

**FEDERAL AGENCIES' SELECTIVE  
ENFORCEMENT OF ESA CONSULTATION**

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**OVERSIGHT HEARING**

BEFORE THE

COMMITTEE ON NATURAL RESOURCES  
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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Wednesday, July 29, 2015

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## CONTENTS

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	Page
Hearing held on Wednesday, July 29, 2015 .....	1
Statement of Members:	
Bishop, Hon. Rob, a Representative in Congress from the State of Utah ...	1
Prepared statement of .....	3
Grijalva, Hon. Raúl M., a Representative in Congress from the State of Arizona .....	5
Prepared statement of .....	6
Statement of Witnesses:	
Bean, Michael, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior, Washington, DC ...	7
Prepared statement of .....	9
Questions submitted for the record .....	13
Rauch III, Sam, Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service, NOAA, Washington, DC .	18
Prepared statement of .....	19
Additional Materials Submitted for the Record:	
Environmental Protection Agency, prepared statement of .....	55



# **OVERSIGHT HEARING ON FEDERAL AGEN- CIES' SELECTIVE ENFORCEMENT OF ESA CONSULTATION**

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**Wednesday, July 29, 2015  
U.S. House of Representatives  
Committee on Natural Resources  
Washington, DC**

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The committee met, pursuant to notice, at 10:03 a.m., in room 1324, Longworth House Office Building, Hon. Rob Bishop [Chairman of the Committee] presiding.

Present: Representatives Bishop, Gohmert, Lamborn, McClintock, Thompson, Lummis, Benishek, Labrador, LaMalfa, Westerman, Newhouse, Zinke, Radewagen; Grijalva, Bordallo, Huffman, Lowenthal, Beyer, Dingell, Capps, and Polis.

The CHAIRMAN. The committee will come to order. The committee is meeting today to hear testimony on Federal agencies' selective enforcement of Endangered Species Act consultation. Under Committee Rule 4(f), any oral opening statements are limited to the Chair, the Ranking Minority Member, and their designees. This will allow us to hear more from our witnesses sooner.

I ask unanimous consent that all other Members' opening statements be made part of the hearing record if they are submitted to the Committee Clerk by 5:00 p.m. today. Hearing no objections, that is ordered.

Also, I politely ask that everyone in the hearing room please silence your cell phones. This will allow minimum distraction for both Members and our guests.

I am now going to recognize myself for the first 5 minutes.

## **STATEMENT OF THE HON. ROB BISHOP, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH**

The CHAIRMAN. Like every day, Americans are required to comply with an ever-growing list of Federal regulations that restrict their freedom, harm job creation, and slow our economic growth. Every agency seems to be enjoying this continuous onslaught of regulatory activity at a fever pitch.

No agency has perhaps expanded the Federal regulatory burden more than the EPA. You can imagine our surprise when the Environmental Protection Agency was shirking its duty under the Endangered Species Act at the same time it was rapidly trying to finalize two of the most expensive and far-reaching regulations in the last 50 years.

Today we hope to discover that, if not through the front door at least through the back door, EPA and the Fish and Wildlife Service are not selectively enforcing a critical component of the ESA to speed up the very rules that threaten to slam the brakes on America's economy.

While well-intentioned, the Endangered Species Act has been a headache for Americans as it has moved far afield from its original intent 40 years ago. Instead of focusing on saving species, it has become a political tool for radical special interest groups to exact retribution on those they do not like, especially those seeking to make use of our natural resources.

Instead of having an open and transparent process with a partnership with the states, we have been left with a litigation-driven system that resolves controversies in closed-door settlement agreements. Recent proposals by this Administration serve only to highlight that the status quo is unacceptable and that improvements in the transparency and the collaboration between state and local governments are definitely long overdue.

While there is a growing consensus that ESA improvements should and can be made, it is still hypocritical for agencies like EPA to expect everyday Americans to follow the regulations while they are able to evade them. They are even trying to evade answering our questions. Amidst the EPA's confusing statements about their expertise on the ESA, they communicated to the committee last week that they did not have a witness that could speak on this topic on the agency's behalf.

In March 2014, then-Chairman Vitter of the Senate Environment and Public Works Committee wrote to Administrator McCarthy and Director Ashe asking if EPA would be required by law to consult with Fish and Wildlife Service with regard to EPA's rule on new source performance standards.

In response to the letter, Director Ashe responded, "To date, the EPA has not asked Fish and Wildlife Service to engage in section 7 consultation on the proposed new source performance standard rule." As of today, 16 months later, EPA still has not responded to that letter.

So, during March of this year, I asked Director Ashe if EPA had consulted them on the rule for existing power plants. Once again the answer was no. Ultimately, in a letter Director Ashe stated that the determination of whether EPA's actions may affect endangered species, and therefore require ESA consultation, could only be completed by the EPA, given their expertise with Clean Air Act issues.

While some of those who are trying to follow the law can wait for years for consultation, this agency seems to be simply picking and choosing which parts of the law they wish to ignore.

Courts have repeatedly emphasized that this law is intentionally a low threshold. Courts have stated, "Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the requirement." One court even went as far as to say that the mere presence of a listed species was enough to require consultation.

It should not be difficult to get a straight answer as to whether these two massive rules may affect listed species; but we will hold the Federal agencies accountable until we actually do get that.

I do want to know one thing. We received unsigned, unsolicited written remarks from the EPA very late last night, as well as a belated few documents in request to a letter sent by Chairman Inhofe and myself. If EPA thinks that this action is acceptable as

compliance, they are crazy. If Mr. Grijalva had acted this way with this committee, I would consider him to be arrogant, self-righteous, ineffective, unresponsive, and a jerk. And fortunately, Mr. Grijalva is not that because he takes his job seriously, he does things well, and he does not act with a cavalier attitude the way EPA does.

I thank the witnesses for attending this hearing, and I look forward to learning more about the process, if not through the front door, at least through the back door.

[The prepared statement of Mr. Bishop follows:]

PREPARED STATEMENT OF THE HON. ROB BISHOP, CHAIRMAN, COMMITTEE ON  
NATURAL RESOURCES

Every day, Americans are required to comply with an ever-growing list of Federal regulations which restrict their freedoms and hinder their efforts to create jobs and grow our economy. From nearly every agency, the Obama administration's regulatory onslaught continues at a fever pitch, killing jobs and condemning our Nation's economy to the anemic growth we are currently experiencing.

No agency has done more to add to the expanding Federal regulatory burden than the EPA. Imagine our surprise when it appeared that the EPA was shirking its duties under the Endangered Species Act at the same time it seeks to finalize two of the most expensive and far-reaching regulations in the last 50 years. Today, we hope to discover that the EPA and the Fish and Wildlife Service are not selectively enforcing a critical component of the ESA to speed up the very rules that threaten to slam the brakes on the American economy.

While well-intentioned, the ESA has caused more than its fair share of headaches for Americans, moving far afield of the original intent of 40 years ago. Instead of a law focused on saving species in danger of extinction, it has become a political tool for radical environmentalists to exact retribution on those seeking to make use of our natural resources.

Instead of an open, transparent, and science-based regulatory scheme that would make partners of states, we have been left with an opaque, litigation-driven system that resolves controversial policy questions through closed-door settlement agreements. Recent proposals by this Administration serve only to highlight that the status quo is unacceptable and that improvements in transparency, science, and State-Federal collaboration are long overdue.

But while there is growing consensus that ESA improvements can and should be made, it is hypocritical for agencies like the EPA to expect everyday Americans to follow its regulations while they are able to evade them. They even are trying to evade answering our questions. Amidst EPA's confusing statements about their expertise on ESA, they communicated to the committee last week that they didn't have a witness that could speak on this topic on the agency's behalf.

In March 2014, then-Chairman Vitter of the Senate Environment and Public Works Committee wrote to Administrator McCarthy and Director Ashe asking, among other things, if EPA was required by law to consult with the Fish and Wildlife Service with regard to EPA's rule on new source performance standards. In response to this and 16 other detailed questions, Director Ashe responded, and I quote: "To date, the EPA has not asked the [Fish and Wildlife Service] to engage in section 7 consultation on the proposed [new source performance standard] rule." As of today, more than 16 months later, the EPA has still not responded to the letter.

Then, during a hearing before this committee in March of this year, I asked Director Ashe if EPA had consulted on its rule for *existing* power plants. Director Ashe responded that EPA had not requested consultation on the rule. Ultimately, in a letter following that hearing, Ashe stated that the determination of whether EPA's action may affect endangered species, and therefore require ESA consultation, *could only be completed by the EPA*, given their expertise with Clean Air Act issues.

While some trying to follow the law can wait years to complete a consultation, Federal agencies are ignoring the basic question of whether sweeping EPA regulations "may affect" listed species or critical habitat.

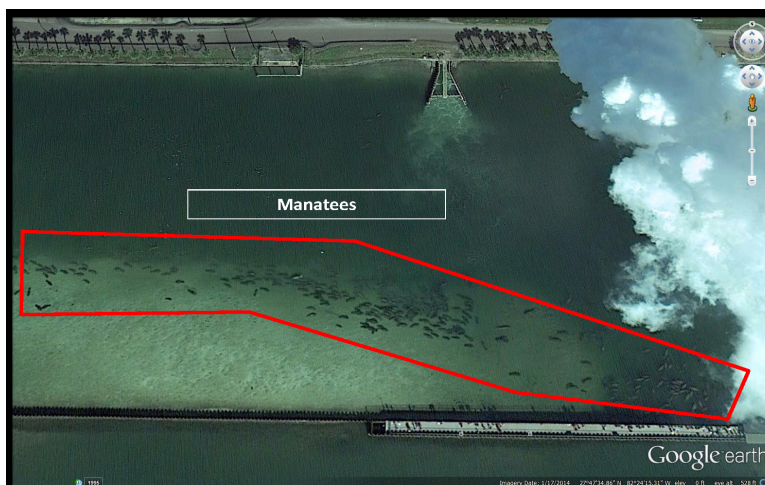
Courts and agencies have repeatedly emphasized that this is an intentionally low threshold. Courts have stated that "[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character" triggers the requirement, and one court even went as far as to say that the *mere presence of a listed species was enough to require consultation*.

It should not be this difficult to get straight answers as to whether these two massive rules “may affect” listed species. But, we will hold the Federal agencies accountable until we do.

I should note at this time that we received unsigned and unsolicited written remarks from EPA late last night on this issue as well as the belated first few documents supplied in response to the letter sent by Chairman Inhofe and myself. If EPA believes a few pages of unrequested testimony is a fair substitute for coming before this committee and answering questions in front of the American people, then it sorely misses the point of this institution. I will continue to press forward with our questions until EPA has answered them to my satisfaction.

I thank the witnesses for attending this hearing and I look forward to learning more about this process.

#### SLIDES PRESENTED BY CHAIRMAN BISHOP



[ADDITIONAL SLIDES SUBMITTED SHOWING PROJECTED GROWTH OF THE WIND INDUSTRY OVER THE NEXT 35 YEARS ARE BEING RETAINED IN THE COMMITTEE'S OFFICIAL FILES]



The CHAIRMAN. With hesitation, I now recognize the Ranking Minority Member for his opening statement.

**STATEMENT BY THE HON. RAÚL M. GRIJALVA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA**

Mr. GRIJALVA. Thank you very much, Mr. Chairman. As my momma always said, praise is praise, I guess——

[Laughter.]

Mr. GRIJALVA. And we take it where we can get it.

I was hoping today's hearing signaled to some extent the end of my Republican colleagues' campaign to drive American fish and wildlife to extinction one species at a time. I wish the Majority wanted to see the ESA fully funded, enforced, and implemented instead of seeing it weakened, or as one of my Republican colleagues has called for, repealed.

Unfortunately, this is not the case. Rather than turning over a new leaf, Committee Republicans are turning a new page in their extinction playbook.

Today we will hear the argument that the Environmental Protection Agency should have worked harder to assess the impact of its proposed power plant rule on Florida manatees. We are asked to believe that my Republican colleagues raise this concern because they care deeply about the manatees, not because they oppose the power plant pollution limits. The Majority's story line is unconvincing for several reasons.

First, the proposed rules do not require the closure of a single power plant, period. The states would decide how best to comply with the new Clean Air Act regulations. It would be up to power plant companies to decide if keeping an individual plant in operation makes any business sense.

The Endangered Species Act does not and should not require EPA to guess what the indirect effects of the industry's reaction to a new regulation might be. What if a power plant does close as a result of this rule and the building is redeveloped as a hip new condo complex? Should EPA assess the impact that a swarm of hipsters might have on the coffee scene in the area?

The Majority has no idea whether power plants will close as a result of this proposed rule. We are holding this hearing today because they think the EPA should have a better crystal ball than they do.

Second, the proposed rules are exactly that, proposed. Today the Obama administration announced that they would push back the deadline for states to submit their carbon-cutting strategies by a year under the Clean Power Plant Rule and give them an additional 2 more years, until 2022, to comply with the plan. So, assessing any potential impact to manatees today at this hearing seems more and more of a stretch.

Once the rule is out, if my colleagues or the public still have concerns about manatees, the ESA includes a process for seeking a review of the rule by the courts. On every day except today, the Republican agenda in this committee is to limit or wipe out public comment periods for Federal regulations and to weaken or prohibit judicial review of Federal regulations.

Many of my Republican colleagues, by their own account, support expedited, half-hearted review processes for rules that help industry make more money; but here they are today demanding that EPA must unreasonably review standards for a rule that might result in pollution limits.

I am sorry to say that I think this newfound Republican concern for the health and well-being of the Florida manatees is a sham. Next Monday, they will hold an oversight hearing in Homestead, Florida in order to attack the National Park Service management plan for Biscayne Bay National Park. At that hearing, Republicans will argue that the new plan is far too restrictive.

Guess what that managed plan is designed to do? In part, to protect the Florida manatees.

With that, I yield back.

[The prepared statement of Mr. Grijalva follows:]

PREPARED STATEMENT OF THE HON. RAÚL M. GRIJALVA, RANKING MEMBER,  
COMMITTEE ON NATURAL RESOURCES

Thank you, Mr. Chairman.

I wish today's hearing signaled the end of the Republican campaign to drive American fish and wildlife to extinction one species at a time.

I wish the Majority wanted to see the ESA fully funded, enforced and implemented, instead of seeing it weakened or, as one of my Republican colleagues has called for, repealed.

Unfortunately, that's not the case. Rather than turning over a new leaf, Committee Republicans are turning a new page in their extinction playbook.

Today we will hear the argument that the Environmental Protection Agency should have worked harder to assess the impacts of its proposed power plant rule on Florida manatees. We are asked to believe that my Republican colleagues raise this concern because they care deeply about manatees, NOT because they oppose power plant pollution limits.

The Majority's storyline is unconvincing for several reasons.

First, the proposed rules do not require the closure of a single power plant. Period. The states would decide how best to comply with new Clean Air Act regulations. It will be up to power companies to decide if keeping an individual plant in operation makes business sense.

The Endangered Species Act does not—and should not—require EPA to guess what the indirect effects of industry's reaction to a new regulation might be.

What if a power plant does close as a result of this rule and the building is redeveloped as a hip new condo complex? Should EPA assess the impact that a swarm of hipsters might have on the coffee scene?

The Majority has no idea whether power plants will close as a result of this proposed rule. We're holding this hearing today because they think EPA should have a better crystal ball than they do.

Second, the proposed rules are exactly that: proposed. Any final rules will take public comment into account, including what Members of Congress and others have to say about ESA consultation with respect to impacts on manatees.

Once the rule is out, if my colleagues or the public still have concerns about manatees, the ESA includes a process for seeking a review of the rule by the courts.

On every day except today, the Republican agenda in this committee is to limit or wipe out public comment periods for Federal regulations and to weaken or prohibit judicial review of Federal regulations.

Many of my Republican colleagues, by their own account, support expedited, half-hearted review processes for rules that help industry make more money. But here they are today demanding that the EPA meet unreasonable review standards for a rule that MIGHT result in pollution limits.

I'm sorry to say that I think this new-found Republican concern for the health and well-being of Florida manatees is a sham. Next Monday they'll hold an oversight hearing in Homestead, Florida, in order to attack the National Park Service management plan for Biscayne Bay National Park. At that hearing, Republicans will argue that the new plan is far too restrictive.

Guess what that management plan is designed, in part, to protect? Florida manatees.

I yield back.

The CHAIRMAN. Thank you.

We will now have the opportunity to introduce our witnesses. We have first Mr. Michael Bean, who is the Principal Deputy Assistant Secretary for Fish and Wildlife and Parks of the U.S. Department of the Interior. And our second witness today is Mr. Samuel Rauch, who is the Deputy Assistant Administrator for Regulatory Programs for the National Oceanic and Atmospheric Administration, or NOAA Fisheries.

I am assuming you have both been here before, so you know the drill. Your entire written statement is part of the record. Your oral statements are limited to 5 minutes. You have the clock in front of you. When the light goes red, I will cut you off.

So with that, we appreciate you being here. I recognize Mr. Bean for your testimony.

**STATEMENT OF MICHAEL BEAN, PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC**

Mr. BEAN. Thank you. Chairman Bishop, Ranking Member Grijalva, members of the committee, thank you for the opportunity to testify before you today concerning the interagency consultation process of the Endangered Species Act.

Section 7 of the Act requires Federal agencies to ensure that their actions that they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or adversely modify their critical habitats.

In carrying out this duty, Federal action agencies consult with the Fish and Wildlife Service or the National Marine Fisheries Service, or both, depending upon the species affected. The consultation process has been quite successful.

The vast majority of Federal actions that are scrutinized under section 7 go forward with, at most, only minor adjustments or modifications to avoid harmful impacts. As a result, highly imperiled species have a better shot at getting off the path to extinction and onto the road to recovery; and many species are on that road to recovery, as my written statement documents.

The section 7 consultation process is set forth in detail in Joint Regulations by the two Services, issued in 1986 during the Reagan administration. It can proceed through one, two, or three steps.

In the first step, the action agency—the agency proposing to undertake, authorize, or fund an action—must determine whether that action may affect any listed species or critical habitat. If it determines that its proposed action does not do so, it has no further consultation obligation. The concurrence of the Services is not required in order for an action agency to conclude that its action does not meet the “may affect” test.

Although action agencies are solely responsible for making the initial “may affect” finding, they may find useful the guidance embodied in a 2008 legal opinion by the Interior Department’s Solicitor during the Bush administration.

That guidance notes that in determining whether a proposed action may affect a listed species, the agency must take into account both direct and indirect effects. As the Solicitor noted, although direct effects are not defined, they are commonly understood to refer

to effects that are an immediate and natural consequence of the taking of the proposed action. Indirect effects, on the other hand, are defined rather narrowly in those regulations to refer to effects that are both caused by the proposed action and reasonably certain to occur.

Where future effects upon listed species or critical habitats depend upon subsequent intervening actions, such as actions by states, private interests, or both, distinguishing effects that are reasonably certain to occur from those that are more uncertain and speculative is often not easy. However, the judgment reflected in the Joint Regulations is that action agencies are the appropriate entities for making such determinations at the initial “may affect” stage.

If an agency determines that its proposed action may affect listed species or habitats, it proceeds to the second step, known as informal consultation. The purpose of that is to determine whether a proposed action is likely to adversely affect a listed species or critical habitat. The process ends at this step if the action agency determines that the proposed action is not likely to adversely affect a listed species or critical habitat, provided the Services concur in writing.

On average, the Fish and Wildlife Service engages in roughly 10,000 informal consultations annually. Through the process of informal consultation, it is often possible to identify acceptable modifications to proposed projects that avoid adverse effects upon endangered species.

If an action is likely to adversely affect listed species or critical habitats, the process moves to the third and final step, known as formal consultation. This ends with the issuance of a written biological opinion from the Service in which the Service expresses its view as to whether the action agency’s action complies with the requirements of section 7.

Like the informal consultation process, the formal consultation process often identifies project modifications that eliminate adverse effects or reduce them to acceptable levels. On average, the Fish and Wildlife Service engages in about 1,000 formal consultations annually; and during the period from 2008 through 2014, only a fraction of 1 percent of these resulted in what are known as “jeopardy opinions.”

The Service’s determinations and its biological opinions are intended to be the expert judgment of an agency that has the responsibility of developing and applying its biological expertise in the conservation of imperiled species. As such, they are quite consequential, and the action agencies typically rely upon them. However, they are not legally binding on action agencies. An action agency may disagree with the conclusions of a biological opinion.

Through this process, the Act has been largely successful in ensuring that Federal agencies do not contribute to the extinction of rare species. Thank you, sir.

[The prepared statement of Mr. Bean follows:]

PREPARED STATEMENT OF MICHAEL J. BEAN, PRINCIPAL DEPUTY ASSISTANT  
SECRETARY, FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR

INTRODUCTION

Chairman Bishop, Ranking Member Grijalva, and members of the committee, I am Michael J. Bean, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks at the Department of the Interior (Department). I appreciate the opportunity to testify before you today on section 7 of the Endangered Species Act of 1973 (ESA) and on the interagency consultation process it employs. As I will describe in greater detail below, the interagency consultation process has largely achieved the congressional purpose of ensuring that Federal agency actions do not imperil the survival and recovery of endangered species; and it has contributed to the Act's record of success in moving species off the road to extinction and onto the path to recovery.

America's fish, wildlife, and plant resources belong to all Americans, and ensuring the health of imperiled species is a shared responsibility for all of us. In implementing the ESA, the U.S. Fish and Wildlife Service (Service) endeavors to adhere rigorously to the congressional requirement that implementation of the law be based strictly on science. At the same time, the Service has been responsive to the need to develop flexible, innovative mechanisms to engage the cooperation of private landowners and others, both to preclude the need to list species where possible, and to speed the recovery of those species that are listed. The Service remains committed to conserving America's fish and wildlife by relying upon the best available science and working in partnership to achieve recovery.

Some aspects of that record are worth noting at the outset. Already in this Administration, more species have been taken off the endangered list due to recovery than in any prior administration. Though still endangered, many other species—among them the California condor, black-footed ferret, whooping crane, Florida manatee, Kirtland's warbler, Kemp's ridley sea turtle, and Florida panther—have had their populations increase to or near their highest levels in decades. Scores of other species, like the dunes sagebrush lizard, after having been identified as candidates for Federal protection, were ultimately determined not to need that protection as a result of conservation efforts spurred by the potential prospect of listing. Most importantly, nearly all of the plants and animals protected by the Endangered Species Act are still with us. They still have a fighting chance for survival, despite the many threats that beset them.

When Congress enacted the ESA, it envisioned creating, "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] a program for the conservation of such endangered species and threatened species," and placed the responsibility of conserving species that are in danger of extinction or likely to become so in the foreseeable future upon all Federal agencies by establishing a duty of Federal agencies to ensure that their actions are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its designated critical habitat.

Section 7 of the ESA—Interagency Cooperation—plays an integral role in accomplishing the goals of the ESA. The Service, one of the agencies responsible for implementing the ESA, assists Federal agencies comply with the requirements of the ESA by consulting on thousands of Federal actions each year. Through these consultations, unintended and avoidable harm to endangered and threatened species is avoided. And most of these consultations do not lead to substantial changes to project design or implementation. The vast majority of our ESA work consists of technical assistance that usually results in minimal modifications to a project in order to avoid project impacts to listed species or designated critical habitat. In addition, the majority of our informal and formal consultations are completed in a timely fashion.

The Department and the Service are committed to making the ESA work for the American people to accomplish its purpose of conserving threatened and endangered species and protecting the ecosystems upon which they depend. In addition to working diligently to complete consultations in a timely manner, under the statutory time frames, the Department, through the Service, has created a number of tools such as the use of conference opinions prior to listing to make consultation more efficient and has published regulatory changes that continue the Administration's broader agenda for improving implementation of the ESA.

PURPOSE OF CONSULTATION

Congress, with the passage of the ESA, placed the responsibility of conserving threatened and endangered species upon all Federal departments and agencies and required them to "utilize their authorities in furtherance of the purposes of this

Act.” Congress assigned a special responsibility to Federal agencies—to ensure that their actions neither jeopardize the continued existence of listed species nor destroy or adversely modify their critical habitat. Congress also entrusted the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the Services) to implement the ESA, and through section 7, the Services serve as technical advisors on threatened and endangered species, so Federal agencies can fulfill their responsibilities of conserving these species.

Consultation is the procedural mechanism by which “action agencies” engage the Services as necessary to ensure compliance with their responsibilities under the ESA. Specifically, section 7(a)(1) of the ESA charges Federal agencies to aid in the conservation of listed species, and section 7(a)(2) requires the agencies, through consultation with the Services, to ensure their activities are not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitats.

Section 7 of the ESA is entitled, “Interagency Cooperation,” and the Services are responsible for working with and assisting all Federal agencies in carrying out their duties under the ESA. However, the title of this hearing reflects a misapprehension of the consultation process, as neither the Fish and Wildlife Service nor the National Marine Fisheries Service “enforces” section 7. They advise and assist Federal agencies in carrying out their responsibilities under section 7, but it is ultimately the responsibility of the action agency to determine whether to consult and whether to adopt the Services’ recommendations.

#### THE CONSULTATION PROCESS—SEC. 7(A)(2)

The scope of Federal actions subject to the consultation process is broad—it applies to any discretionary action authorized, funded or carried out by a Federal agency. Because of this broad scope, the Service provides technical assistance to tens of thousands of projects each year. Between 2008 and 2014, the Service provided technical assistance on over 100,000 projects; conducted nearly 80,000 informal consultations; and conducted nearly 7,000 formal consultations.

Under regulations that were jointly promulgated by the Services and that have been in place since 1986, consultation begins with the determination, made by the action agency, as to whether a proposed Federal action may affect a listed species or its critical habitat. If the action agency determines that its proposed action will not affect a listed species or its critical habitat, it has no further consultation obligation. The concurrence or assent of the Services is not required in order for an action agency to conclude that its action does not meet the “may affect” test.

Although action agencies are solely responsible for making the threshold “may affect” determination, they may find useful the guidance on the consultation process embodied in a 2008 formal legal opinion by the Interior Department Solicitor. That guidance notes that in determining whether a proposed action may affect listed species or designated critical habitat, an action agency must consider both direct and indirect effects of the action. As the Solicitor noted, although “direct effects” are undefined in the regulations, they are commonly understood to refer to “effects that are the immediate and natural consequences of the taking of the proposed action.” Thus, for example, the immediate and natural consequence of closing the gates on a newly constructed dam would be to inundate the reservoir area behind the dam. Indirect effects, on the other hand, are defined in the joint regulations, and they are defined rather narrowly to refer to effects that are both “caused by the proposed action and . . . reasonably certain to occur.” Where future effects upon listed species or designated critical habitats depend upon subsequent intervening actions, such as actions by states, private interests, or both, the task of distinguishing those effects that are reasonably certain to occur from those that are more uncertain and speculative is often not easy. However, the judgment reflected in the joint regulations since 1986 is that action agencies are the appropriate entities for making such determinations at the threshold “may affect” stage.

#### *Technical Assistance and Informal Consultation*

In 2014, the Service provided technical assistance on more than 11,000 projects, completing those actions in a median of 8 days. Technical assistance includes actions such as providing species lists, providing information on potentially affected species, or recommending surveys or conservation measures to reduce adverse effects on species.

In 2014, the Service also engaged in over 9,500 informal consultations. Informal consultation is an optional process in which the Service assists action agencies or a designated non-Federal representative in determining if their projects are likely to adversely affect listed species or designated critical habitat. Oftentimes, the Service is able to help action agencies modify or adjust proposed actions to eliminate

any potential adverse effects upon listed species or critical habitat. In these cases, if the action agency subsequently determines that the proposed action is “not likely to adversely affect” listed species or critical habitat, and the Service concurs with that determination, the action agency has no further consultation obligation. The Service completed 79 percent of the 9,500 informal consultations in 2014 within 30 days. Those projects that fall outside of the 30-day range tend to be complex, involving more than one listed species.

#### *Formal Consultation*

If a proposed action is likely to adversely affect a listed species or designated critical habitat, “formal consultation” between the action agency and the Service is required. The ESA requires that consultation be completed within 90 days, and the regulations allow an additional 45 days for the Service to prepare a biological opinion. The biological opinion provides the Service’s analysis and findings of whether or not the proposed action is likely to jeopardize the continued existence of the species or destroy or adversely modify designated critical habitat. If a jeopardy or adverse modification determination is made, the Service works with the action agency to identify any reasonable and prudent alternatives that would avoid the likelihood of jeopardy or adverse modification and could allow the project to move forward. Between 2008 and 2014, the Service engaged in 6,982 formal consultations. In those years, only three of those consultations resulted in a jeopardy or adverse modification final opinion.

If a proposed action is reasonably certain to cause incidental take of a listed animal and the Service concludes that the proposed action (or the implementation of any reasonable and prudent alternatives) is not likely to jeopardize listed species or adversely modify or destroy critical habitat, the Service will issue along with the biological opinion an incidental take statement that exempts the anticipated take from the ESA’s take prohibitions, as long as reasonable and prudent measures and associated terms and conditions to minimize the take are followed. In other words the project can comply with the ESA, even though it will likely take listed species, as long as there is no jeopardy caused and as long as reasonable measures are taken to minimize the take. Service staff, working through the consultation process, play a key role working with the project proponents to find reasonable ways to minimize take.

A recent example of the Service conducting a challenging formal consultation was in Russell County, Kentucky. The Service completed a biological opinion on the effects of restoring water levels in Lake Cumberland on the duskytail darter, which allowed the U.S. Army Corps Engineers (Corps) to be positioned to capture the spring rains necessary to refill the lake to its normal recreation season elevation after making repairs to Wolf Creek Dam. In this case, the Corps and the Service worked together closely to implement an expedited review and analysis process to complete the consultation in only 45 days—an extraordinary pace—because of the recognized importance of Lake Cumberland to the local and regional economies of Kentucky and Tennessee and citizens who live and work in communities around the lake.

#### *Programmatic Consultations*

Programmatic consultation is a generic term referring to consultations on Federal programs, plans, or regulations that establish guidelines, provide direction, or impose procedures that control subsequent actions that may affect listed species or designated critical habitat. Determining whether consultation is required for such programmatic actions usually involves consideration of the potential for indirect effects, i.e., effects that, under joint regulations, are caused by the programmatic action, occur later in time, and are reasonably certain to occur. Given the large variety of programmatic actions carried out by Federal agencies, some of which are highly complex in nature, assessing causation and reasonable certainty of effects to listed species or designated critical habitats can be challenging and complex. While the Service can assist Federal agencies in that assessment, and often does so with agencies that lack experience and expertise in section 7 consultation, we ultimately depend upon the action agencies to establish the effects of their programs, plans, or rules and determine whether their actions trigger the need for section 7 consultation.

An example of a recent programmatic consultation involving a rulemaking was our consultation with the Environmental Protection Agency (EPA) on the promulgation of new regulations governing permitting of cooling water intake structures pursuant to Section 316(b) of the Clean Water Act. EPA determined that consultation was warranted, and we worked with them through the formal consultation process to create procedures for EPA, state permitting authorities, and the facilities to

follow that would ensure that no permits would issue that were likely to jeopardize listed species or destroy or adversely modify designated critical habitat. This process allowed EPA to move forward with their new regulation while ensuring their action was in conformance with the ESA.

#### SECTION 7(A)(1)

Section 7(a)(1) of the ESA requires all Federal agencies to utilize their authorities, in consultation with the Fish and Wildlife Service and the National Marine Fisheries Service to develop and carry out programs to conserve all species listed under the ESA. The purpose of section 7(a)(1) conservation programs is to improve endangered and threatened species baselines (population and habitat) within the scope of Federal action-agency authorities, thereby contributing to the conservation of all species within that habitat.

Conservation plans developed by Federal agencies to meet the goals of section 7(a)(1) are another example of the flexibility we are using within the ESA to achieve positive conservation results. They are good for our mission, good for conservation, and good for our economy. The plans provide greater predictability and efficiency to Federal agency partners and put in place a transparent and continuous process of effective interagency communication, review, and feedback at all levels of management. This ensures a strong adaptive management component of cost-effective conservation program execution that helps streamline the 7(a)(2) consultation process.

The Corps and the Service are committed to improving the efficiency of civil works project operations and the effectiveness of ESA compliance through the integration of conservation planning in development of Operation Plans for Corps projects, using existing Operation and Maintenance authorities. In 2013, the Corps' Mississippi Valley Division released the Conservation Plan for the Interior Least Tern, Pallid Sturgeon, and Fat Pocketbook Mussel in the Lower Mississippi River. The plan outlines a process to conserve the three endangered species within the footprint of the Channel Improvement Program in the Lower Mississippi River. The Service conducted a consultation under section 7(a)(2) of the ESA with the Corps on the their conservation plan.

The consultation process required close inter-agency communication and collaboration during all phases of development. Over the course of the consultation, it became apparent the very programs that most significantly affected the endangered species and their river habitats could be important and effective tools to maintain and enhance its ecological functions. This resulted in the identification of conservation opportunities that could be effectively incorporated into existing channel improvement or maintenance projects, with little to no additional program costs, and with no negative impact to the Corps' primary flood management and navigation safety missions. It also resulted in significantly improved habitat and population baselines for all three endangered species within the Lower Mississippi River portion of their ranges. Largely as a result of this work, the Service recommended in a 5-year status review last year that the Interior Least Tern should be delisted. This consultation demonstrates that numerous benefits for species, their ecosystems, and agencies can be derived under section 7(a)(1). It also demonstrates the key role played by Service staff working with the action agencies. Species and projects always benefit when technically competent, innovative, and engaged Service staff are involved.

#### IMPROVING CONSULTATIONS

As part of our ongoing efforts to improve implementation of the ESA, the Services recently finalized the regulations governing Incidental Take Statements for listed species. The final rule clarified and codified the current policy of the Services regarding the use of "surrogates," and addressed recent court decisions related to Incidental Take Statements for "programmatic" Federal actions. These changes will improve the ESA's effectiveness and allow for flexibility in how the Services prepare Incidental Take Statements.

The Services also jointly announced on May 18, 2015 a set of initiatives to increase regulatory predictability, increase stakeholder engagement, and improve science and transparency. Among the actions are proposed revisions to interagency consultation procedures to streamline the process for projects, such as habitat restoration activities, that result in a net conservation benefit for the species.



## CONFERENCING FOR CANDIDATE SPECIES

The Service and the Natural Resources Conservation Service (NRCS) began a partnership, later named as “Working Lands for Wildlife” (WLFW), in 2009 to confer on the greater sage-grouse and Gunnison sage-grouse. Work began on the conference report for the lesser prairie chicken the next year and an additional five species—New England cottontail, bog turtle northern population, golden-winged warbler, gopher tortoise, and southwest willow flycatcher—were added to the partnership in 2011. WLFW provides landowners with technical and financial assistance to achieve specific conservation goals for at risk species.

The Service and NRCS used a unique process for working together to expedite the section 7 work. For each of the species covered, based upon information from species experts, NRCS and Service staff worked together to “condition” the NRCS practices used by landowners to both conserve the species and increase productivity of the land. A biological opinion or conference report (similar to a biological opinion, but for proposed species and critical habitat) was then developed depending on the status of species.

Agreements between landowners and NRCS are now being implemented that include plans for conservation practices covered under the ESA. To further bolster WLFW, the two agencies developed the term “regulatory predictability” that clarified for participating landowners that they would be provided coverage for incidental take under the ESA as long as they implemented the “conditioned” practices.

## ESA CONSULTATION BUDGET

The consultation process works to conserve species and allow action agencies to avoid jeopardizing the existence of a listed species and help achieve the imperative goals of the ESA. This highly beneficial, important process depends on having skilled people with training, technical expertise, institutional knowledge, and strong communication ability stationed and working in field offices across the country.

During Fiscal Year (FY) 2014, the Service concluded 9,249 informal consultations and another 323 informal consultations were ongoing at the end of the fiscal year. Through April 15, 2015, the Service had concluded 158 formal consultations to date, with another 195 formal consultations ongoing.

To address the substantial workload, the President’s fiscal year 2016 budget requested an increase of \$10.4 million for consultation and planning activities. The Service needs to have adequate staffing to address the increased environmental reviews and permitting workload associated with projects related to economic recovery, job creation and infrastructure improvements. The Service needs these additional resources and staffing so that we can facilitate environmentally sound development activities through timely consultations and environmental reviews.

## CONCLUSION

Thank you for your interest in endangered species conservation and ESA implementation, and for the opportunity to testify.

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QUESTIONS SUBMITTED FOR THE RECORD TO MR. MICHAEL BEAN, PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, U.S. DEPARTMENT OF THE INTERIOR

**Questions Submitted by Chairman Rob Bishop**

*Question 1.* The EPA did a regulatory impact analysis (RIA) of its proposed rule for existing plants, and found that about 12 percent to 19 percent of all coal-fired capacity projected to be in service in the base case would shut down by 2020 under the range of scenarios analyzed. The RIA goes on to say: “EPA examined whether these projected incremental retirements may adversely impact reserve margins and reliability planning.” If EPA could look at coal-fired power plant retirements and determine whether those retirements may adversely affect reliability, why couldn’t it also determine whether those retirements would affect listed species?

Answer. Federal action agencies are ultimately responsible for determining if their projects may affect threatened or endangered species. In this case, we understand that EPA determined that their rules would have no effect on threatened or endangered species. As mentioned in our April 29, 2015 letter, EPA is the expert agency on the Clean Air Act and is best positioned to understand if its rules may affect listed species or designated habitat.

Though action agencies are responsible for determining whether a proposed action may affect listed species or designated critical habitat, in 2008, the Department of the Interior Solicitor provided agencies with useful guidance on the consultation process through a formal legal opinion. That guidance notes that in making the threshold “may affect” determination, an action agency must consider both direct and indirect effects of the action. As the Solicitor noted, although “direct effects” are undefined in the regulations, they are commonly understood to refer to “effects that are the immediate and natural consequences of the taking of the proposed action.” Indirect effects, on the other hand, are defined in FWS’s and NOAA’s joint regulations in 50 CFR 402.02 rather narrowly as effects that are both “caused by the proposed action and . . . reasonably certain to occur.” Where future effects upon listed species or designated critical habitats depend upon subsequent intervening actions, such as actions by states, private interests, or both, the task of distinguishing those effects that are reasonably certain to occur from those that are more uncertain and speculative is often not easy. The judgment reflected in the joint regulations since 1986 is that action agencies are the appropriate entities for making such determinations at the threshold “may affect” stage.

*Question 2.* The Energy Information Administration (EIA) recently released its analysis of the impacts of EPA’s rule for existing power plants. The analysis uses the EIA’s Annual Energy Outlook for 2015 as the baseline, and then compares that baseline to a number of other scenarios, including implementation of the EPA rule.

One of the EIA’s primary conclusions is that the EPA rule will have a “significant effect on projected retirements and additions of electric generation capacity.” Specifically, the EIA found that projected coal plant retirements will more than double if the EPA rule is promulgated.

EPA itself has conducted modeling that shows, down to the generating unit, which power plants are likely to shut down. So if, as EIA and EPA predict, power plants do shut down—could that “affect” listed species like the manatee? (The EPA’s modeling indicates units at Big Bend Power Station will be retired as a result of the rule; the plant’s owner concurs with the EPA’s modeling).

Unsurprisingly for a rule that specifically targets fossil fuel-fired power plants, the EPA’s modeling shows a decline in coal capacity and power sector coal use in every model EPA has released to the public thus far. So according to the EPA’s available modeling, there is no possible situation where coal-fired generation does not decline. Should EPA consult with FWS on the proposed rule for existing plants, since EPA expects plants whose operations affect manatees will shut down if the rule is implemented?

Answer. Federal agencies are ultimately responsible for determining if their proposed actions may affect listed species or designated critical habitat. If they determine that their proposed action will have no effect on listed species or designated critical habitat, no consultation with the U.S. Fish and Wildlife Service (Service) is required. If an agency determines that an action it is proposing may affect listed species or designated critical habitat, it must either formally consult with the Service and/or NOAA Fisheries, or obtain written concurrence that the proposed action is not likely to adversely affect any listed species or critical habitat (i.e., the effects are completely beneficial, insignificant, or discountable).

*Question 3.* One of this committee’s goals is to create conditions in which our forests are more resilient. To that end the House passed the Resilient Federal Forests Act of 2015. Through this Act, the agencies will be able to streamline their planning processes and accomplish meaningful thinning. They will be able to finish their planning work in one-third to one-half of the time it used to take to conduct the NEPA analysis. However, we are still concerned about delays which could be caused by ESA survey protocols.

For much of the intermountain West, surveys for spotted owls and other birds of prey are required. Often 2 consecutive years of surveys are required to make sure that the agency didn’t miss the presence of the species. However, waiting another full year for a biologist to call for birds just to be sure, rather than initiating the thinning project, seems to make little sense when treatment is needed to prevent the impacts of catastrophic wildfire in high fire risk forested areas. It is important to note that if these forests burn, so do the nests and the habitat.

In addition, if the Fish and Wildlife Service’s protocols require 2 years of surveys in burned areas, none of the dead trees will be harvested. This is because the wood is only of value until it begins to rot (generally less than a year after the fire). If the agency cannot sell any dead trees, they will not have funding to reforest the burned area, since most of the reforestation funding comes from the sale of the dead trees. The result will be National Brush fields ripe for a new fire instead of new forests.

Given these scenarios, do you think it makes sense to insist on 2 consecutive years of surveys, irrespective of the potential consequences to the habitat and the forest?

Answer. The recovery plan for the northern spotted owl calls for retaining existing spotted owls on the landscape to the greatest possible extent, including in some of the drier portions of the range such as eastern Washington. Low, moderate and even in some cases high-severity fires do maintain habitat conditions conducive for NSO. With that said, the Service and the recovery plan encourage fuels management and thinning projects that reduce ladder fuels (those small trees and shrubs that can carry a ground fire into the canopy resulting in stand-replacing events) but that retain the stand canopies, which are very important to spotted owls. The Service also promotes siting fuel reduction zones in areas where other breaks already occur, such as roads, landings and meadows. This increases the effectiveness of the fuel breaks while reducing the impact to the forest. What would be most beneficial is if fuel reduction zones were placed in non-habitat that is often more dense than spotted owl habitat and at a higher fire risk. This would increase effectiveness while reducing potential impacts to spotted owl conservation.

It is extremely difficult to successfully implement fuel reduction zones strategically such that fire behavior is affected in the short-term (e.g., within 1 year). Longer-term fuels management planning often involves a series of fuels treatments and thus can often incorporate 2-year owl surveys as well as other longer-term land management priorities. Though we do not require surveys before land management activities begin, surveys are important to identify sites that are occupied by spotted owls and minimize impacts; however, forest management activities that do not modify spotted owl habitat but may result in short term disturbance to spotted owls can be assessed using a 1-year survey protocol (p. 17, Protocol for Surveying Proposed Management Activities that may Impact Northern Spotted Owls, USFWS 2012). In many cases seasonal restrictions can be applied to address the potential for disturbance during the nesting season and can be lifted if surveys show that NSO are not nesting. Salvage and thinning operations occurring in areas that may not be spotted owl habitat can also be assessed using this approach or may not even require surveys.

*Question 4.* There are other instances where FWS, as well as the consultation process itself, slows the initiation of fire recovery projects that are critical to preventing additional fires in high fire risk forested areas. In these cases, the Forest Service proposes to remove dead trees and perform other recovery efforts after a large-scale fire, which may impact a small amount of spotted owl and other ESA-listed species habitat in order to protect a much larger habitat area from catastrophic fire. However, FWS often won't agree to this approach and is unwilling to sign off on a project unless it impacts very little or NO habitat whatsoever.

Why is FWS unwilling to sign off on fire recovery projects in high-fire prone forests that affect a small amount of habitat if it means protecting a much larger habitat area from catastrophic fire?

Answer. The Service supports using the best science to implement fuels management projects to restore more natural and less catastrophic fire regimes, and this position is described in detail in the spotted owl recovery plan. We also seek to prioritize expediting the completion of emergency fuels management projects over other, non-emergency consultation work. We work closely and collaboratively with the U.S. Forest Service (USFS) and the Bureau of Land Management in evaluating post-fire forest treatments where listed species occur. We follow the requirements of the Endangered Species Act section 7 consultation process, helping our Federal partners design and implement projects that meet economic and resource management goals while also conserving listed species. For example, in 2014 we quickly consulted on multiple post-fire salvage projects that permitted harvest to proceed consistent with the ESA and the recommendations of the spotted owl recovery plan. We completed these consultations under established streamlined consultation procedures, taking 30 days for informal consultations and 60 days for formal consultations. Further, if projects are for human safety, we continue to remind the action agencies to use emergency provisions at 50 C.F.R. § 402.05 that allow for expedited informal consultation, with formal consultation initiated after the emergency is under control.

In our experience most post-fire salvage projects tend to be more opportunistic than part of a larger-scale strategic planning effort to reduce fire spread and severity. Such a larger-scale effort could include landscape level considerations for both fuel reduction and strategic fire breaks while incorporating considerations for spotted owls and other land management priorities. Recovery Action 12 in the spotted owl recovery plan recommends retaining post-disturbance legacy structures (such as

large, dead trees, whether standing or down) in areas that are managed for spotted owl habitat because these features greatly improve the quality of the habitat as it recovers over time. The Service encourages working with our Federal land management partners prior to large-scale disturbances in designing landscape scale strategies that meet the needs of listed species while reducing fire risk and severity, thereby reducing post-fire conflicts. It is important for action agencies to seek ways to implement important fuel reduction work without overutilizing salvage logging that can severely affect the survival and recovery of natural resources.

*Question 5.* The Fish and Wildlife Service (Service) has correctly recognized that the data collection methods it utilized to collect whooping crane population information and mortality rates at the Aransas National Wildlife Refuge during the winter of 2008 and 2009 were deficient. To address data collection issues it has now instituted the Whooping Crane Winter Abundance Survey Protocol. What is the Service's official position on whooping crane mortality at the Aransas National Wildlife Refuge during the winter of 2008 and 2009? What is the most current estimate on the whooping crane population at the Aransas National Wildlife Refuge?

Answer. In a 2008–2009 publication, the Service's Southwest Region reported what we believed to have been a loss of 23 whooping cranes, using the best information available at that time. Following the retirement of the Service's Whooping Crane Coordinator in 2011, a team of specialists was formed to evaluate our process for estimating the whooping crane population. After an extensive review, the team updated the methodology used for estimating whooping crane abundance. Use of this scientifically sound methodology has improved our knowledge and understanding of this whooping crane population and will aid in conservation planning, future policy decisions and the long-term conservation of this species for the American public. However the Service is unable to confirm the loss of whooping cranes previously reported in 2008–2009, because the data could not be verified using the previous methodology. Therefore the number of whooping cranes that died at the Aransas National Wildlife Refuge during the winter of 2008–2009 remains unknown.

The Aransas-Wood Buffalo population of whooping cranes in the winter of 2014–2015 was estimated at 308 individuals.

Please see the following peer reviewed publications for further details:  
<http://ecos.fws.gov/ServCatFiles/reference/holding/28257>  
<http://www.sciencedirect.com/science/article/pii/S0006320714003115>

### Questions Submitted by Rep. Bruce Westerman

*Question 1.* The northern long-eared bat was recently listed as a threatened species. Although the Service acknowledges that the species decline is the predominant, over-riding factor leading to the species decline, they've issued a 4(d) rule and, in some cases from some field offices, consultation guidance that would apparently require extensive surveys and avoidance of timber harvest during critical times of the year. The Forest Service manages extensive timber lands within the range of the bat. In general, the agency believes that existing forest plan standards and guidelines should adequately provide for conservation of the species and will prevent jeopardizing its existence. Can you confirm that the listing will not require individual National Forest Units to perform project by project consultation in the range of the NLEB?

Answer. A rule under section 4(d) of the Endangered Species Act (ESA) does not remove, or alter in any way, the consultation requirements for Federal agencies under section 7 of the ESA. The U.S. Fish and Wildlife Service (Service) has been working with the U.S. Forest Service (USFS) nationwide to streamline consultations on the northern long-eared bat. For example, Region 4 (Southeast) of the Service completed a formal programmatic section 7 consultation for USFS Land and Resource Management Plans with Region 8 (Southern) of the USFS. In addition, Regions 3 and 5 (Midwest and Northeast) of the Service anticipate completing a similar programmatic consultation with Region 9 (Eastern) of the USFS by mid-October. These programmatic consultations will address the majority of projects within the range of the northern long-eared bat on USFS lands, and will substantially streamline subsequent project coordination and consultation. In the few instances where USFS activities are not covered under a programmatic consultation, the standard regulatory requirement for project-specific consultation would be applicable.

### Questions Submitted by Rep. Madeleine Bordallo

*Question 1.* Like my Democratic colleagues, I am also concerned about the funding cuts to the FWS listing program proposed by this year's appropriations bill. I feel these cuts will further exacerbate some of the problems we're discussing today.

However, I want to bring up my concerns over how Fish & Wildlife Service and other cooperating agencies prioritize resourcing ESA consultations. For example, this Administration has made a strategic decision to prioritize the rebalance to the Asia-Pacific region.

Part of that strategic initiative is the realignment of military forces in the region. That has led to numerous environmental impact efforts in the Marianas region. However, these EIS efforts have run into challenges from Fish & Wildlife Service who indicate publicly that they do not have enough resources to get the job done. This has negative implications for an Administration priority.

So, while I understand that Republicans continue to needlessly cut resources, what is the Fish & Wildlife Service doing to prioritize strategic objectives? Are there any legal impediments and do you need any authorities? Where is the flexibility in your agency to be able to prioritize proposed actions that are critical to larger national priorities?

Answer. The Service defers to the Department of Defense to prioritize the Service's consultation work on strategic military objectives and addresses these priorities to the maximum extent practicable within our staffing abilities. We continue to work with the Department of Defense to explore how to leverage resources to meet our shared goals; the Department of Defense has arranged for at least one biologist to detail with the Service's Pacific Island Office to assist with workload.

*Question 2.* As you are aware, legislation passed in last year's Congress that authorized Fish and Wildlife and the Navy to enter into a Memorandum of Agreement regarding placement of a safety danger zone over the Ritidian Wildlife Refuge on Guam. This effort was to ensure that the military buildup could continue to move forward and to address the concerns of my constituents who didn't want DoD to take additional land.

However, I am concerned about the potential mitigations that may be a part of a future biological opinion for the Record of Decision on the Marine realignment. Any mitigation plan would be tied to protection of species under the endangered species act on Guam.

I remain concerned that these mitigations would be put in place without a clear plan for meeting the Refuge's mission. Could you please give a quick update about your plan to rehabilitate and reintroduce the species, and progress on that plan? Have any species been reintroduced on Guam?

Answer. The Service continues to work with the Navy, Air Force, Guam Division of Aquatic and Wildlife Resources, and other partners to plan for the eventual reintroduction of Guam rail, Guam Micronesian kingfisher, and the Mariana crow on Guam. Our current focus includes advancing research on control of brown tree snake and identifying and restoring adequate habitat to provide for the conservation of the birds, in anticipation of eventual reintroduction efforts. The recent bait drop study on Anderson Air Force Base provided very encouraging results that may lead to effective large-scale control of brown tree snake. In addition, the Navy, through Joint Region Marianas, recently committed to preserving over 5,200 acres of potential kingfisher habitat in a durable conservation status for the benefit of kingfisher and other extirpated species. The Refuge also continues to be a key part of any future reintroduction efforts. The Service and Navy are continuing negotiations to implement the transition of operational responsibility for Guam NWR consistent with the National Defense Authorization Act of FY15.

*Question 3.* The Final EIS for the Marianas talks about conservation of habitat. Recently, important Chamorro archaeological sites have been found at the Ritidian refuge.

Can I have your agency's assurance that you will work to provide better access to these sites for the public?

Answer. The recently discovered historic Chamorro archaeological site is located on the Ritidian Unit of the Guam National Wildlife Refuge and within the designated Surface Danger Zone for the Marine Corps Live Fire Training Range. Accordingly, access to this site will be controlled by the Navy consistent with public safety concerns and the direction provided by Congress in the National Defense Authorization Act for Fiscal Year 2015.

*Question 4.* There are longstanding issues regarding landlocked landowners whose properties border the Ritidian refuge. Can we get your commitment that you will work with us on these issues?

Answer. The U.S. Government will continue to work with neighboring landowners on access issues.

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The CHAIRMAN. Thank you very much.  
Mr. Rauch.

**STATEMENT OF SAM RAUCH III, DEPUTY ASSISTANT ADMINISTRATOR FOR REGULATORY PROGRAMS, NATIONAL MARINE FISHERIES SERVICE, NOAA, WASHINGTON, DC**

Mr. RAUCH. Good morning, Mr. Chairman, Ranking Member, and members of the committee. My name is Sam Rauch, and I am the Deputy Assistant Administrator for Regulatory Programs at NOAA's National Marine Fisheries Service. It is a pleasure to testify before you today.

With global extinctions occurring at an unprecedented rate, the Endangered Species Act was enacted to conserve threatened and endangered species and their ecosystems. The U.S. Fish and Wildlife Service and the National Marine Fisheries Service jointly share responsibility for implementing the Endangered Species Act. Currently there are 2,220 species listed under the Act. Most of them are managed by the Fish and Wildlife Service; the National Marine Fisheries Service is responsible for the marine species, only about 125 species.

Broadly speaking, we do exactly the same things that the Fish and Wildlife Service does. We conserve and recover marine resources by listing species under the ESA, by designating critical habitat, developing and implementing recovery plans, developing and implementing protective regulations, and enforcing violations of the Endangered Species Act.

I am not going to reiterate the details of how section 7 works; I would refer you back to the testimony that Mr. Bean just gave. I will say, however, that from the National Marine Fisheries Service's perspective, changes in the marine ecosystem due to climate change and other stressors are resulting in a greater number of ESA section 7 consultations on Federal actions.

In addition, growing coastal community populations and growing coastal development are also increasing the need for section 7 consultations. This has resulted, for the National Marine Fisheries Service, in an increase of about 131 percent in the number of consultations in the last 3 years.

To put that in a little perspective, over the course of the last 5 to 10 years we have engaged, total, in about 7,000 formal and informal consultations. Of those 7,000, more than 5,000 of them have been informal. In only 41 of them have we found jeopardy or adverse modification. The vast majority of them allow those projects to come in, they consult with us, and they leave without any significant changes to the project at all. In 41 of them we have engaged with the proposing agency and made modifications to preserve the endangered species.

The result of all this action is that the ESA has been very successful at preventing extinction. Over the last 40 years of existence, less than 1 percent of the species have gone extinct, and 30 species have been recovered.

For instance, ESA recovery actions have stabilized or improved the downward population trend of many marine species, such as the Eastern population of Steller sea lion and the Pacific gray whales, both of which were delisted by NOAA; and the humpback whale populations are currently growing by 3 to 7 percent annually, so much so that NOAA is considering revising their listing status as well.

We are also seeing record returns from some of our salmon populations, particularly the adult Chinook populations in the Columbia River passing Bonneville Dam. Many of our salmon populations, like many other activities, are affected by the drought; but we are seeing very good returns of the adults.

Recovery of threatened and endangered species is a complex and challenging process, but one which also offers long-term benefits to the health of our environment and our communities. Partnerships with a variety of stakeholders are critical to implementing recovery actions and achieving species recovery goals.

For example, from 2000 to 2013, the Pacific Coastal Salmon Recovery Fund has provided over a billion dollars in funding to support partnerships and recovery of listed salmonids and steelheads. With this funding, the states and tribes have leveraged additional resources to collectively implement tens of thousands of projects to conserve West Coast salmon populations.

While there are some success stories, we do face continuing challenges in recovering numerous other species. Declines in coastal habitat from wetlands to coral reefs are often a significant hurdle to recovery. As stresses on coastal ecosystems increase, it is important to place a priority on habitat protection and restoration in order to prevent any need for listings and to facilitate recovery for species already listed.

Thank you again for the opportunity to discuss section 7 of the Endangered Species Act. I am available to answer any questions. [The prepared statement of Mr. Rauch follows:]

PREPARED STATEMENT OF SAMUEL D. RAUCH III, DEPUTY ASSISTANT ADMINISTRATOR FOR REGULATORY PROGRAMS FOR THE NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

#### INTRODUCTION

Good morning, Mr. Chairman and members of the committee. Thank you for the opportunity to testify before you today. My name is Samuel D. Rauch III and I am the Deputy Assistant Administrator for Regulatory Programs for the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) in the Department of Commerce. NMFS is dedicated to the stewardship of living marine resources through science-based conservation and management.

With global extinctions occurring at an unprecedented rate, the Endangered Species Act (ESA) was enacted to conserve threatened and endangered species and their ecosystems. Congress passed the ESA on December 28, 1973, recognizing that the natural heritage of the United States was of "esthetic, ecological, educational, recreational, and scientific value to our Nation and its people." It was understood that, without protection, many of our Nation's living resources would become

extinct. Currently, there are 2,220 species listed under the ESA, 1,575 of which are in the United States and its waters.

A species is considered endangered if it is in danger of extinction throughout all or a significant portion of its range. A species is considered threatened if it is likely to become endangered in the foreseeable future. The U.S. Fish and Wildlife Service (USFWS) within the Department of the Interior and NMFS share responsibility for implementing the ESA. NMFS is responsible for 125 marine species listed under the ESA, from whales and sea turtles to salmon and corals.

#### NMFS IMPLEMENTATION OF THE ESA

NMFS conserves and recovers marine resources by doing the following: listing species under the ESA and designating critical habitat (section 4); developing and implementing recovery plans for listed species that will benefit from such plans (section 4); developing and implementing protective regulations, where necessary and advisable, for threatened species (section 4); developing cooperative agreements with and providing grants to states for species conservation (section 6); consulting on any Federal agency actions where the agency determines that the action may affect a listed species and/or its designated critical habitat and to minimize the impacts of incidental take (section 7); working with U.S. agencies and foreign governments to ensure that international trade does not threaten listed species (section 8); enforcing against violations of the ESA (sections 9 and 11); cooperating with non-Federal partners to develop conservation plans for the long-term conservation of species (section 10); and authorizing research to learn more about protected species (section 10).

#### HOW SPECIES ARE LISTED OR DELISTED

Any individual or organization may petition NMFS or USFWS to “list” a species under the ESA. If a petition is received, NMFS or USFWS must determine to the maximum extent practicable within 90 days if the petition presents enough information indicating that the listing of the species may be warranted. If the agency finds that the listing of the species may be warranted, it will begin a status review of the species. The agency must, within 1 year of receiving the petition, decide whether to propose the species for listing under the ESA. NMFS may, on its own accord, also initiate a status review to determine whether to list a species. In that instance, the statutory time frames described above do not apply. The same process applies for delisting species.

NMFS or the USFWS, for their respective species, determine if a species should be listed as endangered or threatened because of any of the following five factors: (1) present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) other natural or man-made factors affecting its continued existence. The ESA requires that listing and delisting decisions be based solely on the best scientific and commercial data available. The ESA prohibits the consideration of economic impacts in making species listing decisions. The ESA also requires designation of critical habitat necessary for the conservation of the species; this decision does consider economic impacts.

The listing of a species as endangered makes it illegal to “take” (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to do these things) that species. Similar prohibitions may be extended to threatened species. Federal agencies may be allowed limited take of species through interagency consultations with NMFS or USFWS (the Services). Non-Federal individuals, agencies, or organizations may be authorized for limited take for scientific research enhancement of survival, or through special permits with conservation plans. Effects to the listed species must be minimized and in some cases conservation efforts are required to offset the take. NMFS’ Office of Law Enforcement works with the U.S. Coast Guard and other partners to enforce the ESA and prosecute for violations.

#### INTERAGENCY CONSULTATION AND COOPERATION UNDER SECTION 7 OF THE ESA

All Federal agencies are directed, under section 7 of the ESA to utilize their authorities to carry out programs for the conservation of threatened and endangered species. Federal agencies must also consult with the Services on activities that may affect a listed species and/or its designated critical habitat. These interagency consultations are designed to assist Federal agencies in fulfilling their duty to ensure Federal actions do not jeopardize the continued existence of listed species



and/or adversely modify their designated critical habitat. Biological opinions document the Services' opinion as to whether the Federal action is likely to jeopardize the continued existence of listed species and/or adversely modify their designated critical habitat. Where appropriate, biological opinions provide an exemption for the "take" of listed species while specifying the amount or extent of "take" allowed, identifying the reasonable and prudent measures necessary to minimize impacts from the Federal action, and defining the terms and conditions under which such take is exempted from ESA prohibitions. Should an action be determined to be likely to jeopardize a species or adversely modify critical habitat, NMFS will suggest reasonable and prudent alternatives, which are alternative methods of project implementation that would avoid the likelihood of jeopardy to the species or adverse modification of critical habitat. Last year, NMFS completed 1,467 ESA consultations. However, NMFS is currently responding to over 2,100 requests for consultations, some of which are at a national level for many species.

#### CONSULTATION PROCEDURES UNDER SECTION 7 OF THE ESA

Formal consultation is required if an action agency determines a proposed action "may adversely affect" listed species or designated critical habitat. Action agencies often submit a biological assessment to NMFS, USFWS, or both after a "may adversely affect" determination is made. These assessments describe the proposed project, action area, and effects of the action to listed species and their designated critical habitat. Once consultation has been initiated, the Services have 135 days to prepare a biological opinion that determines whether the action is likely to jeopardize the continued existence of listed species and/or adversely modify designated critical habitat. For complex projects, the Services may require more than 135 days and may work with the action agency to establish alternative consultation deadlines.

Informal consultation is an option when the action agency determines the proposed action "may affect, but is not likely to adversely affect" a listed species and/or designated critical habitat. A Federal agency, in the early stages of project planning, approaches the Service and requests informal consultation. Discussions between the two agencies may include what types of listed species may occur in the proposed action area, and what effect the proposed action may have on those species. If the Services believe that the action as proposed or with modifications meets the standard, they write a letter of concurrence in the determination and the consultation process ends. As of the 3rd quarter of FY-15, informal consultations made up 75 percent of all consultations.

#### INCREASING EFFICIENCIES AND SUCCESSFULLY IMPLEMENTING THE SECTION 7 CONSULTATION PROCESS

Growing populations and development in coastal communities are increasing the need for section 7 consultations. The Services recognizes these higher demands on our services and has asked for increased resources through the President's fiscal year 2016 budget request. The budget proposes an increase of \$13.2 million to strengthen NMFS's consultation and permitting capacity required to meet mandates of the Endangered Species Act, as well as the Marine Mammal Protection Act and the Magnuson-Stevens Fishery Conservation and Management Act. Increased species listings, natural hazards such as wide-scale drought, and response to human-caused disasters, such as oil spills, all necessitate increased capacity to ensure that consultations and permits are completed in a manner that is timely and that enables the Nation's economic engine to move forward without unnecessary delays.

Due to the importance of timely consultations, NMFS is engaging with Federal action agencies to set priorities and better synchronize action agency needs with NMFS consultation capacity. Where possible, NMFS is pursuing programmatic consultations. A programmatic consultation evaluates whether routine activities or authorizations enable the agency to identify and address potential threats posed to species and habitats protected under the Endangered Species Act. Programmatic consultations can increase the efficiency of the section 7 consultation process by addressing recurring actions in one consultation rather than through individual consultations, and by facilitating an evaluation of aggregate risks to listed species and designated critical habitat across larger geographies or longer time frames.

## RETROSPECTIVE REVIEW

NMFS and USFWS recently finalized regulations implementing the incidental take statement provisions of the ESA to clarify and codify the current policy regarding the use of surrogates, and address recent court decisions related to incidental take statements for programmatic Federal actions. These changes allow flexibility in the preparation of incidental take statements in situations where assessing and monitoring take of listed species may be difficult. There are several other actions that address other aspects of the ESA; a list can be found at: <http://open.commerce.gov/news/2015/03/20/commerce-plan-retrospective-analysis-existing-rules-0>.

NMFS and USFWS jointly announced on May 18, 2015 a set of initiatives to increase regulatory predictability, increase stakeholder engagement, and improve science and transparency. Among the actions are proposed revisions to interagency consultation procedures to streamline the process for projects, such as habitat restoration activities, that result in a net conservation benefit for the species.

## SPECIES RECOVERY

Recovery of threatened and endangered species is a complex and challenging process, but one which also offers long-term benefits to the health of our environment and our communities. Actions to achieve a species' recovery may require restoring or preserving habitat, minimizing or offsetting effects of actions that harm species, enhancing population numbers, or a combination of these actions. Many of these actions also help to provide communities with healthier ecosystems, cleaner water, and greater opportunities for recreation, both now and for future generations.

Partnerships with a variety of stakeholders, including private citizens, Federal, state and local agencies, tribes, interested organizations, and industry, are critical to implementing recovery actions and achieving species recovery goals. Several NMFS programs, including the Species Recovery Grants to States and Tribes, the Pacific Coastal Salmon Recovery Fund, the Prescott Marine Mammal Rescue Assistance Grant Program, the Community-based Restoration Program, and funds from the American Recovery and Reinvestment Act provide support to our partners to assist with achieving recovery goals. From 2000–2013, the Pacific Coastal Salmon Recovery Fund has provided \$1.09 billion in funding to support partnerships in the recovery of listed salmon and steelhead. With this funding, states and tribes have leveraged additional resources to collectively implement 11,500 projects to conserve West Coast salmon. From 2003–2015, the Species Recovery Grant Program to states has awarded \$43 million to support state and tribal recovery and conservation efforts for other listed species—from abalone to whales—in every coastal region of the United States. The FY 2016 Request includes an increase of \$17.0 million for Species Recovery Grants to address high priority recovery and conservation actions for ESA listed species. From 2001–2014, the Prescott Program awarded over \$44.8 million in funding through 483 competitive and 28 emergency grants to Stranding Network members to respond and care for stranded marine mammals, including those listed under the ESA. From 2001–2014, the Community-based Restoration Program awarded over \$49 million through 644 competitive awards and sub-awards to provide habitat for species listed as threatened and endangered under the ESA. The Community-based Restoration Program also supported implementation of restoration projects funded through the American Recovery and Reinvestment Act of 2009. Of the \$155 million awarded to create habitat and jobs under the American Recovery and Reinvestment Act of 2009, \$63 million was awarded to projects benefiting listed species.

A strong example of how NOAA is leveraging our expertise to protect and recover listed fish species is in California's Russian River watershed, one of NOAA's 10 Habitat Focus Areas. The Forecast-Informed Reservoir Operations (FIRO) project involves scientists from NOAA, U.S. Army Corps of Engineers, U.S. Geological Survey, Bureau of Reclamation, State of California, Sonoma and Mendocino Counties, and Scripps Institution who are conducting a pilot study to determine whether more sophisticated hydro-meteorological forecasting data can be used to better inform water management decisions. This non-regulatory, R&D effort could potentially improve efficiency and flexibility in managing existing water supplies to benefit all users and the listed species.

## ESA SUCCESSES

The ESA has been successful in preventing species extinction—less than 1 percent of the species listed have gone extinct. Despite the fact that species reductions often occur over long periods of time, in only its 40-year existence, the ESA has helped

recover over 30 species. NMFS recently delisted the Eastern population of Steller sea lion, our first delisting since 1994 when NMFS delisted the now thriving eastern population of Pacific gray whales. Between October 1, 2012, and September 30, 2014, of the 86 domestic endangered or threatened marine species listed under the ESA, 29 (34 percent) were stabilized or improving, 11 (13 percent) were known to be declining, 8 (9 percent) were mixed, with their status varying by population location, and 38 (44 percent) were unknown, because we lacked sufficient data to make a determination.

In addition to Pacific gray whales and Eastern Steller sea lions, ESA recovery actions have stabilized or improved the downward population trend of many marine species. For example, humpback whale populations are currently growing by 3–7 percent annually, enough to for NOAA to propose revising the listing status of some populations. In 2013, we saw record returns of nearly 820,000 adult fall Chinook salmon passing the Bonneville Dam on their way up the Columbia River to spawn. This is the largest number of fall Chinook salmon to pass the dam in a single year since the dam was completed in 1938, and more than twice the 10-year average of approximately 390,000. Once numbering in the thousands, the North Atlantic right whale, which is one of the most endangered whales to inhabit our coastal waters, dropped in population to a few hundred due to directed harvest. Now, the western North Atlantic right whale population is exhibiting promising signs of recovery and is thought to number about 450 whales, growing at about 2.7 percent each year.

We face continuing challenges in recovering numerous other species. Declines in coastal habitat, from wetlands to coral reefs, are often a significant hurdle to recovery. As stresses on coastal ecosystems increase, it is important to place a priority on habitat protection and restoration in order to prevent any need for listings and to facilitate recovery for species already listed.

#### CURRENT AND PROPOSED LISTING ACTIONS.

The Services currently have 13 proposed listing actions and another 3 proposed critical habitat designations either proposed or under development for publication in the Federal Register.

#### CONCLUSION

Each plant, animal, and their physical environment is part of a complex web of ecological relationships. Because of this, the extinction of a single species can cause a cascade of negative events to occur that affect many species. Endangered species also serve to indicate larger ecological problems that could affect the ecosystem including humans. As important, species diversity is part of the natural legacy we leave for future generations. The wide variety of species on land and in the oceans has provided inspiration, beauty, solace, food, livelihood and economic benefit, medicines and other products for previous generations. The ESA is a mechanism to help guide conservation efforts, and to remind us that our children deserve the opportunity to enjoy the same natural world we experience.

Thank you again for the opportunity to discuss section 7 of the Endangered Species Act. I am available to answer any questions you may have.

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The CHAIRMAN. Thank you, and I appreciate very much your willingness to be here with us to discuss this issue. As I said, some other agencies are not here who should be, but maybe we can find out indirectly through you what is actually going on.

I am going to remind members of the committee that Rule 3(d) imposes a 5-minute limit on questions. I am going to recognize Members for questions of our witnesses, once again with gratitude for their valuable testimony.

If the committee will humor me for just 1 minute. Normally we ask questions on a seniority basis, but I have always felt bad for the panel that sits in front of me on the lower dais. Crescent Hardy never gets to be recognized by the time we are done with one of these meetings.

What I would like to do, at least from our side, is to allow, on a rotating basis, at least one of our new Members to ask the first

question; and we will rotate that every time I have some kind of a hearing. Then we will go back on the seniority basis. If that is not OK, tough, that is what I am going to do.

[Laughter.]

The CHAIRMAN. So the first one I am going to yield to is Mr. Westerman from Arkansas, if you would like to ask the first series of questions from our witnesses.

Mr. WESTERMAN. Thank you, Mr. Chairman, and thank you for your indulgence today. We know that our main efforts to help threatened and endangered species are to stop poaching or over-harvesting and to ensure the habitats are beneficial to the species.

Mr. RAUCH, you said that it is complex and challenging, the work that we do; and it is somewhat like Newton's Third Law of Motion, that for every action there is often an opposite and equal reaction. I appreciate you guys coming here today to help us understand this issue better. I have a number of what should be easy, short questions; and I want to start with Mr. Rauch.

Is it accurate under the consultation requirements of the Endangered Species Act that Federal agencies must review their discretionary actions to see if they may affect endangered species, threatened species, or critical habitat?

Mr. RAUCH. I believe that is accurate.

Mr. WESTERMAN. So, according to the Shared Consultation Manual of the Fish and Wildlife Service and NOAA Fisheries, one of the enumerated actions that agencies must review for effects is a promulgation of rules. Is that correct?

Mr. RAUCH. Yes. I think so, generally.

Mr. WESTERMAN. Is it true that for purposes of a consultation, an effect on listed species does not have to be adverse; it can also be discountable, insignificant, or even beneficial, according to the Shared Consultation Manual?

Mr. RAUCH. I believe those are different kinds of ways that actions can affect listed species.

Mr. WESTERMAN. Right. I am going to switch to Mr. Bean here for a second. Your agency has a mapping tool on its Web site to assist agencies in reviewing their actions. Those actions affect some listed species. With this mapping tool called IPaC, or the Information for Planning and Conservation, you can map a geographical area and retrieve a list of species or their critical habitat that may be in a selected area. Is that not correct?

Mr. BEAN. Yes. That is its purpose.

Mr. WESTERMAN. And it only works on a desktop; it does not work on an iPhone.

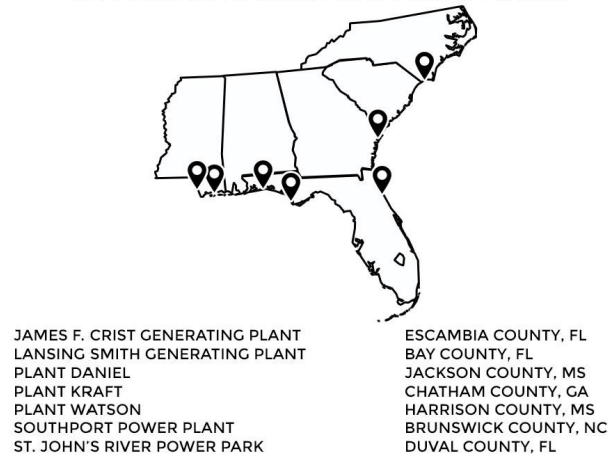
Mr. BEAN. I will take your word for that, sir.

Mr. WESTERMAN. All right. I will switch back to you, Mr. Rauch. Are you aware that IPaC mapping shows endangered sea turtles right near or within the area of multiple coal-fired plants along the Southeastern Coast?

Mr. RAUCH. I am not familiar with that application, so I don't know what it says.

Mr. WESTERMAN. Here is a picture of it.

FWS IPAC MODELING SYSTEM DATA SHOWING  
SEA TURTLES AT COAL FIRED POWER PLANTS



Mr. RAUCH. I will take your word for it. If you say that is what it shows, then I will agree with you that is what it shows.

Mr. WESTERMAN. In order to make that map, they actually use the immediate boundaries of power plants; and studies show that sea turtles are attracted to the warm water discharge of power plants. One study found that elimination of the warm water refuge, especially during the winter months, may cause turtles to react in different ways, including leaving to find warmer water elsewhere or even going into winter dormancy.

If some action caused these plants to close down, eliminating the cooling water discharges that attract sea turtles, would that action trigger, or could you use the determination that it may affect for purposes of ESA consultation?

Mr. RAUCH. It is not up to the National Marine Fisheries Service to determine initially whether an action may affect. That is a determination that the action agency makes. So, that is not something that we would determine.

Mr. WESTERMAN. Which agency would determine that?

Mr. RAUCH. Whichever agency is proposing, in your scenario, to shut down the facility.

Mr. WESTERMAN. So whichever agency it was, would they be able to possibly use that "may affect" designation, if closing a facility was going to remove the warm water and cause these sea turtles to go elsewhere?

Mr. RAUCH. The determination of whether or not their action would actually cause that is a determination that that agency would have to make.

Mr. WESTERMAN. So you don't know?

Mr. RAUCH. I don't know whether or not—

Mr. WESTERMAN. Mr. Bean, do you have a comment on that?

Mr. BEAN. Yes. I would only comment that under our regulations, the responsibility of the action agency is to consider those effects, those indirect effects, that are reasonably certain to occur. That is the regulatory definition or regulatory requirement, if you will.

So an action agency, whoever it may be, is required to determine what actions—what effects, rather—are caused by its action and are reasonably certain to occur. So the answer to your question would depend on its evaluation of that reasonable certainty.

Mr. WESTERMAN. But the manual actually allows to make those different designations where you could actually close a plant and it would affect the species in a negative way. That is not out of the realm of the policy and the manual?

Mr. BEAN. I am not sure I follow your question, sir. I think, under the manual, a process is described. Under that process, the action agency is in the first instance charged with determining whether there are reasonably certain to occur effects that would be adverse.

Mr. WESTERMAN. I think we are out of time on that one. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

And I think Ranking Member Grijalva is allowing Ms. Bordallo—by the way, congratulations on your bill the other day, finally.

Ms. BORDALLO. Thank you.

The CHAIRMAN. It is good to have that one done.

Ms. BORDALLO. And thank you for your sponsorship.

The CHAIRMAN. You are recognized for 5 minutes.

Ms. BORDALLO. Thank you very much, and I thank the Ranking Member for giving me his spot. We cannot talk too much. Is the clock running? No, not yet? All right. Thank you again.

Mr. Bean, my questions are for you, they are local in nature, and they are very important to me. Legislation passed in last year's Congress authorized Fish and Wildlife and the Navy to enter into a Memorandum of Agreement regarding placement of a safety zone over the Ritidian Wildlife Refuge on Guam.

I am concerned about the potential mitigations that may be a part of a future biological opinion for the Record of Decision on the realignment. Any mitigation plan would be tied to protection of species under the Endangered Species Act on Guam. These mitigations would be put in place without a clear plan for meeting the refuge's mission.

Could you give me an update about your plan to rehabilitate and reintroduce the species, and progress on that plan? And very importantly, have any species been reintroduced on Guam, Mr. Bean?

Mr. BEAN. Unfortunately, I will have to get back to you on that, ma'am, because I do not know the answer to your question. I am certainly aware that the problem on Guam for endangered species is largely based upon the effects of the introduced brown tree snake, and ensuring that the brown tree snake will not continue to devastate the native wildlife of Guam is the necessary and obvious first step to any successful effort to restore and maintain its species.

Ms. BORDALLO. I would appreciate if you would get back to me on this issue. Another one is—the final EIS for the Marianas talks

about conservation of habitat. Recently, important Chamorro sites have been found at Ritidian. Can I have your agency's assurance that you will work to provide better access for these sites for the public?

Mr. BEAN. There again, I do not have any specifics about your question; but I can assure you that we will do what is required and responsible in terms of ensuring access that is compatible with conservation and other requirements.

Ms. BORDALLO. All right. The third question is also for you. There are longstanding issues regarding landlocked landowners whose properties border Ritidian. Can we get your commitment that you will work with us on these issues?

Mr. BEAN. You certainly have my commitment. We will investigate and act responsibly to understand and settle these issues, yes.

Ms. BORDALLO. All right. Well, thank you. Mr. Bean, I will appreciate your getting back to me. These are very important issues right now. The EIS is concluded, and now we are waiting for the Record of Decision on this realignment of the Marines to Guam. So I really do need your answers to these questions.

Mr. BEAN. You will get them.

Ms. BORDALLO. Thank you, Mr. Chairman, and I yield back.

The CHAIRMAN. Thank you.

Mrs. Lummis.

Mrs. LUMMIS. Thank you, Mr. Chairman. Well, whether it is sea cows or 4-H cows, I just love cows, so I welcome this hearing today, Mr. Chairman.

The Fish and Wildlife Service recovery plan for the manatee includes a list of recovery actions for downlisting the manatee from endangered to threatened. One of the actions included is to make sure that warm water manatee refuge sites are protected as manatee sanctuaries, refuges, or safe havens. That includes Big Bend Power Plant and Crystal River Power Plant in Florida.

Mr. Bean, do you agree that protecting these warm water refuges near these power plants contributes to the conservation of the manatee?

Mr. BEAN. Yes.

Mrs. LUMMIS. Earlier this year, the U.S. Geological Survey produced a report entitled, "Status and Threats Analysis for the Florida Manatee." The report states that the second greatest threat to the manatee, and a very close second to the propellers, is long-term loss of warm water habitat. The same report agrees with the Fish and Wildlife Service Manatee Recovery Plan regarding the importance of power plant cooling water discharges to conservation of the manatee.

Now, specifically, that same study found that one of the primary causes of warm water habitat loss is the retirement of power generation plants that produce warm water flows. Other research on manatee habitat suggests that when a power plant goes off-line, manatees that rely on the plant do not necessarily move elsewhere. They are apt to remain there, and perhaps even succumb to cold stress.

Mr. Bean, are you aware of the U.S. Geological Survey study that determined long-term loss of warm water habitat is the second greatest threat to the manatee?

Mr. BEAN. Yes, ma'am. I am aware of the study.

Mrs. LUMMIS. Are you aware of the same USGS study's conclusion that a primary cause of the loss of warm water habitat for the manatee is the retirement of power plants that produce warm water?

Mr. BEAN. I do not know the details of the study. However, I believe the study identifies that as a potential threat for the manatee. The manatee, of course, is a species that has dramatically improved under the protection of the Endangered Species Act. Indeed, the census this year is the highest ever recorded.

Mrs. LUMMIS. Then why haven't they been elevated to threatened from endangered?

Mr. BEAN. The Fish and Wildlife Service is actively considering doing exactly that.

Mrs. LUMMIS. Does the conclusion surprise you, based on existing research on how manatees respond when power plants go off-line?

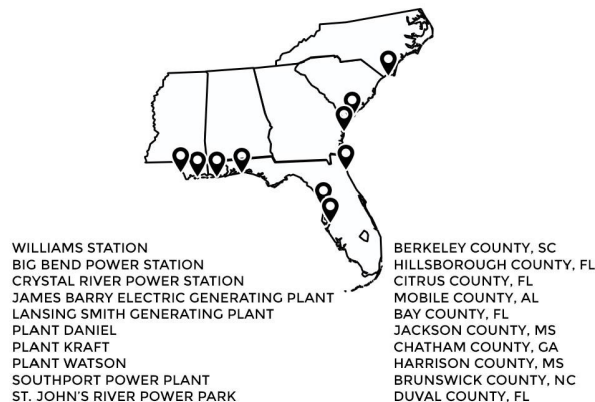
Mr. BEAN. No. It is well known that the manatees utilize warm water, both natural and artificial warm water, yes.

Mrs. LUMMIS. Are you aware of any research at all that shows they are likely to remain around a power plant when it goes off-line and potentially succumb to cold stress?

Mr. BEAN. I am not familiar with the research in general, so I would be reluctant to comment about that.

Mrs. LUMMIS. Mr. Bean, we used the Fish and Wildlife Service's own maps to figure out how much overlap there is between manatee habitat and coal-fired power plants. With so many coal-fired power plants—and staff, could you put that one up on the screen? There are at least 10 coal-fired power plants located near the habitat of manatees or other listed species. If you overlay Fish and Wildlife Service's own on-line mapping tool on coal-fired power plants along the coast, there are at least 10 where they coincide. We used the Fish and Wildlife Service's own maps to figure out how much overlap there is.

FWS IPAC MODELING SYSTEM DATA SHOWING  
MANATEES AT COAL FIRED POWER PLANTS





With so many coal-fired plants near manatee habitat, don't you think the EPA should have formally consulted with the Fish and Wildlife Service on its proposed rules that would force the closure of those power plants?

Mr. BEAN. Well, I would note that many of the power plants depicted on that map are well outside the winter range of the manatee, when the manatee is most dependent upon warm water discharges. So I think——

Mrs. LUMMIS. So, are you suggesting that when these plants are shut down, that the manatees that die as a result are collateral damage?

Mr. BEAN. No. I am not suggesting that. I am suggesting that some of the plants shown on the map have little or no relationship to providing warm water refugia in the winter for the manatee, because the manatee is typically not in North Carolina or South Carolina in the winter.

Mrs. LUMMIS. Well, are they on the Gulf Coast of Florida?

Mr. BEAN. In the Tampa Bay area, where I think you have two sites indicated, that is a known winter concentration area. The others, to my knowledge, are not.

Mrs. LUMMIS. What about the others over in the Panhandle?

Mr. BEAN. As I said, to my knowledge, they are not major winter concentration areas.

Mrs. LUMMIS. Are you suggesting that they are not important to manatee habitat?

Mr. BEAN. No. I am not suggesting that. I am suggesting that the warm water refugia and the threat to manatees from the potential closure of those particular plants is not as significant as would be the case elsewhere.

Mrs. LUMMIS. But don't you think a consultation is required? I mean, you would require that of anyone else, wouldn't you, a non-government agency?

Mr. BEAN. The Fish and Wildlife Service does not require consultation of anyone. As I described, our regulations provide that the action agency makes the initial determination whether its action may affect listed species, taking into account those indirect effects that are reasonably certain to occur.

Mrs. LUMMIS. Do you always pay ultimate deference to other agencies in terms of whether a consultation is required?

Mr. BEAN. At the "may affect" stage, our regulations are absolutely clear that that is the action agency's responsibility.

Mrs. LUMMIS. Thanks, Mr. Chairman. I yield back.

The CHAIRMAN. Mrs. Dingell.

Mrs. DINGELL. Thank you, Mr. Chairman. I am about to get in trouble because I am going unscripted, because I care about this issue greatly, like everybody else does. When I first came to Congress, I cared deeply about a number of issues.

But the original author of the Endangered Species Act is someone who cares deeply about it, and I guess I feel a commitment to understand it and protect it. I am glad to see my colleagues talking about it this morning and wanting to preserve it, because many times we seem to be thinking that it does not work.

And I, like my two colleagues that have gone before me, have a power plant in Michigan that has warm water, and it is an

incredible sight in January and February where more than 200 bald eagles gather to feed. There are a number of issues going on there, as we look at one of the neighboring coal plants that is likely to be closed or something is going to happen to that.

But my understanding of the Endangered Species Act is that it addresses issues if a species would be eliminated. So, when we talk about sea turtles, we talk about the manatees—in 1973, the year that the Endangered Species Act was passed, there were only 700 to 800 manatees left in Florida. Today, the manatee population has risen to more than 6,000. The tools provided by the Endangered Species Act have been instrumental in helping Federal agencies address the threat to the manatee, including thermal discharges from the power plants.

I guess as I am listening to all of these discussions, my question is: I think that all of these species, the bald eagles, if they were not to stay—and I hope to God they stay because it is one of the most beautiful sights I have ever seen—they would not be endangered, they would go to another habitat. So am I right that the challenge here is to make sure that we are all working together with all the agencies to make sure we are protecting the habitats of these species?

Mr. BEAN. I will be happy to answer that. First, let me say it was my pleasure to testify on this Act before Mr. Dingell on many occasions in the past. I greatly admire and appreciate his role in making this law happen and making it effective.

Certainly, as you note, the manatee and many other species have recovered dramatically under the Act's protection. Key to that is the protection of habitat. The Endangered Species Act, through section 7 and other mechanisms, has been quite successful in protecting, restoring, improving, and otherwise ensuring the availability of habitat—not just for manatees, but also for bald eagles. Kirtland's warblers is a species in your state that is at or near its record levels of abundance. In the Chairman's state, we have the California condor having reproduced in the wild last year probably for the first time since European man set foot on the North American continent. These are some of the dramatic examples of success of the Endangered Species Act, and they are underscored by the need to protect habitat. Yes, ma'am.

Mrs. DINGELL. Thank you. It is not perfect; no law is. The last perfect law was probably the Ten Commandments; and in today's Congress, those probably would not be perfect, either.

But the Obama administration is on track to delist more species than any other administration has in the history of the law. Mr. Bean, this year the Fish and Wildlife Service requested an increase of \$10.4 million for your activities. Can you talk about section 7 consultations and other planning activities and how they would improve if you had adequate funding?

Mr. BEAN. Yes. Thank you. The section 7 consultation process is subject to some statutory timelines for completing a consultation. However, it is often the case that because of insufficient resources, the Fish and Wildlife Service has to ask the action agency for extensions of those timelines, which the action agencies are generally willing to give in order to allow the process to be completed.

With the requested increase in funding, we expect the Service to be able to address more consultations more quickly. So the question, for example, about the buildup in Guam and some of the consultations there, the Service has had to prioritize consultations with the Defense Department because it lacks the resources to process multiple consultations simultaneously. The requested increase in funding would allow us to get a better handle on that.

Mrs. DINGELL. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman. I appreciate the witnesses being here.

Mr. Bean, my colleagues have talked to you about the section 7 consultation, but I want to follow up on that since that requirement is to determine which protected species might be impacted by the EPA's actions. Correct? Is that a confusing question?

Mr. BEAN. The question for the action agency is not only what species might be affected, but whether they will be affected, whether they are reasonably certain to be affected. Yes.

Mr. GOHMERT. Right. That is part of the step by step that section 7 would require.

On the Fish and Wildlife Service's Web site, you have a tool called IPaC. I have to say, I was really impressed. I have given the FWS some hard times on some issues that I have been concerned about, but I am really impressed with this Web site. It stands for Information for Planning and Conservation.

IPaC is a project planning tool obviously intended to streamline the FWS review process and give agencies a quick and easy access to information by which endangered species may be impacted by any given project. It takes less than 2 minutes, and I would like to go ahead and just have the video run to show what it takes to use the IPaC service on the Internet.

[Video played.]

Mr. GOHMERT. If somebody were wanting to make an inquiry of an area, they could zoom in down on Florida. It would appear so easy that even the EPA, if somebody had adequate training with a mouse, could be able to utilize this service. That would require you to keep enlarging until you could get down; that might take additional training.

[Laughter.]

Mr. GOHMERT. Then, rather than the street, you would get the actual satellite view of the area. Then take the mouse, draw the area in question. If someone would want to find out what species might be impacted—in this case, draw the area, and voila. Here this comes.

Then we have species listed that might be impacted. It would seem that if somebody at the EPA had adequate training with a mouse, they could use this service and be able to determine—I mean, that is a really fantastic service, and I commend Fish and Wildlife for being able to put something together that actually is so very usable.

Any agency is allowed to use IPaC. Correct?

Mr. BEAN. Yes, sir. Thank you for your kind words about IPaC. It is intended to do just what you said—to make it easy for

agencies and others to know what species may be present in a particular area, so that they can more intelligently evaluate whether their actions are reasonably certain to affect those species.

Mr. GOHMERT. So, in less than 2 minutes, you can find out what species are affected. Mr. Bean, do you have any record of EPA ever requesting a list of species that might be affected or further inquiring about any species that was listed in the IPaC?

Mr. BEAN. I am not aware of that, sir. But then again, I would not normally be made aware of such things.

Mr. GOHMERT. Does Fish and Wildlife have any record of EPA requesting a list of impacted species in the course of a "may affect" analysis?

Mr. BEAN. The answer to that is, I don't know, sir.

Mr. GOHMERT. You would know, wouldn't you, if they had made such a request?

Mr. BEAN. Ever, with respect to any of their actions?

Mr. GOHMERT. On this project in Florida that we were working on.

Mr. BEAN. I am sorry, sir. Which project are we referring to?

Mr. GOHMERT. Well, the one that was outlined there in the video.

Mr. BEAN. That was an EPA project?

Mr. GOHMERT. Right.

Mr. BEAN. I don't know the answer to your question.

Mr. GOHMERT. All right. I see my time is expired.

The CHAIRMAN. Thank you.

Mr. Beyer.

Mr. BEYER. Thank you, Mr. Chairman. And thank you both very much for coming and being part of this. It is fascinating. It seems to me that the heart of the matter is, given that section 7 of the Endangered Species Act clearly says that the action agency is required to seek consultation and that neither Fish and Wildlife or National Marine Fisheries has any enforcement action, that you are in the rather passive sense of providing consultation when requested.

So the key question is, why didn't the EPA ask you for advice on the new Clean Power Plan rules, the Clean Air Act rules? The EPA, in their memo that they submitted, argued that the data was insufficient to draw a causal connection between the reduction in emissions, which is different from the water, and the effect on endangered species.

The Majority memo says that it is not just adverse effects, like loss of habitat, that trigger the consultation requirement, but also beneficial effects, negligible discountable effects. It then notes also that the EPA says the positive environmental effects are not necessarily beneficial effects.

Mr. Bean, do you think the EPA had a responsibility, under this action agency section 7, with the beneficial effects for the manatee, to come to you?

Mr. BEAN. EPA's responsibility was to evaluate the likelihood that its actions would cause beneficial or detrimental effects that were reasonably certain to occur. That is the same responsibility that any Federal action agency has when considering this first step of the consultation process.

Mr. BEYER. It is fascinating that the No. 1 cause of death for manatees, I understand, is from propellers. If they take away the warm water in those 2 out of the 10 sites that were on the map, and cold water and they flee that area, are we likely to have fewer manatee deaths because they are not near the boats? Is there any way to assess the net impact on manatees from not having this artificial environment prompted by coal-fired power plants, also putting them at risk from boats?

Mr. BEAN. Whether there is an increased risk from boats, I really couldn't say. Clearly, the manatees utilize the warm water discharge areas. Were those areas not to be available, they would have to find other warm water discharge areas, presumably.

Mr. BEYER. With the Fish and Wildlife Service or National Marine Fisheries, Mr. Rauch, would you view the positive effects any differently whether they were man-made and artificial, say a power plant discharge, versus those that come from the natural environment, non-manmade? Or is the protection of the endangered species paramount regardless of what created the habitat?

Mr. RAUCH. Thank you. I think that—

Mr. BEYER. You look confused. I am confused, too.

Mr. RAUCH. I am trying to parse out the question. When we analyze and the action agency analyzes, we are looking at the effects of the action. Usually that is looking at the man-made effects of the action because that is what the action is.

Occasionally, we do deal with species displacement issues, where the action may displace a species from one habitat to another. Sometimes that is beneficial; sometimes that is not. We do look at changes to the natural environment. I am not exactly sure whether that answered your question, but we do consider the difference in habitats as a potential effect if you cause a species to move.

Mr. BEYER. The Majority memo suggests that perhaps the reason the EPA did not ask is because it would create a delay in implementing the new power plant rules, the new Clean Air Act rules. Given all the written testimony that you offer about how quickly these consultations are conducted and approved—15 days, 35 days—is this a meaningful concern for the EPA that would slow down the power plant rules, to have sought consultation or perhaps to seek consultation before the rules are finalized?

Mr. BEAN. I don't know the answer to your question, sir. I do believe that what EPA described in its proposed rule for existing sources went into some detail as to the basis for their "no effect" determination. Quite frankly, that is unusual, for action agencies to provide that level of detail.

The Fish and Wildlife Service does not, as a general matter, receive and certainly under its regulations has no duty, responsibility, or ability to compel an explanation from an action agency for its "no effect" determination. In this instance, EPA provided one, which appeared to reflect an understanding of how our process works.

Mr. BEYER. Thank you. I am pleased, too, that the manatee is now getting this kind of attention that we hope the sage-grouse and the gray wolves will also get on this committee. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. McClintock.

Mr. MCCLINTOCK. Thank you, Mr. Chairman. As you know, California is suffering what hydrologists suggest may be the worst drought in 1,200 years; certainly it is the worst drought in recorded history. Yet we continue to see massive releases of what precious little water remains behind our dams to meet ESA requirements for fish.

For example, in April, 30,000 acre-feet of water was deliberately released out of the New Melones Dam down the Stanislaus River for what, the Fish and Wildlife Service admitted, was 29 steelhead trout—30,000 acre-feet of water is enough to meet the annual residential needs of a human population of 300,000.

So, on the one hand, you have the immediate and desperate needs of 300,000 human beings, as opposed to nudging 29 steelhead trout to swim to the ocean, which they generally tend to do anyway. How do you justify such a policy? And by the way, New Melones is now at 16 percent of its capacity.

Mr. RAUCH. Thank you for the question. I think you are absolutely correct that California is facing a drought of historic—

Mr. MCCLINTOCK. That is not what I asked. How do you justify this policy, putting the needs of 29 steelhead trout over the needs of 300,000 human beings in the worst drought in the recorded history of the state?

Mr. RAUCH. There is not enough water to meet the needs of either the human beings, the fish, or the agricultural users—

Mr. MCCLINTOCK. But you made a choice to favor the fish over the human beings, and 29 of them as opposed to 300,000 human beings for a year.

Mr. RAUCH. You cited Fish and Wildlife Service. I am not aware of that number. I know that the fish are critically endangered. We lost 95 percent of the Chinook run last year.

Mr. MCCLINTOCK. Well, there are a lot of folks that think that the human population is now seriously endangered. They may run out of water before the end of the summer.

Mr. RAUCH. We were trying to balance the needs of all the users of the water.

Mr. MCCLINTOCK. By the way, that is just one dam. We are seeing these pulse flows out of dams across the state and are unable to get a straight answer on just how much. But the anecdotal information is huge amounts of water.

Mr. RAUCH. The fish do need water in order to survive.

Mr. MCCLINTOCK. The human beings need water, too, to survive. We build these water systems so that surplus water can be retained for beneficial human use; so you have no moral justification other than you favor the fish over the human population?

Mr. RAUCH. No, sir. We are trying to—the fish are—

Mr. MCCLINTOCK. Let's talk about the fish for a moment. The biologist told me that you are not doing any favors for the fish, either. What he told me was that no salmon in its right mind is going to enter a river in a drought. The water is too warm and there is not enough of it. So by doing these pulse flows, we trick fish into doing things their own common sense tells them not to do; and it does not end well for them.

Mr. RAUCH. I am not aware of what biologist may have told you that. The fish need to go upstream and downstream in order to survive. If they cannot do that, they will go extinct.

Mr. MCCLINTOCK. But what you are doing is upsetting their own natural guidance, by inducing them to enter rivers that normally their common sense would tell them to stay out of.

Mr. RAUCH. Their natural guidance would tell them, for certain species during the middle of the summer, they need to go upstream or they need to go downstream.

Mr. MCCLINTOCK. Well, let's go on to one other question.

Mr. RAUCH. That is what their instinct tells them, sir.

Mr. MCCLINTOCK. I used to have the Klamath River in my district, where four perfectly good hydroelectric dams are slated for destruction to meet ESA requirements—again for salmon, because of what we are told is a catastrophic decline in the salmon population. I said, "Well, that is terrible; how many are left?" They said, "Oh, just a few hundred left in the entire river." And I said, "That is terrible; why doesn't somebody build a fish hatchery?" Well, it turns out somebody did build a fish hatchery years ago at the Iron Gate Dam. The Iron Gate Fish Hatchery produces 5 million salmon smolts a year; 17,000 return every year as fully grown adults to spawn in the Klamath.

The problem is, they are not allowed to be included in the population count. Then, to add insult to insanity, when they tear down the Iron Gate Dam, the Iron Gate Fish Hatchery goes with it. I am wondering, do you have any way to justify that policy?

Mr. RAUCH. The Endangered Species Act tries to preserve these species in their natural state, in the state in which they do not rely on humans for their continued survival. They do not require—

Mr. MCCLINTOCK. Stop. Once the smolts are released, they do not rely on human care. They go out into the oceans, they spend years in the oceans, and return as fully grown adults to spawn. There is no more difference between a hatchery fish and a wild-born fish than the difference between a baby born at a hospital and a baby born at home.

Mr. RAUCH. We do not have most of our wild species born in hospitals, sir. It is quite common that these species are heavily manipulated. They are brought into a hatchery. They spend a great part of their very vulnerable life in a hatchery. And they have to do that—

Mr. MCCLINTOCK. And then they spend years out—

Mr. RAUCH [continuing]. Because we have so altered the ecosystem.

The CHAIRMAN. Time is expired.

Mr. MCCLINTOCK. Thank you.

The CHAIRMAN. Mr. Huffman.

Mr. HUFFMAN. Thank you, Mr. Chairman. I am glad my friend from California went right before me because the attack on the Endangered Species Act protections for anadromous fish is more characteristic of the discussions we have about the ESA in this committee.

Normally, when we have hearings here about the Endangered Species Act, it is about how to weaken it, how to undermine it, how to throw obstacles in the way of citizen enforcement, and so on and

so forth, and an endless stream of policy proposals that would essentially gut this critically important law that has been so effective and that is so popular with the American people.

But today we have a little bit of political whiplash, because some folks across the aisle have come up with the clever argument that perhaps the Endangered Species Act, a critical law that was intended to protect our environment, can be used to stop one of the most important environmental proposals perhaps in any of our lifetimes, the Clean Power rule, and an attempt to take meaningful action on global climate change.

Suddenly, instead of the usual assault on the Endangered Species Act, we have a meeting of America's newest environmental group, Friends of the Coal-Powered Manatee, with generous funding from the Koch brothers.

One thing I think we should all be very clear about, is that this is not about the manatee. This is about climate change, climate denial, and the continued boosterism of the fossil fuel industry that has become the trademark of this committee and, unfortunately, too many of my friends across the aisle.

I just want to ask each of you, since we have you here, to speak about the bigger picture. What are the environmental effects, not just for the manatee but for other species that we care about, of global climate change?

Mr. BEAN. Thank you, sir. I will be happy to try to answer that. Clearly, climate change is a threat that has both economic and environmental dimensions to it. We are aware that increased temperatures, sea level rise, and ocean acidification present new threats to species and make an already difficult task of conserving endangered species even more challenging.

We often lack the information to make specific connections between a particular action that may contribute to climate change or reduce climate change and its effects upon endangered species. As a general matter, however, it is quite clear that the effects of climate change are going to be detrimental for the environment in general.

Mr. HUFFMAN. Mr. Rauch, would you agree? And since your agency focuses on the marine environment, maybe specifically the effects of ocean acidification as well.

Mr. RAUCH. Yes, sir. Thank you very much. We are very much concerned, as is the Fish and Wildlife Service, about the generic effects of climate change. I would agree it is very hard to tie it to one specific action.

But we know that climate change is currently threatening the health of many of our coral reef systems. The structure upon which these coral reefs are built is very sensitive to ocean acidification. We are concerned about the effects of ocean acidification on our shellfish industry in this country, one of our most vibrant coastal economies. Those shells are all made of calcium carbonate and are subject to ocean acidification.

We are seeing dramatic changes in some of our commercial fish populations, not an Endangered Species Act issue, but an issue which is affecting the fishing industry in the Northeast and other places, due to climate change and the fact that certain areas where these fish breed are the warmest they have ever been.



So, our concerns about climate change touch on many endangered species and the health of reef systems, but it also extends to many of our industries that rely on the ocean for their livelihood.

Mr. HUFFMAN. Thank you. As I mentioned, my friends in the Majority generally have little use for the Endangered Species Act when it is protecting salmon, steelhead, delta smelt, prairie chicken, sage-grouse, et cetera, et cetera; but today it appears there is some concern, at least, for the manatee, or at least some manatee in certain locations.

Do either of you have any suggestions, if Congress really cares about the manatee, on some things we can actually do to enhance their continued recovery, thanks in large part to the Endangered Species Act?

Mr. BEAN. I would answer that this way. Part of the reasons that manatees have become dependent, at least in part, upon these artificial warm water discharges is because the natural warm water springs have been either developed or degraded, or spring flow has been reduced.

There are measures that the Fish and Wildlife Service has taken and plans to take to help restore manatee access to some of these natural warm water areas, as well as ensure sufficient flows to maintain those over time. These are the sorts of activities that the Fish and Wildlife Service, through its recovery budget, can promote.

Mr. HUFFMAN. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Mr. Newhouse.

Mr. NEWHOUSE. Thank you, Mr. Chairman. And let me say thank you for your deference to those of us in the lower part of the chamber.

I appreciate you two being here this morning and visiting about this important topic. There are a couple of things I wanted to talk about, but the subject today certainly has been about the selective enforcement.

So, to pivot off of the previous questioner, impacts of actions taken can be beneficial or negative. Given the last remarks we just heard, even if the benefits are beneficial, isn't EPA still required to consult and approve one way or the other the impacts of an action, whether they be good or bad?

Mr. BEAN. Thank you, sir. I will answer that this way. EPA's responsibility in the first instance is to determine whether its actions will cause effects that are reasonably certain to occur. Those can be either beneficial or detrimental for a particular endangered species. That is their obligation.

Mr. NEWHOUSE. Right. Good or bad. Unlike some believe, people on both sides of the aisle have concerns for endangered species and certainly want to be as smart as we can about rules that we implement to protect them.

In my home state of Washington and many other parts of the Northwest, since the salmon door has been opened, I will just ask about this. Multiple agencies, including NOAA, have been locked in litigation for many years over operation of hydroelectric dams, irrigation projects, certainly on the Columbia-Snake River system, regarding whether these projects affect several species of ESA-listed salmon.

In the Northwest, we spend close to a billion dollars a year, as you are aware, the ratepayers do, on this issue. Yet many species have seen multiple years of record or near record returns, as you referenced in your testimony. Could you comment quickly—we don't have much time—on why the agency has not been able to produce a defensible biological opinion that I think would end years of uncertainty and litigation for our Northwest citizens?

As a followup question to that while you are thinking, I understand that NOAA is reviewing the status of 28 species of salmon in the Northwest. Could you speculate as to whether any of these species will be delisted in the future?

Mr. RAUCH. Yes. Thank you for the question. As you indicate, we have had numerous biological claims on the Federal Columbia River power system. Some of them we did win in court on; some of them we had to reinstate consultation, and we subsequently lost.

The current one, which is a 2008 opinion, was initially found by the court to be invalid. That litigation is ongoing. We supplemented that opinion, and we are currently in litigation. We believe that we have developed a defensible biological opinion, and we are waiting, hopefully, on the court to agree with us. We expect a ruling sometime this year.

In terms of the other species, you are absolutely right. We are reviewing the status of all of our Pacific salmonids. We expect to have initial determinations on that sometime next year, early next year. I cannot tell you at the moment whether or not any of them are candidates for delisting, but we are actively looking at that question.

Mr. NEWHOUSE. Mr. Bean, I am certainly concerned about the lack of progress in advancing the proposed rule to delist the gray wolf. I am sure you are familiar with the situation in my state of Washington. Do you think that the Service should move forward with finalizing and implementing the proposed rule for delisting? Also, could you please explain why the Service has not met its statutory deadline to do so?

Mr. BEAN. Yes, sir. Thank you for the question. Certainly the view of the Fish and Wildlife Service, expressed many times, is that wolves have recovered and no longer need the protection of the Endangered Species Act. The proposal that you have referenced was built upon an assumption that the wolves in the Great Lakes would be delisted, and they were for a time.

But a court decision overturned that, and that has forced the Fish and Wildlife Service to re-evaluate its options. It remains, however, of the view that wolves have recovered and no longer need the protection of the Act.

Mr. NEWHOUSE. Thank you, Mr. Chairman.

The CHAIRMAN. Mrs. Capps.

Mrs. CAPPS. Thank you, Mr. Chairman, for holding this hearing; and to our witnesses, thank you for your testimony.

The Endangered Species Act, or ESA, is one of our Nation's most essential and effective conservation laws. Since 1973, it has played a critical role in successfully protecting our vulnerable plant and wildlife populations from threat of extinction.

Threatened wildlife populations are an invaluable and precious part of our global ecosystems, and we have a responsibility to ensure their survival through ESA. Not only has ESA successfully prevented the extinction of hundreds of vulnerable species, it has achieved this goal by using the best scientific and commercial data available.

ESA played a critical role in the survival of key wildlife populations in my district in California and throughout the Nation; for example, the California condor, which you have referenced already, Mr. Bean. The largest land bird in North America has been on the verge of extinction and is now one of the world's rarest bird species; but thanks to the hard work of the Fish and Wildlife Service under ESA, more condors are flying free in the wild today on the central coast of California than in captive breeding for the first time since recovery efforts began.

Also in my congressional district, the island fox; it is found only on the Channel Islands. It was also on the verge of extinction, but is making a strong recovery thanks to the strong collaboration between our conservation agencies.

These examples are a testament to the remarkable success ESA has had for precious species just in my district. My constituents and I know this. Any attempts to undermine key provisions of ESA would only deny our future generations the opportunity to fully explore the gifts of nature we are privileged to experience.

My question to you, Mr. Bean is: How has the ESA helped the California condor recovery? Are there specific ways that you can highlight, so we can understand the role the Fish and Wildlife Service has played?

Mr. BEAN. Thank you, Mrs. Capps. The condor is a remarkable success story, because it was once gone from the wild entirely. There were none left in the wild. There were but a handful of survivors in captivity at a time when there had been no experience in successfully breeding these birds in captivity, no experience restoring these birds to the wild. So those were the steps taken. With the cooperation of the L.A. Zoo, the San Diego Zoo, and other partners, there was a successful captive breeding effort. They provided enough condors to begin restoring them to the wild, not only in California but also to the Grand Canyon in Arizona, from which they have since expanded into Utah.

Mrs. CAPPS. Right.

Mr. BEAN. It is a remarkable success. There are, as you know, more condors alive today in the wild than probably any time in well over half a century.

Mrs. CAPPS. Right. I don't mean to interrupt, but community stakeholders, even private citizens, have also been part of this. Is that correct?

Mr. BEAN. That is correct. For one example, the Peregrine Fund, a private nonprofit organization, has been instrumental in helping in the captive rearing and release of condors.

Mrs. CAPPS. Dr. Rauch, in your testimony you highlight the need to address declining coastal habitats to improve marine life in our oceans. How can Congress improve ESA to better protect vulnerable marine populations?

Mr. RAUCH. Thank you. I think the Endangered Species Act, at the moment, works very well. When we consult, we are suffering from—as Mr. Bean indicated from the Fish and Wildlife Service, the National Marine Fisheries Service also is falling behind on the pace of its consultations, because the consultation workload has increased over 131 percent because of the increased coastal consultation.

The President has asked for additional funds to help us continue our work. We believe that the engagement of our National Marine Fisheries Service staff with project proponents at an early stage allows them, at a low cost, to modify their projects to protect the habitat and to protect the species.

It has worked very well for us, but we cannot continue at the pace that we are. We continue to fall further behind in the pace of our consultation.

Mrs. CAPPS. So the success has created the extra workload?

Mr. RAUCH. I think the increase in coastal development has created the extra workload.

Mrs. CAPPS. Right. I yield back, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Lamborn.

Mr. LAMBORN. Thank you, Mr. Chairman.

This is for either one of you. Last year, members of the Senate Environment and Public Works Committee raised the issue of consultation on EPA's rule for new power plants, but the proposed rule EPA released does not include a "may affect" analysis or even any Endangered Species Act analysis at all.

If the final rule still does not include a "may affect" analysis, would either of the Services raise the issue with the EPA?

Mr. BEAN. I do not know what EPA's plans are with respect to that rule. I do know that as a general matter, the obligations of action agencies is to make a "may affect" or "no effect" determination. If they make a "no effect" determination, they have fulfilled their consultation responsibilities.

The Fish and Wildlife Service is not in the role of enforcing compliance with section 7. Section 7, rather, allows the Service to provide technical assistance and advice to other agencies, but we can neither compel nor require agencies to take any particular action.

Mr. RAUCH. I would concur with that answer.

Mr. LAMBORN. Thank you. Mr. Bean, if EPA—just to drill down a little bit more on this—finalized a rule that expressly and solely mandated the closure of all coal-fired power plants in Florida and determined it would have no effect on manatees or sea turtles, what would you do? Would FWS take any action?

Mr. BEAN. I don't know whether that hypothetical is even in the realm of the possible. Clearly, were all coal-fired plants that manatees depend upon closed, there would be some impact to manatees; but I think in the current situation—as I understand it, and I cannot speak for EPA in this regard—the question EPA asks itself, at this stage, is whether there are reasonably certain to occur effects upon manatees or other endangered species. Framed in that way, the EPA has to answer that question as best it can.

The question is not, as I understand it, whether specific plants will be closed, but whether their action will have reasonably certain to occur effects upon any listed species.

Mr. LAMBORN. Thank you. Also, as a followup, if EPA's rule was reasonably certain to cause the retirement of coal plants with cooling water discharges where manatees are known to gather, would that rise to the level of "may affect" for purposes of section 7? I know you have already partially answered that, but—

Mr. BEAN. If it is reasonably certain to occur, then it is a "may affect" situation, yes.

Mr. LAMBORN. Changing gears, I would like to ask you more of a broad philosophical question. What is the policy of the Fish and Wildlife Service if a species is introduced where it is not native, but it is a rare species, like the Canadian lynx, for instance? What then becomes the responsibility, if any, of the Fish and Wildlife Service for a non-native species that people are wanting to introduce into the United States?

Mr. BEAN. I don't know that we have a specific policy. I know as a matter of practice, the Fish and Wildlife Service has not listed non-native species in the United States as endangered species. Certainly parts of the Endangered Species Act—for example, section 10(j), which allows for the establishment of experimental populations of endangered species—is pretty clear that those experimental populations are to be established within the historic range of the species, not outside of it. That is the best I can do to answer your question, sir.

Mr. LAMBORN. I appreciate that. Another philosophical question, since I've got you here and I appreciate the opportunity—what about a species that is endangered or threatened, arguably, within the borders of the United States, but outside the borders of the United States is not? I think the polar bear might be one example of that.

Mr. BEAN. I am not sure the polar bear is a good example. But I would say this—under the Endangered Species Act, the Fish and Wildlife Service and the National Marine Fisheries Service can list as threatened or endangered either species that are true biological species, subspecies, or distinct population segments.

There are some instances in which the Fish and Wildlife Service has listed the U.S. population or the Lower 48 population of a species that occurs, for example, in Canada or Mexico. That is within the authority of the Service; and to a limited degree, the Service has used that authority.

Mr. LAMBORN. I think that is something we need to further debate in the future, but I appreciate your answers. Thank you.

The CHAIRMAN. Mr. Grijalva.

Mr. GRIJALVA. Thank you, Mr. Chairman.

Mr. Bean, just a couple of rudimentary questions. We heard a lot of talk about power plants and their warm water discharges being necessary for the survival of manatees, and sea turtles were included in that discussion as well. I would like to ask you just a few basic questions.

Which inhabited Florida first, manatees or coal-fueled power plants?

Mr. BEAN. I believe the answer is manatees, sir.

Mr. GRIJALVA. Thank you. What allowed manatees to survive cold winters before the power plants existed?

Mr. BEAN. Manatees utilize warm water springs and warm water areas in general to escape the cold conditions in the winter. Before there were artificial sources, they relied upon natural sources.

Mr. GRIJALVA. Why can't these natural springs that you mentioned support that manatee population now?

Mr. BEAN. Those remaining natural springs or natural warm water sources do, in fact, provide a winter habitat that is important to manatees. Many of those natural warm water refugia have been adversely affected by development or reductions in spring flow. I indicated a moment ago in my answer to an earlier question that there are things that can be done and are being done to try to improve those habitats.

Mr. GRIJALVA. Is the Fish and Wildlife Service developing a plan for how to protect manatees if any power plant discharges would become unavailable in the future?

Mr. BEAN. I think all of the power plants in Florida are subject to National Pollution and Discharge Elimination System Permits that the state issues; and the Fish and Wildlife Service works very closely with the State Fish and Wildlife agency to ensure that those permits include manatee measures to protect manatees against the loss of warm water discharges during cold snaps in the winter, for example.

Mr. GRIJALVA. For both of you gentlemen, if you don't mind, to the issue of required consultations—the backlog of those requests and need-to-do items on consultation, the budget, the relationship between even the discussion today and other discussions and the budget, and the consultation that the agencies must do and the budget requests and that relationship in order to be able to expedite, get them done?

Mr. RAUCH. I cannot speak to the specifics of Fish and Wildlife Service's, but for the National Marine Fisheries Service, as I indicated, we have in the last few years done 7,000 consultations, of which we only found jeopardy or adverse modification on 41 of them. The rest of them we were able to work with the applicants in the time allowed to put in reasonable restrictions, small changes, or no changes in order to make sure that the species could benefit.

Mr. GRIJALVA. Relative to the budget, in order to be able to do that?

Mr. RAUCH. Right. In order to do that, the pace has been picking up, over a 131 percent increase. We could not do that, so we asked for—the President asked for—\$13 million for the Fisheries Service to continue to do that to keep up the pace.

Mr. GRIJALVA. And predictably, if you do not get that?

Mr. RAUCH. If we do not get that, we will not be able to work through that. Projects will be slowed down. Many of them are in the Southeast, but they happen across the country. Our ability to both protect species and to allow this coastal development to continue will be imperiled.

Mr. BEAN. The same is very much true for the Fish and Wildlife Service.

Mr. GRIJALVA. Thank you. Mr. Bean, yesterday—this is a request off the subject—multiple media outlets reported that Cecil, an African legendary lion among tourists and locals in Zimbabwe, was lured out of the national park and killed by an American trophy hunter, who paid 50 grand for the privilege.

I am very concerned about this as it relates to others around the world as the United States tries to take a leadership role in fighting this global wildlife poaching and trafficking crisis. I understand the details are still emerging, but let me ask you some questions that you can get back to the committee as opposed to answering them now.

Question one: Did the hunter import any part of the poached lion into the United States? Question two: The hunter is a convicted wildlife poacher in the United States. Does the Fish and Wildlife Service prohibit or restrict the importation of wildlife by people with such convictions?

Last October, Fish and Wildlife Service proposed listing the African lion as threatened under the Endangered Species Act. Incidents like this one show clearly that ESA protection is needed. What is the status of that final listing? Also, I ask my colleagues to consider H.R. 2697 as a partial remedy to what just occurred.

With that, I yield back.

The CHAIRMAN. Thank you.

Mr. Thompson.

Mr. THOMPSON. Thank you, Chairman. Gentlemen, thank you for being here. A series of questions here, pretty straightforward, just some clarifications.

What types of agency actions require consultation under section 7 regulations?

Mr. BEAN. Many different types of agency actions require consultation. Typically, they are place-specific projects, like building a highway, a dam, or something of that sort. But they also can cover issuance of regulations or adoption of land use plans. It is quite encompassing.

Mr. THOMPSON. When a Federal agency has broad statutory authority to act, is the promulgation of a rule considered a discretionary agency action?

Mr. BEAN. Yes. The regulations that I referenced in my statement, the 1986 Joint Implementation Regulations, clearly specify that issuance of regulations is a Federal action.

Mr. THOMPSON. How impactful does the effect have to be to trigger consultation? Is it a broad effect on the population, or a single effect on one member of an ESA-protected species?

Mr. BEAN. It does not have to broadly affect the species as a whole, but it does have to be a reasonably certain to occur effect, if it is an indirect effect. That is a key requirement of our regulations—that an agency must, in making its “may affect” determination, take into account direct effects, which are those things that happen immediately and naturally as a result of an action, as well as indirect effects, provided the indirect effects are reasonably certain to occur.

Mr. THOMPSON. As you know, under the ESA, “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture,

collect, or attempt to engage in any such conduct. For section 7 purpose, is an effect above or below the threshold of a “take”?

Mr. BEAN. The Fish and Wildlife Service view on that is that if a take occurs, it would be an effect that would have to be taken into account. I would note, however, that the Supreme Court, some years ago in a case known as the Sweet Home Case, held that the requirement that—excuse me, the prohibition against “take”—was based upon ordinary principles of proximate causation. So, the take has to be proximately caused by the action in order for it to be a cognizable take.

Mr. THOMPSON. Can adverse effects occur even if a take is unlikely?

Mr. BEAN. There are certainly ways to adversely affect a species without taking it, so I guess the answer to your question is yes.

Mr. THOMPSON. When does an agency need to ask the appropriate Services for a concurrence letter?

Mr. BEAN. If the agency in step one of the process has determined that its action may affect a listed species, that then triggers step two, which is the informal consultation process. If the action agency in that second step concludes that its action is not likely to adversely affect the species, consultation ends, provided that the Service issues a written letter of concurrence. Without that written letter of concurrence, however, the agency’s duty is to enter into the third and final step, the formal consultation phase.

Mr. THOMPSON. You touched on this briefly, I think, but what kinds of effects trigger consultation? Any effect or only certain effects?

Mr. BEAN. Direct effects, and indirect effects that are reasonably certain to occur.

Mr. THOMPSON. I want to change gears with what little time I have left and just zero right in on one endangered species that is impactful in 38 states, including my Keystone State, the northern long-eared bat. I do think your agency needs resources to deal with this species. It was listed as threatened, but you need the right resources. I would argue that elevating that at any time to endangered would be the wrong resources.

I think Congress has provided—and I appreciate the distribution about 2 or 3 weeks ago of about a million dollars’ worth of grants. My question is, though, that was distributed in chunks of about maybe \$35,000. So what was the rationale? What is the level of effectiveness when we disburse it in such small pieces across so many different places?

Mr. BEAN. I don’t know the details of those particular grants; but I would say that we are constrained, the Fish and Wildlife Service is constrained, by a budget that does not allow it to make grants that are commensurate with the challenge we face, in that case white-nose syndrome.

Mr. THOMPSON. Thank you.

The CHAIRMAN. Mr. Labrador.

Mr. LABRADOR. Thank you, Mr. Chairman.

Mr. Bean, in the proposed rule for existing plants, EPA states, “There are substantial questions as to whether any potential for relevant effects results from any element of the proposed rule, or would result instead from the separate actions of states



establishing standards of performance for existing sources and implementing and enforcing those standards.” What are the substantial questions EPA is referring to in the preamble?

Mr. BEAN. I cannot speak for EPA or explain beyond the words of their statement that you read.

Mr. LABRADOR. Have you spoken to the EPA about this?

Mr. BEAN. I have not.

Mr. LABRADOR. Why have you not spoken to the EPA about this? If there are substantial questions, shouldn't we know what those substantial questions are?

Mr. BEAN. My interpretation, if you will, of those remarks—

Mr. LABRADOR. Please.

Mr. BEAN [continuing]. Is that their proposed plan, in and of itself, does not have any particular effects upon particular facilities in particular places; that their proposed plan sets in place a process whereby states develop implementation plans. Pursuant to those state plans, particular facilities may or may not change their operations. Those, I think, are the intervening steps that in EPA's mind, apparently, led it to the conclusion that there were not reasonably certain to occur impacts.

Mr. LABRADOR. Does it concern you that EPA has concluded that there are no effects, but has made that determination while acknowledging their substantial questions about whether the effects are a result of the Federal action?

Mr. BEAN. I understand their identification of substantial questions to be part and parcel of their apparent determination that there are not reasonably certain to occur impacts upon endangered species.

Mr. LABRADOR. So, it does not concern you in any way that they would write this statement in the preamble in this way?

Mr. BEAN. I think the statement in the preamble is a more detailed explanation of a “no effect” determination than the Fish and Wildlife Service typically sees, because it typically does not see any at all from action agencies.

Mr. LABRADOR. EPA's own modeling shows Big Bend generating units will close. EIA analysis predicts that coal-fired power plant closures will double, and Tampa Electric asserts in its comments on the Clean Power Plan that Big Bend will have to shut down.

Big Bend is a primary warm water refuge for manatees, and has a manatee protection permit appended to its NPDS permit; and according to EPA's modeling and the plant operator, will shut down as a result of this rule. Does this not adequately demonstrate that EPA's rule is reasonably certain to adversely affect that listed species?

Mr. BEAN. I don't know whether those projections are accurate, whether they are shared by EPA, or whether they are disputed; so I really cannot intelligently inform that discussion.

Mr. LABRADOR. You are doubting that those are accurate. If they happen, do you agree that then you will be putting a listed species in danger?

Mr. BEAN. If what happens, sir?

Mr. LABRADOR. If these things actually occur, as they have been reported. Do you not think that it will actually make the manatee, which is a listed species, be adversely impacted by this?

Mr. BEAN. There is the potential for an adverse effect from a closure of a facility, any facility, that provides warm water refugia during the winter. If that occurs during a cold snap, that is a particularly dangerous time. If it occurs in the summer, there may be an opportunity for manatees to find other places to seek warm water refugia in the winter. So, it is somewhat conjectural.

Mr. LABRADOR. You are saying the EPA does not even agree with its own modeling? Because it is their own modeling that shows that Big Bend generating units will close.

Mr. BEAN. Unfortunately, I don't have any information about their modeling. I am sorry, sir.

Mr. LABRADOR. Well, you should look it up.

If the likely effects of a discretionary Federal action on listed species are positive, how would you best describe those effects for section 7 purposes—beneficial, insignificant, discountable, or no effect?

Mr. BEAN. If there are reasonably certain to occur beneficial effects, those would justify a "may affect" situation.

Mr. LABRADOR. What about effects that are remote or very small? How would you best categorize those—beneficial, insignificant, discountable, or no effect?

Mr. BEAN. If the effects are remote and very small, they would, in all likelihood, not justify a "may affect" determination.

Mr. LABRADOR. If there is only a very slight effect, is that still an effect?

Mr. BEAN. The magnitude of the effect is one question. The other question is the certainty of its happening. Our regulations are quite clear that, at least for indirect effects, those need to be taken into account if they are reasonably certain to occur.

Mr. LABRADOR. Thank you. I yield back.

The CHAIRMAN. Mr. LaMalfa.

Mr. LAMALFA. Thank you, Mr. Chairman. I apologize I was not here at the beginning of the hearing today. So Mr.—how do you pronounce it, Rauch?

Mr. RAUCH. Rauch.

Mr. LAMALFA. Rauch. I am sorry about that. Thank you, Mr. Rauch.

Following up on a previous hearing here, my colleague, Mr. Denham—I am acting as him today—asked a question of Deputy Regional Administrator Barry Thom about predator prevention programs. The subject at that time had been the Columbia River basin, but as well, predator problems we have in California; and he was not aware of any.

What we are talking about basically is the Delta, where we have invasive striped bass that your own agency stats have shown consume approximately 98 percent of endangered winter run salmon. Ninety-eight percent of that run is gone by the time it works its way down the Sacramento and gets through the Delta.

What I am wondering is, do you have any information on what NOAA is doing to reduce the number of these predators of the invasive striped bass, so that that endangered run would be able to continue, and we would be more effective in the whole matrix of what we are doing to prevent that loss?

Mr. RAUCH. As you indicated, we are very concerned about predation on the listed populations in the Sacramento Central Valley. Predation is a natural occurrence, but given that the system is so altered and our fish are so stressed, the impacts of predation can be quite severe.

Depending on the agency we work with, we do try to impose or try to work with them to lessen the impacts of predation. We have worked with——

Mr. LAMALFA. We are letting an incredible amount of water run out through the Delta to address a smaller percentage of the population, whereas predation obviously is a giant percentage of what we are losing here. Wouldn't we get the most bang for the buck by getting after the predators, these striped bass, that are indeed gobbling up so much of this endangered fish, rather than letting so much valuable water out in a drought situation that only helps a tiny percentage of that, that is not subject to that depredation?

Mr. RAUCH. I am not familiar with the statistics that you provided that 95 percent of the fish were lost due to predation. I know that last year, for the winter run, we lost 95 percent of the run above Red Bluff Diversion Dam, because of the extremely hot temperature and because there was not enough cold water flushing down there. It may well be that——

Mr. LAMALFA. What percentage are you attributing to the hot water?

Mr. RAUCH. Ninety-five percent, I think. I don't know what we attributed. We lost——

Mr. LAMALFA. We have numbers that show that 90-plus percent is due to predators and not——

Mr. RAUCH. I don't want to debate that. That was the number I had. Clearly, predation——

Mr. LAMALFA. Well, evidently you do not have a plan for predators, really, to speak of, then, bottom line?

Mr. RAUCH. We do not have a comprehensive plan. Different agencies have different roles in predation. We are working——

Mr. LAMALFA. I am sorry. I have limited time here, sir. The bottom line is you do not really have a broad plan?

Mr. RAUCH. We work with different agencies using their authorities to address predation under whatever authority——

Mr. LAMALFA. So which one do we need to talk to? What other agency?

Mr. RAUCH. We work with the Bureau of Reclamation in designing their projects, so as to minimize the water flows for predation. We are working with land management agencies to try to better improve the habitat so that our fish have more hiding places to hide.

Mr. LAMALFA. All right. Very good. Thank you, sir. I am sorry on the time here.

Mr. Bean, I want to come back over to you. We have been having a problem with the regulatory load from this Administration—not a lot of consultation with Congress here. For example, new regulations on a listing of yellow-legged frog in the Sierra Nevada has caused some very detrimental economic effects.

For example, an event called the Lost Sierra Endurance Run, which is a 32-mile charity foot race through private land and

through National Forest—it has been a very important economic engine, they have faced a consultation fee that was too great, and they have actually canceled the event.

Now, this is on the heels of a couple of field hearings we had on yellow-legged frog possible listings, where the agencies involved said, well, there is really not going to be an economic effect on the area other than on government agencies, what it will cost them to do it.

So, we see that has been canceled. Big economic effect, and they have not come up with any effect on the local economy. Has the Administration ever exempted any entity like the Lost Sierra Endurance Run from ESA consultation requirements?

Mr. BEAN. I am not familiar with that particular run. I would note—

Mr. LAMALFA. In general. Have you ever exempted entities from such a thing?

Mr. BEAN. I am not aware of exemptions. We do have a programmatic consultation with, I think, nine National Forests that cover some thousand or more activities that has expedited the consultation process for all of those activities.

Mr. LAMALFA. At a high cost?

Mr. BEAN. I don't know the cost, sir.

Mr. LAMALFA. Thank you.

The CHAIRMAN. Mr. Zinke.

Mr. ZINKE. Thank you, Mr. Chairman.

Just to shift gears a little on the process—looking at the Ivanpah Solar Electric Generation System, and that is the one on 15 near the California border; looking at a timeline, on December 7, 2009, the BLM requested a consultation. That initial consultation was completed on April 26, 2010. That is 4 months.

Then subsequently, they went on. There was some cause. It went to the second one, which was completed, the whole thing, on June 10, 2011. That is less than a year, in looking at it.

Now, it is interesting that it allowed 1,100 takes of tortoises. When I looked at this, in my experience as a SEAL commander in Niland, Twentynine Palms, and everywhere else that the military trains, 1,100 seems excessive. I remember seeing one or two and stopping training, stopping special operations training, stopping SEAL training in the height of what we now engage in. So 1,100. Do you think the 1,100 was a little excessive in this review of takes for desert tortoises?

Mr. BEAN. I believe what the Fish and Wildlife Service required in that instance was the relocation of tortoises from the project site to places outside the site where they would be expected to survive. I think it is important to emphasize that, as I understand it, this was not 1,100 tortoises being killed, but rather moved.

Mr. ZINKE. Was the same program offered to the U.S. Navy and the U.S. Marine Corps to relocate tortoises? Because I was involved in at least two EISs and maybe a dozen EAs, and it was never brought to our attention that we could relocate tortoises within the Niland training area or Twentynine Palms.

Mr. BEAN. I don't know about your particular situation. I would say that the relocation of tortoises has been widely used by the Fish and Wildlife Service for a variety of projects.

Mr. ZINKE. The point I am getting at, it was a very short period, 1,100 tortoises. Then you turn to other things, such as the mine in northwest Montana—that project took 3 years of consultation, and they still do not have a permit.

The consultation in which the mining company provided about \$100,000 of funding to your agency to do the review—the review came back, in this case it was the grizzly bear habitat and the bull trout, no effect. Yet it takes over 3 years, and again, a case where they have a small footprint, no effect, and it takes a year for 1,100 tortoises.

Why is there such a difference in timing?

Mr. BEAN. I don't know the facts of these particular cases you have posed. I would say, as a general matter, the differences stem from the complexity of the action under consideration and the resources available to address it.

Mr. ZINKE. In my experience, and I have seen the mine up in northwest Montana—that mine started, the project started, when I was in high school; and I did not graduate 2 years ago. That is how long it has taken this company that has invested to do it, and it seems like every roadblock is put in their way. Also, the mine footprint is nowhere near Ivanpah, and I think we have all seen Ivanpah; nor does it have streamers from Ivanpah.

I find that it seems like we are picking and choosing projects that we like going the fast track, and the projects that we do not like seem to be stopped. Do you see that as part of—are we playing favorites?

Mr. BEAN. In my experience, no, sir. In my experience, what the Service tries to do is to be responsive to agency needs insofar as its resources allow it that flexibility. Often it simply lacks the resources to process some of these particularly challenging consultations in a rapid fashion.

I think about 80 percent of the informal consultations are completed within 30 days or less, but some of them last much longer. The example of Guam is a good example in which it was necessary, because of resource limitations, to stagger consultations over a period of time to address what were most important to the Defense Department first.

Mr. ZINKE. All right. Thank you. And thank you gentlemen for being here.

Mr. Chairman, I yield back.

The CHAIRMAN. Thank you.

Mrs. Radewagen.

Mrs. RADEWAGEN. Thank you, Mr. Chairman. I want to thank both of you gentlemen for your testimony.

Mr. Bean, yesterday EPA made its first and belated delivery of documents in response to a request from Chairman Bishop and Chairman Inhofe relating to the Clean Power Plant and ESA consultation. Were you, or any officials in your respective agency, made aware of the documents EPA provided to the committee?

Mr. BEAN. No, I was not.

Mrs. RADEWAGEN. Mr. Rauch?

Mr. RAUCH. I think I received them at the same time the committee did.

Mrs. RADEWAGEN. Thank you. I yield back the balance of my time, Mr. Chairman.

The CHAIRMAN. Thank you. I have a few questions for you as well, and I appreciate you two being here. I realize it would probably be easier if EPA had decided to show up and defend themselves at the same time, and we are getting at information in an inverse way. Also, you are facing a difficult time trying to walk a fine line here, but I do appreciate your commitment to stay here and talk to us at the same time.

We have gone somewhat far afield in the time of this hearing. The issue, at least for today, is not whether the Endangered Species Act is an effective law or not. The question is whether the law is actually being followed, and if agencies are ignoring the law to reach their conclusions.

If it is appropriate for that, then the law should be changed. If not, then the agency should be held accountable. The question is, if they are ignoring requirements of the law in one area, are they requiring it in other areas?

I have some specific questions dealing with that, but let me go far afield as well, because questions have been given to you and you have both commented on the threat of climate change to endangered species. The question is very simple. Will EPA's rules be beneficial for endangered species or critical habitat?

Mr. BEAN. Mr. Chairman, I presume so, but I have no particular knowledge on which to base a definitive answer.

The CHAIRMAN. Mr. Rauch, can you give me a definitive answer?

Mr. RAUCH. I would agree with Mr. Bean on that.

The CHAIRMAN. That you do not know?

Mr. RAUCH. I do not know. I assume that that is one of the goals of that, and anything that benefits climate change will benefit some of our listed species.

The CHAIRMAN. We have had assumption of goals before in a lot of areas, and it does not necessarily have the same effect. It seems to me that one of the issues we have today is that the hatred of coal seems to overwhelm our love of endangered species.

When we are talking about whether a consultation needs to take place, obviously the courts have had some specific guidance on those things as well, and that you are right. Whether you determine both the informal or formal, it does not have to just be an adverse effect, beneficial, benign, or actually any undetermined character.

The one court did say the presence of a listed species was enough to affect a required consultation. I don't know if personally I would go that far, but to be honest with you, it does not really matter whether I personally believe that—that is what the courts have held, and that should be a standard which should be looked at.

Let me try and walk through this again. I am going to do this as specifically as I can. Under the Clean Water Act, plant operators must have a permit to discharge their cooling water. The permit is called a National Pollution and Discharge Elimination System Permit, and as a condition of this permit for the Big Bend and Crystal River power plants, those power plants must abide by the Manatee Protection Plan attached to their permits.

Among other things, these plans include provisions requiring the plant to notify Fish and Wildlife Service if any generating units are going to be retired. They also require the operator to immediately report any unplanned interruptions where there is no thermal discharge for 24 hours or longer to the Florida Fish and Wildlife Conservation Commission. I assume that is correct. Right? I actually do not need an answer. Yes, it is correct.

So, if EPA has conducted their modelings to the effect that the 111(d) rule, the proposed rule for these existing power plants, according to the EPA models, as Mr. Labrador said—all their runs indicate that these will be shut down. Tampa Electric Company, which owns them, has also done their modeling service for the Public Service Commission, which requires it, and said the essentials really require them to be shut down.

Once again, if EPA's own modeling shows they will be shut down and Big Bend's owners are correct that it would be shut down, is the EPA rule not affecting the manatee?

Mr. BEAN. Mr. Chairman, I would say the following. What EPA's modeling shows, I do not know. I would say, however, that EPA's decision on whether its action may affect a listed species will be based on its own assessment rather than somebody else's assessment of the impact.

The CHAIRMAN. You are coming close to an answer. But if EPA's modeling shows it will shut down, and if the company says the modeling shows it will shut down, does that not affect the manatee?

Mr. BEAN. On the face of it, one would presume so, yes.

The CHAIRMAN. So, even though EPA's own modeling shows it would shut down, and the electric company says it would shut down, who would be held accountable for affecting the manatee if not the EPA?

Mr. BEAN. Held accountable, sir?

The CHAIRMAN. Yes. If not the EPA, who actually has accountability for that?

Mr. BEAN. Well, with respect to the section 7 consultation process, it is EPA's obligation to make the "may affect" determination. If the facts are as you describe—and I do not know whether they are or are not—but if they are as you describe, it is the EPA's—

The CHAIRMAN. You can trust me. I am always honest here.

Mr. BEAN [continuing]. Responsibility to make that determination.

The CHAIRMAN. Then the EPA would be held accountable?

Mr. BEAN. They would be responsible. There is no mechanism, sir, for the Fish and Wildlife Service to enforce section 7 compliance obligations.

The CHAIRMAN. Close enough, then. Let's go back to the question that was asked of you by Mrs. Lummis, Mr. Gohmert, and Mr. Beyer again: Should EPA have insisted on a section 7 consultation? Is that not required by the law?

Mr. BEAN. It is required by the law if, sir—

The CHAIRMAN. Now, not if—

Mr. BEAN. Yes, if—

The CHAIRMAN. What the court said. If there is any kind of impact—in fact, the one court said even if it was a listed species, that should require it.

Mr. BEAN. Our regulations are quite clear that they must be reasonably certain to occur effects.

The CHAIRMAN. Let me ask if Mr. Thompson has any other questions, because I am coming back to you on that one.

Mr. THOMPSON. Thank you, Chairman. Yes. I would like to follow up. Actually, with the gentleman, I want to zero in on the reasonably certain standards. The consultation handbook explains that indirect effects are caused by or result from proposed action or later in time, and are reasonably certain to occur.

Some examples from the handbook of indirect effects are that predators may follow off-the-road vehicle tracks into piping plover nesting habitat or destroy nests, and also the people moving into a housing unit bring cats that prey on the mice left in the adjacent habitat.

If it is reasonably certain that predators will follow off-the-road vehicle tracks, and new occupants will bring cats that prey on nearby mice, is it reasonably certain that the power plants in question will close as EPA models predict and as the owner/operator of Big Bend argues?

Mr. BEAN. My answer, sir, is I have no idea whether that is reasonably certain or not. I am not familiar enough with the details of the EPA rule or the expectation as to how the state of Florida will respond to that rule in developing an implementation plan.

Mr. THOMPSON. If a Federal rule directs states to decrease carbon dioxide emissions from power plants, is it reasonably certain that some power plants will generate less power or shut down altogether and, consequently, will discharge less cooling water, thereby negatively impacting the existing species that has been talked about so much today?

Mr. BEAN. Again, sir, that is really outside my area of expertise. I do not know whether that is reasonably certain or not.

Mr. THOMPSON. What about the negative impact in terms of the lack of discharge, of the less cooling water being discharged?

Mr. BEAN. I think it is quite clear for the Fish and Wildlife Service that the availability of warm water refugia is an important conservation consideration for manatees. Whether this proposed rule of EPA will have the effect of reducing that availability, I do not know.

Mr. THOMPSON. Is it reasonably certain that the power plants that EPA modeling shows will shut down will actually shut down? Are they wrong? Do you question the EPA's expertise on this matter?

Mr. BEAN. I have neither reviewed their models nor would I have the competence to evaluate their models so I really could not say, sir.

Mr. THOMPSON. Mr. Chairman, I appreciate the opportunity to pursue these questions. Obviously, the EPA's actions that are taken based on what I have heard will have an impact specifically on the manatee. But I would say, beyond that, any time we shut down the source of affordable and reliable electricity, one of the



largest species to be impacted is probably the human species. With that, I yield back.

The CHAIRMAN. All right. Let me tie a couple of loose ends together, if I might here. I appreciate once again what you have gone through. The question, once again, is: Are agencies ignoring the law? And the answer, we have said, is yes, they are. There should have been those consultations. Either the law needs to be changed, or agencies need to in some way, shape, or form be held accountable.

Mr. Bean, I would also like to change or at least clear up one of the comments you made to Mr. Zinke, who is no longer here, about the 1,100 desert tortoise takings. You were inaccurate in your response to him. What it clearly said was not that it was removing them to another spot. The ruling was that actually between 405 and 1,136 tortoises and their eggs would be directly affected by it, not taken and moved somewhere else, but would be directly affected by it.

Let me go through a couple of other things here. In *TVA v. Hill*, the Supreme Court said—well, let me not do that one first.

Mr. Rauch, you said that EPA—who once again should be here—you saw their written testimony that was sent to us late last night.

Mr. RAUCH. I have seen their written testimony, sir, at some point before this hearing.

The CHAIRMAN. Did you get it last night?

Mr. RAUCH. I think so.

The CHAIRMAN. So they sent it directly to you?

Mr. RAUCH. I don't know how I get these things.

The CHAIRMAN. Well, we did not send it to you, so I am assuming they—

Mr. RAUCH. No. I assume it came from them somewhere. Yes, sir.

The CHAIRMAN. Don't you find it interesting that they will share their testimony with you right away, but they will not ask for a section 7 consultation on something that it directly affects? That is rhetorical. You know it. You do not have to answer that question.

I also would remind the Fish and Wildlife Service that there are some issues that were dealing with endangered species in which you are actually the action agency and should be initiating section 7 consultations at the same time, even though EPA should have been initiating section 7 consultations on this particular issue.

But in *TVA v. Hill*, the Supreme Court said that the ESA reflected—and I am quoting here—"the decision to give endangered species priority over the primary missions of Federal agencies." Was the Supreme Court right?

Mr. BEAN. One does not question the Supreme Court, sir.

The CHAIRMAN. Yes, you can. You should never confuse Supreme Court decisions with the Constitution. Let me ask you the question again. Was that statement correct?

Mr. BEAN. That statement, as I understand it, was part of the process by which the court in that case concluded that TVA had an obligation to refrain from completing the completion of Tellico Dam.

The CHAIRMAN. Do I take that as a yes, it was correct?

Mr. BEAN. As I said a moment ago—

The CHAIRMAN. Or no, you disagree with it?

Mr. BEAN. I do not disagree with the Supreme Court ever. It is pointless to do so.

The CHAIRMAN. So yes, it was correct?

Mr. BEAN. In our system, the Supreme Court has the ultimate say on these matters, as you know.

The CHAIRMAN. I am still waiting for your opinion. Let me go on and give you an easier one, then. Under the ESA, do listed species take first priority over the missions of Federal agencies?

Mr. BEAN. Under the ESA, Federal agencies have an obligation to ensure that their actions do not jeopardize the existence of listed species or adversely modify critical habitat. So to that degree, yes.

The CHAIRMAN. So they do. So do listed species take priority over EPA's Power Plant Rule?

Mr. BEAN. The same answer, I would say, that—

The CHAIRMAN. Yes?

Mr. BEAN [continuing]. What the law requires is that agencies ensure that their actions not jeopardize the existence of listed species.

The CHAIRMAN. Thank you. Which meant there should have been a consultation, a section 7 consultation. It is very clear and it is very obvious. I appreciate your efforts of being here.

Once again, I thank you for having the courage to come and talk to us and give us the input from the receiving end of what should have taken place. I wish the other agencies, instead of giving us unsolicited and unsigned testimony late last night, would have actually shown up here to answer the specific questions on why or what took place and why it did not.

At the same time, the question is not if ESA is ineffective or not. If the provisions of the Endangered Species Act are not being followed by the agencies, then we either change the law or we insist that the agencies do follow the law. They do not have the option of simply picking and choosing what is there and what is not there.

Can I just give one last comment here? The concept of extinction and lack of extinction, showing the success of an Act, is not really a good standard. As another Beane in Moneyball once said, "If you play the game and commit no errors, that is not a great deal. It could mean that you are simply too bad of a player to actually touch the ball."

We have a lot of work to do on the Endangered Species Act to make sure that it is doing what it was supposed to do—actually preserving and rehabilitating species, not just listing them and managing them. We also have to make sure that if the law is there, the law needs to be followed.

I appreciate your appearance here today. Thank you for spending your time with us. If there is no other business—I do want to mention that there may be other questions as time develops, and we would ask you to respond to those in writing. Under Committee Rule 4(h), the hearing record is held open for 10 business days.

Therefore, if there is nothing else—Mr. Thompson, anything else? We thank you for being here. The hearing is adjourned.

[Whereupon, at 12:03 p.m., the committee was adjourned.]

## [ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

## PREPARED STATEMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY

This statement describes the Environmental Protection Agency's role in addressing section 7(a)(2) of the Endangered Species Act (ESA) consultations, specifically as it relates to EPA's proposed greenhouse gas regulations for new and existing fossil fuel-fired power plants.

EPA is very aware of the requirements of section 7(a)(2) of ESA and is carefully considering those requirements as they relate to the EPA's proposed greenhouse gas regulations for new and existing power plants. I can assure you that any rule EPA finalizes regulating greenhouse gas emissions from new or existing fossil fuel-fired power plants will be based on sound science, will be legally sound, will comply with the ESA, and will also address any comments we receive on the ESA during the comment period on EPA's proposed rules.

EPA recognizes that ESA section 7(a)(2) requires Federal agencies, in consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service (together, the Services), to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of federally listed endangered or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. Importantly, under the Services' implementing regulations, section 7(a)(2) applies only to actions where there is discretionary Federal involvement or control, and consultation is required only for actions that may affect listed species or designated critical habitat. Consultation is not required where the action has no effect on such species or habitat. It is the Federal agency taking the action that evaluates and determines whether consultation is required.

EPA appreciates that section 7(a)(2) addresses a broad range of potential direct and indirect effects on listed species and critical habitat. However, not all Federal actions will meet the ESA's "may affect" threshold. In the Clean Power Plan proposal, the EPA noted that we did not believe there would be effects on listed species that would trigger the section 7(a)(2) consultation requirement. 79 Fed. Reg. 34830. 34,933-34 (June 18, 2014). At this point, the EPA has not finalized this determination or taken any final action in connection with this proposal or with the proposed rule for new power plants. The EPA would finalize its consideration of ESA requirements in connection with the issuance of any final rules and in that context would address any comments raising ESA issues in response to comments.

With regard to the ESA and the Clean Power Plan, EPA considered in the preamble to the proposed rule a variety of categories of potential effects. For example, as described in the proposed Clean Power Plan preamble and my response to your request letter, in the context of a separate rule involving GHG emission standards for light duty vehicles, EPA examined the GHG emission reductions achieved by that rule and concluded that available modeling tools cannot link the calculated small, time-attenuated changes in global metrics to effects on specific listed species in their particular habitats (Docket EPA-OAR-HQ-2009-4782). As EPA noted in the proposed Clean Power Plan, the agency believes the same reasoning would apply to the GHG emission reductions that would be achieved if the proposed regulations for fossil fuel-fired power plants are finalized. EPA thus proposed to conclude that any potential for effects related to GHG emission reductions would be too remote to call for section 7 consultation.

As explained in the preamble for the proposed Clean Power Plan, EPA also considered reductions in non-GHG air emissions that would be achieved by the rule, if promulgated. However, because EPA lacks relevant discretion under section 111 of the Clean Air Act to adjust the standard based on potential impacts of such pollutants on listed species, EPA proposed to conclude that section 7 consultation would not be required with regard to such emissions, consistent with longstanding ESA regulations promulgated by the Services.

As EPA further stated in the preamble to the proposed Clean Power Plan, the agency also considered other potential outcomes (beyond reductions in air pollutants) and whether any such matters would fall within the ESA regulatory definition of the effects of an action. As EPA explained, there are substantial questions as to whether any potential for relevant effects results from any element of the rule or would result instead from separate decisions and actions made in connection with the development, implementation, and enforcement of plans to implement the standards established in the rule. EPA recognized, for instance, that questions may exist whether decisions such as increased use of solar or wind power could have effects on listed species. Subsequent to publication of the proposal, EPA also received

questions from Chairman Bishop regarding whether the rule may have potential effects on certain facilities located in the state of Florida whose discharge effluent may provide a warm water refuge for manatees.

As EPA explained in the preamble to the proposed Clean Power Plan, the precise steps taken to implement any final rule are at this point uncertain and cannot be determined or ordered by the rule. EPA cannot predict with reasonable certainty where specific implementation measures would take effect or which measures would be adopted. It is thus uncertain whether particular types of facilities (such as new wind or solar facilities) might be built, where those facilities might be located, or how a future implementation plan for a particular state, such as Florida, might affect, if at all, the operations of a specific existing facility. Although EPA would only finalize its consideration of ESA issues in the context of a final rulemaking, EPA notes that section 7(a)(2) of the ESA does not provide for such speculation. Rather, effects must be caused by EPA's action and reasonably certain to occur to qualify for ESA purposes.

In conclusion, I would note that climate change is one of the greatest challenges of our time. It already threatens human health and welfare and economic well-being. The science is clear. The risks are clear. And the high costs of climate inaction are clear. We must act. As the climate changes, species will need to either adapt to the new local climate or migrate to stay within their preferred climate zone. The National Research Council stated that some species will be at risk of extinction, particularly those whose migration potential is limited whether because they live on mountaintops or fragmented habitats with barriers to movement, or because climatic conditions are changing more rapidly than the species can move or adapt. Likewise, the 2014 National Climate Assessment found that currently prevalent species may disappear from certain areas due to rapidly changing habitats caused by climate change and other stressors.

