

Moreover, when Congress passed the ESA in 1973 it was acutely aware that stemming the loss of biodiversity required more than protecting individual animals and plants. It also required protecting habitat from destruction or adverse modification. Of the many threats to America's wildlife heritage, Congress recognized that the "most significant has proven also to be the most difficult to control: the destruction of critical habitat."<sup>255</sup> In the 1978 amendments to the ESA, Congress reemphasized that "[t]he loss of habitat for many species is universally cited as the major cause for the extinction of species worldwide."<sup>256</sup>

**1. No compelling evidence demonstrates that Section 7 consultation would result in a finding of no jeopardy for listed species.**

Section 7 of the Endangered Species Act imposes on the Corps (the action agency) a substantive obligation to promote the conservation of species.<sup>257</sup> As part of this duty, the Corps must consult with either the Service or the National Marine Fisheries Service (the consulting agencies) whenever it acts, authorizes, or funds a project that may impact a listed species or its habitat.<sup>258</sup> In doing so, the action agency and the consulting agency must determine that a project is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species.<sup>259</sup> Throughout the consultation process, both the action agency and the consulting agency must "use the best scientific and commercial data available."<sup>260</sup>

Depending on the anticipated effects that a project will have on species or habitat, the Section 7 consultation process can constitute several steps. As a preliminary matter, the threshold for triggering consultation is low.<sup>261</sup> To comply with its ESA Section 7(a)(2) obligations, the action agency must first determine whether its action "may affect" each listed species or critical habitat for that species present in the action area, which means "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action."<sup>262</sup>

If an action "may affect" listed species or critical habitat, the agencies must then engage in informal consultation, possibly followed by formal consultation. To complete informal consultation, the action agency must determine, with the written concurrence of the consulting agency, that the action is not likely to adversely affect listed species or critical habitat.<sup>263</sup> If the action is likely to adversely affect any listed species or designated critical habitat, the action

---

<sup>255</sup> H.R. Rep. No. 93-412, 93d Cong., 1st Sess. (July 27, 1973); *Tenn. Valley Auth.*, 437 U.S. at 179 ("Congress stated from the finding that '[t]he two major causes of extinction are hunting and destruction of natural habitat.' Of these twin threats, Congress was informed that the greatest was destruction of natural habitats.") (citations omitted).

<sup>256</sup> H.R. Rep. No. 95-1625, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455.

<sup>257</sup> 16 U.S.C. § 1536(a)(1).

<sup>258</sup> *Id.* § 1536(a)(2).

<sup>259</sup> *Id.*; 50 C.F.R. § 402.14(a).

<sup>260</sup> 16 U.S.C. § 1536(a)(2).

<sup>261</sup> *See* 50 C.F.R. §§ 402.13, 402.14.

<sup>262</sup> 50 C.F.R. § 402.14; 50 C.F.R. § 402.02 (defining "action area").

<sup>263</sup> 50 C.F.R. § 402.13(a).