



DEPARTMENT OF THE ARMY

U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:
CECC-ZA

JUN 11 2013

MEMORANDUM FOR ALL COUNSEL, HQ, DIV, DIST, CENTER, LAB & FOA OFFICES

SUBJECT: ESA Guidance

I. Introduction

a. Implementation of the Endangered Species Act (ESA) provides the Corps of Engineers Civil Works Program opportunities to contribute to the preservation of listed endangered and threatened species. However, the Corps must satisfy the statutory requirements of the ESA in a manner that also ensures the continued viability of the project purposes authorized by Congress, such as navigation, flood control, water supply, and hydropower. This guidance document is intended to review for all Corps commands the legal requirements of the ESA, so that measures that the Corps adopts to implement our ESA responsibilities will be within Corps' legal authorities, consistent with the Corps' missions and responsibilities, and feasible from both a technological and economic point of view. As explained further below, this requires accurate description of the action being proposed by the Corps, a careful determination regarding what to include in the environmental baseline, as well as thoughtful adoption of measures designed to meet the requirements and intent of the ESA.

b. I expect every Division Counsel and District Counsel to ensure that every ESA Section 7 formal consultation undertaken in that Division or District receives a careful legal review to determine whether the legal principles described in this document are being implemented. If not, please confer with my points of contact identified at the end of this document.

II. Context

a. This guidance document focuses on Section 7(a)(2) of ESA, which requires Federal agencies to consult with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service/NOAA Fisheries (NMFS) (collectively "the resource agencies"), and to ensure that actions they fund, authorize, permit, or otherwise carry out will not jeopardize the continued existence of any listed species or adversely modify designated critical habitats.

b. As the Corps conducts planning studies for new Civil Works projects, the Corps seeks the views of, and works closely with, the resource agencies pursuant to Section 7 consultation requirements of the ESA. This allows the Corps to plan and design new Civil Works projects in a way that will accommodate the needs of endangered and threatened species and critical habitats while still producing an efficient and cost-effective Corps project. The ESA presents different challenges for Civil Works projects that have already been constructed and that are now being

operated and maintained by the Corps. Many of those projects were planned, designed, and built before the ESA was enacted in 1973, and sometimes the listed species or designated critical habitats were not present in the area until after the Corps project was built.

Determining the Corps' ESA legal responsibilities for such existing Civil Works projects requires care and precision.

c. In addition, for both proposed Civil Works projects and existing projects, it is important to remember that resource agencies have missions, goals, and responsibilities that are in some important respects different from those of the Corps of Engineers. For example, the FWS and the NMFS approach their responsibilities under the ESA by focusing almost exclusively on what measures would best advance the interests of listed endangered and threatened species. While the Corps shares with the resource agencies the goal of protecting listed species, we also have to ensure that we can plan, design, build, operate, and maintain Civil Works projects that serve the purposes for which Congress authorized each project (such as navigation, flood control, water supply, hydropower, etc.), in a cost-effective and efficient way. It becomes critical, therefore, that the Corps work diligently with the resource agencies to ensure that the proposed "Action" and "Environmental Baseline" are properly defined, and that alternatives that minimize impacts (and "Incidental Take") and other requirements set forth in a biological opinion are appropriate and technically and economically feasible.

III. Defining the "Action" and the "Environmental Baseline"

a. As the Corps evaluates its legal responsibilities under the ESA, the first step is to carefully identify and define the Corps' "action" that must comply with the ESA's procedural and substantive requirements. The FWS/NMFS ESA Section 7 regulations at 50 CFR Part 402 define "action" as follows:

b. "'Action' means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: . . . (d) actions directly or indirectly causing modifications to the land, water, or air." (50 CFR 402.02)

c. It is important that the Corps, not the resource agencies, defines the "action" at issue in a manner consistent with this definition. In all interactions with the resource agencies, it is important for the Corps to define and describe our agency's "action" in a precise manner, to ensure that any measures intended to minimize adverse impacts pursuant to the ESA accurately account for only those activities over which the Corps has discretion. For example, where the Corps is responsible for an existing structure such as a dam, levee, channel, etc., the mere continued existence of that structure cannot reasonably be said to cause modifications of the land, water, or air within the meaning of the ESA regulations. In other words, the existence of a Corps Civil Works structure is part of the existing "environmental baseline" for purposes of ESA compliance.

d. The FWS/NMFS regulations define the environmental baseline as follows: "The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area . . ." (50 CFR 402.02). It is the view of

the Corps that the responsibility to maintain Civil Works structures so that they continue to serve their congressionally authorized purposes is inherent in the authority to construct them and is therefore non-discretionary. Only Congressional action to de-authorize the structure can alter or terminate this responsibility and thereby allow the maintenance of the structure to cease. For example, many years ago, and before the enactment of the ESA, the California Debris Commission constructed the congressionally authorized Englebright and Daguerre Point dams on the Yuba River in California to prevent debris from hydraulic gold mining activities from washing downstream and blocking the navigation channel of the Sacramento River. Later the Congress transferred responsibility for those dams to the Corps. After construction of those dams, anadromous fish could not swim upstream past the Englebright Dam at all, and could swim upstream of the Daguerre Point Dam only with the assistance of a fish ladder added after construction of the dam. Although the Corps maintains the fish ladder at the Daguerre Point Dam to keep it operational, the only other actions that the Corps takes at either dam is to inspect the structures from time to time to ensure their safety and integrity, and to take the minimal maintenance actions needed to ensure that the dams can continue to serve their Congressionally authorized purposes.

e. Because the Corps has a non-discretionary duty to maintain those Civil Works structures for which it has O&M responsibilities, the fact that the Corps perpetuates the structure's existence is not an action subject to consultation. The how and when of the maintenance activities may be subject to Section 7 consultation if the process of maintenance (as opposed to the results of maintenance) could affect listed species or designated critical habitat. When the Corps does conduct Section 7 consultation for an existing Corps project, the Corps' positions on important matters such as what activities are included in the agency action and what conditions are included in the environmental baseline should be presented clearly and forcefully in the biological assessment (BA) that the Corps prepares and submits to the resource agency at the beginning of the consultation process.

f. Careful definition of "action" and "environmental baseline" is critical because the analysis of the effects of the Corps' action pivots on these determinations. "Effects of the action" is defined to include "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action." (50 CFR 402.02) However, the ESA only requires the consideration of effects that are "reasonably certain to occur" (*ibid*) in contrast to NEPA's requirement to consider effects that are "reasonable foreseeable". See *Medina County Environmental Action Ass'n v. S.T.B.*, 602 F.3d 687, 695 (5th Cir. 2010) (quoting the FWS comments on the ESA regulations). The ESA does not require an agency to engage in speculation regarding a potential endless chain of effects. *San Francisco Baykeeper v. U.S. Army Corps of Engineers*, 219 F. Supp. 2d 1001, 1021-22 (N.D. Cal. 2002). There has to be a reasonable causal relationship between the agency action and the effects to be considered. See *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667-668 (2007) (assessing what actions an agency can be considered to have legally caused for purposes of the ESA). See also *Medina County*, 602 F.3d 687 (assessing causation for purposes of identifying interrelated actions). The ESA Section 7 Consultation Handbook (http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf) uses a "but for" test for determining interrelated and interdependent activities, but stresses that the question is the relationship of the activity that is potentially interrelated with the action under

consultation – not the opposite. (*See Handbook*, p.4-26 – 4-27.) Activities that relate to the action under consideration but that have independent utility apart from the action under consideration should not be included in the ESA analysis if it is “reasonably certain” that this activity would occur absent the primary action. Independent utility of an activity that is not reasonably certain to be implemented absent the primary action being considered is not grounds to exclude the activity from ESA consultation. *See id.* *See also Medina County*, 602 F.3d at 700; *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987).

IV. Adopting Reasonable and Prudent Alternatives Based on a Jeopardy Biological Opinion

a. The analysis of whether or not a proposed action is likely to jeopardize the continued existence of a listed species or adversely modify designated critical habitat is contained in a biological opinion issued by FWS and/or NMFS at the conclusion of formal Section 7 consultations. If a jeopardy or adverse modification determination is made, the biological opinion must identify any reasonable and prudent alternatives (RPAs) that could allow the project to move forward in a manner that would not jeopardize a listed species or its critical habitat. Typically such a biological opinion also includes an incidental take statement that provides an exemption to the prohibitions of Section 9 of the ESA. In such circumstances the Corps should work closely with the resource agency to develop an RPA that the Corps can implement.

b. An RPA is, from a legal point of view, a suggestion or recommendation that the Corps is not legally obligated to adopt or implement. If the Corps cannot implement the RPA that is recommended in a final biological opinion, the Corps must otherwise ensure that it is not violating the ESA: For example, the Corps may choose to not implement the project; the Corps may disagree with the jeopardy or adverse modification determinations in the biological opinion and proceed with its action (in this circumstance, the Corps must undertake a thorough evaluation of alternative approaches to ESA compliance to ensure no jeopardy or adverse modification); the Corps can seek to re-initiate ESA consultation with the resource agency hoping to receive a new and different biological opinion; or the Corps may request an exemption from the ESA from the “Endangered Species Committee” (a rarely used committee made up of seven cabinet members). If the Corps implements the project in such circumstances, the Corps needs to consider the legal vulnerabilities that come with a biological opinion that contains a finding of “jeopardy or adverse modification” under the ESA and the lack of an incidental take statement that exempts the Corps from the prohibitions of Section 9 of the ESA.

c. It is essential that the Corps work closely with the FWS and/or NMFS as that resource agency develops a suggested RPA to ensure that the RPA contained in the final biological opinion will conform to the legal requirements for what an RPA must be, and to ensure that the RPA can actually be implemented by the Corps within our existing legal, economic, and practical limitations. To accomplish those goals it is important to keep in mind the restrictions and limitations that govern the development of an RPA, and that are inherent in the legal definition of what an RPA is. The FWS/NMFS ESA Section 7 regulations define the term “RPA” as follows:

d. “Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.” (50 CFR 402.02)

e. Each element of the definition of an “RPA” requires the Corps’ perspective and presents questions that are uniquely within the Corps’ expertise: whether a recommended RPA would be “. . . consistent with the intended purpose of (the Corps’) action . . .”; whether a suggested RPA “. . . can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction . . .”; and whether a recommended RPA would be “. . . economically and technically feasible . . .”. The law recognizes deference to the action agency on these questions, since only the action agency is responsible for the proposed action and for implementation of any recommended RPA.

f. In order to facilitate the production of a biological opinion that accurately reflects the Corps’ action, authorities, and the feasibility of implementation of appropriate alternatives, the Corps should work closely with the resource agencies early in the process of developing RPAs and should formally request a draft biological opinion for review and comment in order to ensure that the view of the Corps on these questions is appropriately considered. If requested to do so, a resource agency should provide a draft Biological Opinion to the action agency for review. Attempting to resolve differences of opinion before the biological opinion is finalized benefits all parties to the process and minimizes the likelihood that the Corps will have to request re-initiation of consultation to correct incorrect facts, assumptions, and/or legal conclusions of the biological opinion. Resolving these problems at the draft BiOp stage also creates a stronger administrative record should the final decision be challenged in court. In order to help develop implementable RPAs, Corps counsel should work actively with appropriate clients, keeping in mind the applicable definition of “RPA” as it applies to Corps Civil Works activities.¹

V. Conclusion

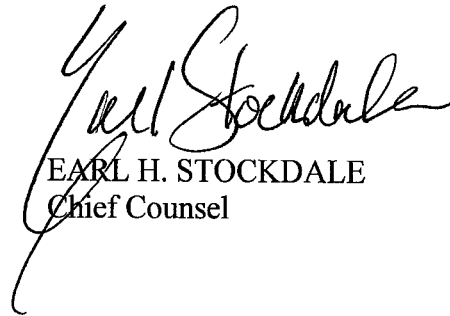
By following the recommendations of this guidance document, the Corps can try to ensure that the Civil Works budget is not inappropriately diverted to pay for large-scale environmental restoration projects that Congress has not authorized or funded, in the guise of alleged ESA responsibilities that are not legitimately the Corps’ responsibilities under the ESA. This follows the ESA’s requirement to focus “on harm to individual listed species and their habitat rather than

¹ Both the Corps and the resource agencies should recognize that the costs of RPAs added after the Corps has designed an alternative may alter costs of the alternatives so much that the recommended plan may be changed; furthermore these added RPAs may not be the best option to reduce the potential adverse effects on a protected species. To reduce these cost shifting situations and to better reduce adverse effects on protected species, interagency coordination should be a critical part of the earliest steps of alternative formulation. Through early informal coordination potential adverse effects to protected resources may be avoided or minimized to the extent practicable rather than fixing the problem as an afterthought. If formal consultation is still necessary following this early informal coordination, the Corps should formally request a draft biological opinion for review and comment in order to facilitate the production of a biological opinion that accurately reflects the Corps’ action, authorities, the feasibility of implementation of appropriate RPAs.

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on the health of ecosystems as a whole.” *San Francisco Baykeeper v. U.S. Army Corps of Engineers*, 219 F. Supp. 2d 1001, 1021 (N.D. Cal. 2002) (finding that scope of a biological opinion for a port renovation project was properly confined to “immediate vicinity” of proposed project). My points of contact for this guidance are Lance Wood (202-761-8556) and Max Wilson (202-761-8544).



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