing and praying. 2)We have sometimes tried to influence who in the agency gets assigned our projects. 3)Field visits. 4) Education regarding larger regulatory framework and construction processes. 5) Early informal consultation.

Worked with FERC to establish working meetings and dialogue with the agencies to finalize the records and comments. We had to handle the coordination directly and no

involve consultants in the process, since the agencies were less inclined to discuss the project with the consultant. This seemed to lessen the technical discussion and focus more or litigation and compromise. Overall, this was less beneficial to the resource.

Have set-up annual "blanket" clearance letters for minor project work on non-Section 7c projects, continue to work on early planning and scoping for Section 7c and 7b projects to allow for enough time to work thru ESA requirements and survey time restrictions.

I have found many staff level service employees do not like to accept input from applicants. As a resource conservation based organization the services typically view the impacts of their decisions as necessary although they are often not well informed of the true impacts of the projects. Sometimes we are left to incur the costs and impacts of complying with conservation measures that may or may not provide any additional resource protection. I have addressed issues directly with Director level personnel and that will occasionally provide some resolution. One recent measure was the use of a cost recovery agreement to expedite review. I understand this is under review and may not be an option going forward.

Provided survey assistance above-and-beyond requirements, i.e. mapped additional pipeline corridor for critical habitat; used trap and release of listed species - gathered blood samples, used radio telemetry to provide baseline species data to the USFWS.

Outside legal council was used and elevating consultation to higher level within the Service was used regarding Effects Analysis. Consistent and Persistent consultation and meetings regarding time delays, as well as elevation to a higher level within the Service a lot of unnecessary dollars were spent to obtain BO, during construction, as well as following construction when Service claimed take was exceeded. Schedule delays cost additional dollars.

We've entered into a reimbursement agreement to staff two positions to support our HCP program and high priority projects. This really hasn't helped our schedule issue. We are also working with USF&WS on multi-species, regional Habitat Conservation Plans to help make our operation and maintenance work go smoother. But it's taking an extremely long time to get final HCP's in place.

Coordination and consultation - try to have effective working relationships with on the ground representatives from the various agencies.

reroute, reschedule dates of impact, or modify project ie bore instead of trench

Nothing special; routine handling.

Spend more money on consultants/surveys/agency projects and/or make changes to project.

In the first case, a Fish and Wildlife Biologist espoused that revegetation with non-

invasive species would in fact facilitate the overseeding of the surviving protected species. It was accepted by F & WS, FERC. He was right as the R/W now serves as twice the habitat and population base. The second case was not forced into some type of resolution.

We must complete surveys even when there is no reasonable assumption for a species to exist in an area. We have been forced to complete these surveys only in the breeding/nesting/ or habitat season forcing us to delay other permits to clear an area.

Q-5. Of the approaches that you have described, please tell us which approaches worked best and which approaches were the least satisfactory.

Pre-application meetings have always worked the best for us.

Company discusses alternative solutions with the agency and then follows up in writing for approval.

One agency becoming lead

1) most successful 2) least successful 3) essential, effectiveness depends on agency individual 4) important, effectiveness depends on agency individual 5) successful

FERC acting as a mediator and direct communication without the consultant's participation. Although not preferred, it seemed to be the most effective. Least effective was trying to go directly to the agencies without FERC participating.

Both approaches have been working, blanket clearance letters or HCP/ITP's work best, continually trying to smooth out early planning and scoping issues still is problematic.

Both approaches have been working, blanket clearance letters or HCP/ITP's work best, continually trying to smooth out early planning and scoping issues still is problematic.

Education and communication are the best tools available when dealing with the services. If that does not yield the required results I have found the only way to get through a conflict is to go directly to management at the local or regional office. The cost recovery approach did not result in an appreciable increase in turn around time but it did provide a platform for communication with the service's management when issues arose.

Best: collecting hard data that could support future projects by demonstrating that species were more extant and hardier than previously believed; Least: Surveying and mapping critical habitat along our pipeline (some nominal benefit for future projects, but not in comparison to cost to obtain the data).

Getting programmatic, regional permits in place to cover our O&M activities for the long term works well. The problem is getting enough staff time to get these permits in place in a reasonable amount of time. It takes too long to get a final agreement, because staff gets hung up on detailed analysis that's not appropriate or too detailed for the level of effect. For linear facilities we typically will have temporary impacts but the Service gets hung up on trying to impose mitigation for permanent type impacts.

Communication is key and upfront and early dialogue on the issues.

Pipeline folks don't like any.

NA

They all worked. The problem is that the potential impact/benefit is questionable so you're left wondering what you just spent your shareholder's money on and almost all project changes increase the cost of the project.

I think the direct involvement by F& WS in a "given" circumstance allowed for timely resolution of the issue. Paperwork is fine in most cases, however, on-site inspection and resolution seems to be a very effective mechanism.

Consultation has worked. However some of the agency representatives have been Napoleonic in their approach forcing additional information when it is not clearly necessary. We have been forced to undermine the hierarchy of the agency just to get clearance to do surveys or obtain clearance.

Some regions appear to not actively provide guidance regarding addressing MBTA issues. The industry requires clearer direction on the Act's application, liability, mitigation opportunities to avoid non-compliance.

Q-6. Has your company been subject to timing or seasonal limitations on construction or maintenance activities to protect a listed species? If so, please describe those limitations briefly below and how they did or did not affect your company's ability to pursue its project or activity.

Yes. We do a considerable amount of work in the Gulf Coast area and have been limited in construction dates by Bald Eagle and wading bird issues. These limitation are magnified when you have overlapping areas of impact. The effect is that if you have overlapping areas of impact, you may be limited to one to two months of construction for the entire year.

Yes. Indiana bat - required to limit clearing of potential roost trees to timeframe between Sept. 1 and April 30. This restriction was followed and did not significantly impact construction, because clearing was conducted before the start of the construction

season. Piping Plover - surveys for piping plover were required before construction could begin. Although none were found, we were at risk of having to move-around or skip construction in any areas with plovers until after the nesting season. This season was to be determined by the FWS. We have not had an ESA issue significantly affect a construction or operation project to date, although the potential is there for this to occur.

Raptor nest buffer zones prevent ANY activity within 0.25 mi to 1 mi depending on the species for up to six months of the prime construction season. Required surveys for migratory bird species cause construction delays and skips in linear projects.

yes, our schedule is totally based on species migration

Operate in an area with limited T&E impacts. Have used alternative construction methods to avoid timing impacts. No major impact on the projects.

We've experienced seasonal-related limitations associated with numerous species, including bald eagle, southwest willow flycatcher, Yuma clapper rail, Northern spotted owl, various fish species, San Joaquin kit fox, marbeled murrelet and pygmy rabbit. Timing restrictions may or may not be problematic, depending on many factors. It should be noted that candidate species are, for practical purposes, the same as listed species, since a conference opinion will entail very similar processing time frames, and mitigation recommendations are developed in the context of assuming a listing at the time of construction.

Yes, we were restricted to placing dredged material in the open water Gulf of Mexico. We had to agree to not place material in April or May of any given year. The impact was we had to shut down and restart our dredging activities. The net result was an increase in the project cost and project planning.

Yes, usually these limitations put us into conducting clearing or construction in late fall and winter timeframes which is not the best time due to increased weather and safety hazards.

Yes, we have been subjected to all of these impacts. We have been subjected to move-arounds, construction start delays, and limitations on use of access roads. This is primarily due to raptors. We have also been restricted to narrow crossing windows and techniques for fish. This creates many move-arounds, skips and logistical problems trying to schedule stream crossings.

Timing of construction in coldwater fisheries - limiting time spent in crossing or requiring HDD for crossing; Maintenance - Mowing restriction April 15 - August 1 severely restricts northeastern states. We have difficulty striking the balance between USFWS/FERC requirements and DOT surveillance requirements; also, not enough time to mow all of the ROW we need to mow; what do we do in multi-line ROW? It is not realistic to mow strips, nor to many landowners want us to maintain their property in this fashion. Requirement to survey for gopher tortoises prior to mowing. Added cost.

Time restrictions were implemented on stream, including the area within 150 ft. each side of streams and the temporary construction bridge. The project moved forward, but these restrictions, particularly the restriction for the area within 150 ft. and the bridges caused great inefficiencies. A stream which was crossed via a conventional bore was also restricted.

All of the time. For example, facilities around the SF Bay are typically subject to the breeding season of the California Clapper Rail. We are restricted from any type of activity between February 1 through July 31. We have similar restrictions when dealing with northern spotted owl, California Tiger salamander, and California red-legged frog just to name few. We plan our construction activities around these restrictions but sometimes need to do work under emergency situations.

Timing windows for construction have been problematic but we have been able to work through them in coordination with the agencies.

Yes. On a recent pipeline project, the USFWS imposed a condition of no blasting within a 1/2 mile of a canyon because one MSO was heard during 8 survey nights at 4 calling stations in the canyon. No nests were found and the prevailing belief among the survey biologists and agency biologists was that it was a foraging male owl who just happened to be in the area one night. Rather than seeming reasonable and prudent, the no-blasting condition seemed arbitrary and capricious. We set about discussing with the USFWS and FERC the need for blasting in the canyon and that blasting for pipeline construction is not much louder than hammering away at the rock and it certainly is quicker. We were instructed by the agencies to collect sound data and look into other non-blasting compounds to fracture the rock. By the time we completed this exercise, the contractor was able to create a trench without the need to blast (but it took longer).

ABBA, ARS, terns, frogs, Eagles

Timing and seasonal limitations have been suggested, but usually have been negotiable and workable.

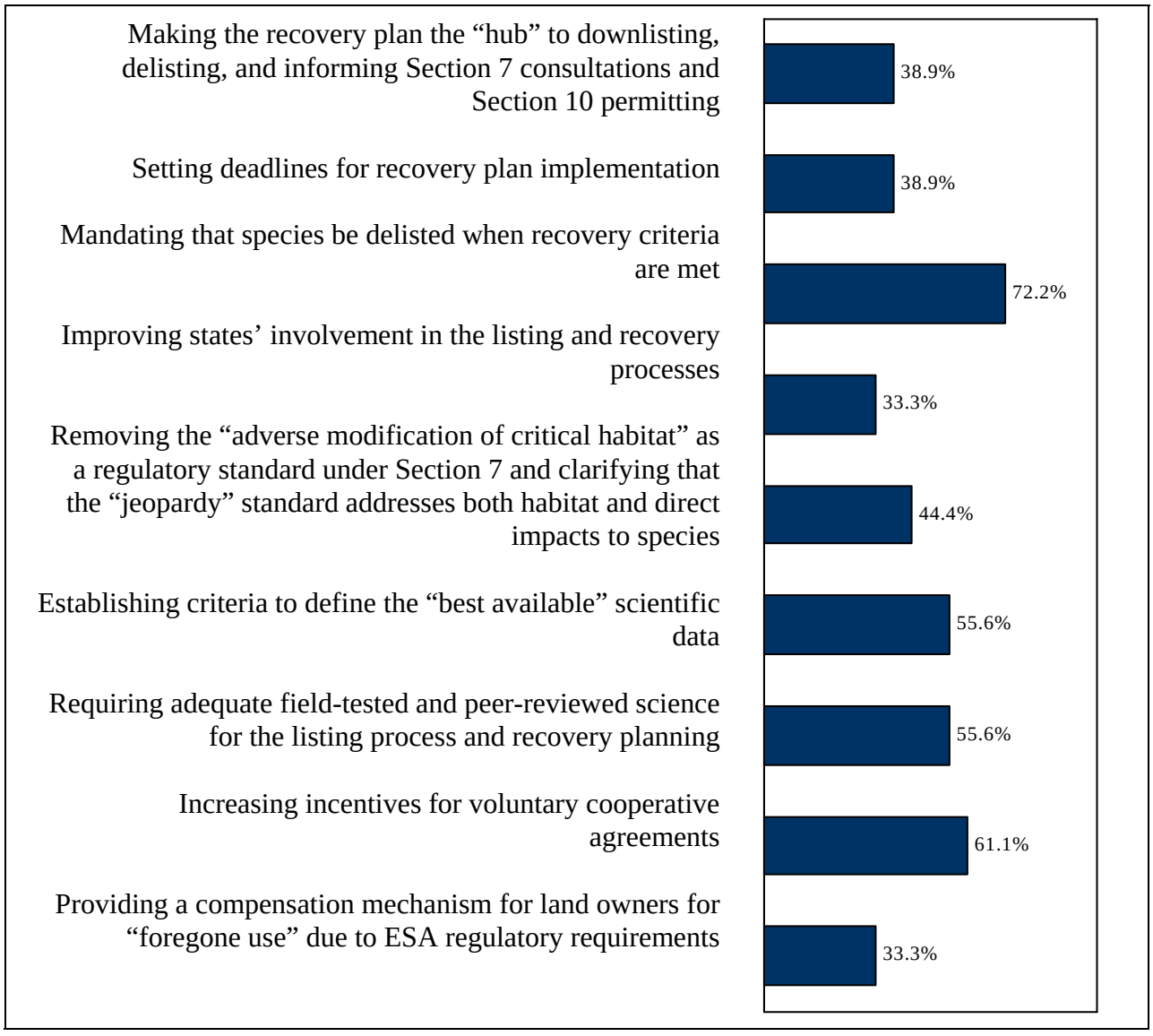
Yes. Tree cutting limitations due to Indiana Bat habitat have created construction schedule difficulties both in project timing and/or forcing winter construction. More problematic is the clearing of trees for required repairs, emergencies, and maintenance in conflict with tree clearing windows. We have worked within the time constraints and not experienced the inevitable conflicts above. Again-some situations necessitate the immediate and direct involvement of the agency to resolve the issues.

Yes, mowing restrictions keep us from maintaining right-of-way. Then once vegetation grows..it becomes habitat for other listed species and we can't mow at all

Yes several times delayed due to construction. Example Gray vireo existing throughout the southern hemisphere of the U.S. we just got delayed because we may have suitable

habitat in the area. We had to delay the 10-day construction to survey it and have an ornithologist on site prior to construction just to mobilize equipment.

Q-7. Recent legislative proposals have included the following measures. Which if any do you think would be beneficial for improving the administration of the ESA?



Q-8. Considering either the above or any other ESA areas that you think might be changed, please describe below the key areas where improving ESA administration is important to the natural gas pipeline industry.

As more and more federal and state guidelines and regulations are strapping the oil and gas industries, there is need for some type of relief. Over the last 5 years safety issues have become a black-hole for operating companies' budgets. The attempt to provide this relief should not come at the expense of the environment but we feel strongly that there are ways to streamline the process. The pipeline industry is willing to partner the government to be stewards of the environment but has to have the freedom to install the infrastructure needed to keep America on the move.

It is very important that some level of consistency be achieved in the implementation of ESA. The establishment of criteria for "best available" scientific data and use of the recovery plan to help define risk to species by specific activities will help drive consistency between regions that doesn't exist today. This will provide a more stable process that will allow project proponents and agencies to come to feasible agreements that protect species while also allowing projects to proceed in a feasible manner. Removal of the "adverse modification of critical habitat" as a regulatory standard would likely be the most beneficial change to ESA, because this is often a highly subjective criteria that agencies can use to require unneeded or unrealistic mitigation measures during project implementation.

Develop a willingness to explore mitigation measures for sensitive species, especially in areas where those species are abundant.

A more defined chain of authority between states & the federal agencies.

Most of the reform attempts have focused on the listing/de-listing and recovery processes. Instead, the gas industry should be interested in pursuing an ESA that allows for endangered species issues to be balanced among the entire array of natural and human resources issues that must be considered when planning and permitting projects. Endangered species should not automatically trump every other issue, which is largely the case today. At a minimum, compensatory mitigation requirements and other forms of mitigation should be commensurate with project impacts. However, the ESA agencies frequently use the fear of a jeopardy opinion as a means to insist upon mitigation that is out of all proportion to project impacts. When compensatory mitigation is deemed appropriate, for example, the bases for formulas used to determine compensation ratios are often inequitably applied, ad hoc, or even non-existent. Staff turnover is also, in our experience, a problem; preparing B.O.s is not considered a prime occupation within FWS, consequently, less experienced or less capable staff often get these assignments.

Time to approve a project is the most critical part of the process. Outside of timing, knowing the limits of the ESA and the agreements that can be made to mitigate and/or

work around/with an endangered species is critical to successfully managing a project with endangered species issues.

Establishing criteria/guidance for species mitigation/recovery and improving states involvement in the listing and recovery processes.

Predictability on decision making timelines with opportunity to assume concurrence for failure to act. Restrictions on conservation measures not specific to direct take or impacts to designated critical habitat. Opportunities to mitigate unavoidable impact as opposed to total avoidance as the only "solution."

Timeliness of Biological Opinions; working with FERC to ensure that EA or DEIS/FEIS is issued promptly.

Linear facilities and R/W's are not specifically considered in the ESA. Our gas and electric facilities cross multiple habitats and agency jurisdictions presenting unusual permit and agency consultation challenges. Many potential habitat or species impacts from linear facilities are temporary and do not take habitat out of production for future species use.

It would be nice if the project proponent was able to see and comment on a Biological Opinion before it is issued or if the BO's conditions were recommendations to be discussed/coordinated with the USFWS. That way, mitigation could be discussed/negotiated and agreed upon before being imposed.

Provide funding to EPA to administer the ESA as intended and provide better level of certainty and consistency to industry and landowners as to how they will be affected by the ESA. The ESA generally does not provide an insurmountable obstacle to industry, but more consistency would make construction and operations more predictable and efficient.

I understand FERC's duty to see that the ESA is followed. I do not understand FERC's "authority" to incorporate State Listed species or threatened species into certificates to, in effect, to protect non ESA species by going end around.

Development including housing, office and other affects the environment. It seems p/ls are the only one who have to consider ESA issues and enforces them for all our work. While adjacent construction disregards all of our protection time frames. Consistency first. Rely on the field office for data review.

Q-9. Is there anything else that you would like to tell us about improving the administration of the ESA?

No.

N/A

Pay less attention to the listing/delisting and recovery processes, and more to the end results - how can the consultation process be reformed to 1) ensure mitigation is commensurate with impacts, 2) that endangered species protections are applied in a balanced, equitable and scientifically supportable manner, and 3) better agency staff oversight and accountability. Also consider overhauling or eliminating the arbitrary and subjective categorization schemes pertaining to jeopardization of the species and base a new ESA on determining what is a reasonable level of avoidance, minimization or mitigation for a given action.

Improve the staff behind the consultation process and define the limits or escalation process when an issue results.

No.

USF&WS is short on staff and seem to have a large turnover. It may be helpful to set themselves up with an "energy division" that could dedicate time to linear utilities.

No.

I believe an up to date listing of species and locations is critical along with allowing a particular company to verify a specific project falls or does not fall into the protected locations. FERC should not require written consultation if the applicant can demonstrate that at the time of the activity, no species were listed.

The single biggest issue regarding this act is the severe underfunding/understaffing of the Agencies that administer our clearances to do work under the Act. We don't think that making any of the changes in this survey would have near the impact of properly funding/staffing the Agency so that we can work within the framework of the current Act. Some of the changes proposed might be advantageous to us, but we don't see significant advantages over just making the current system work like it's supposed to.

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