

Conservation Matters: **Contributions from the Conservation Committee**

Administrative rule changes have been proposed to a key provision of the United States Endangered Species Act (ESA). While few of us have likely heard of Section 7 consultations, it has been one of the most effective tools for conservation of imperiled species in the United States. The ESA requires federal agencies to consult with wildlife experts at the Fish and Wildlife Service to ensure that their actions do not jeopardize a listed plant or animal, or harm or destroy its habitat. These independent reviews, called Section 7 consultations, provide a critical safety net for imperiled wildlife and help ensure that Federal actions do not harm those species most at risk. The proposed changes, designed to "streamline" the Section 7 process, allow non-biologists to make initial determinations relative to the project's impact on listed species. Someone without training in conservation, or

any biological science, will be able to evaluate projects and, in some cases, allow these to proceed without further review.

Currently, about 70,000 federal actions per year have triggered consultation. On average, between 85 and 95 percent are resolved through informal consultation. Informal consultation allows the project, with agreement from the wildlife agencies, to proceed with or without project modifications. These (external) informal reviews offer crucial safeguards for listed species.

When a Federal agency determines, through a biological assessment or other review, that its action is likely to adversely affect a listed species, the agency submits to the Service a request for formal consultation. During formal consultation, the Service and the agency share information about the proposed project and the species likely

to be affected. Following formal consultation, the Service prepares a biological opinion on whether the proposed activity will jeopardize the continued existence of a listed species. The Service also provides the consulting federal agency with reasonable and prudent alternative actions that are designed to minimize or mitigate for negative impacts to listed species.

As required by law, comments were solicited from the public regarding the proposed rule changes. Because of the importance of the proposed changes, the Conservation Committee developed a consensus that our Society should provide comments. With concurrence of the Executive Council and our President, we submitted the following letter. As of this writing, the fate of the proposed rule changes is unknown.



THE LEPIDOPTERISTS' S

A non-profit, scientific, international organization of professional and amateur lepidopterists since

October 13, 2008

Public Comment Processing

Attention: 1018-AT50

Division of Policy and Directives Management

U.S. Fish and Wildlife Service

4401 North Fairfax Drive, Suite 222

Arlington, VA 22203

Subject: Proposed Rule to Amend Part 402 of Title 50 of the Code of Federal Regulations Implementing Section 7 of the Endangered Species Act of 1973

Thank you for the opportunity to comment on the proposed rule to amend part 402 of title 50 of the Code of Federal Regulations, which implements section 7 of the Endangered Species Act of 1973. The Lepidopterist' Society has always placed much emphasis on the science associated with butterflies and moths. As stated in our Constitution,

“It shall be the purpose of the Society to promote internationally the science of lepidopterology in all its branches; to further the scientifically sound and progressive study of Lepidoptera; to publish periodicals and other publications on Lepidoptera; to facilitate the exchange of specimens and ideas by both the professional worker and the amateur in the field; to compile and distribute information to other organizations and individuals for purposes of education and conservation and appreciation of Lepidoptera; and to secure cooperation in all measures tending to that end.”

There are now members in over 60 countries although the majority are from all 50 United States and 10 Canadian provinces. The Lepidopterists' Society embraces a wide range of interests and viewpoints concerning the study and appreciation of moths and butterflies.

Members of the Society have a keen interest in lepidopteran conservation, and the Society has a standing Conservation Committee. Across the country, the members of the Society have worked with the U.S. Fish and Wildlife Service (FWS) and many other federal, state and local partners to conserve threatened and endangered species through several authorities provided under the Endangered Species Act of 1973. Our members have provided much of the science that underlies the recovery and management of listed lepidopteran species and have served numerous roles on Recovery Teams across the country.

Especially relevant to our members' interests and work to conserve lepidopteran species and priority habitats in recent years is a close working relationship with the FWS and Federal action agencies to implement mitigation projects for species under section 7 formal consultations that have required the implementation of reasonable and prudent alternatives to proposed agency actions. In these cases, our members helped shape constructive compromises that have allowed those actions to proceed while avoiding harm to protected species and their habitats. For example; military training exercises still proceed on sites occupied by listed butterflies, but with relatively minor adjustments to ensure that listed species persist on bases; National Forests still manage for timber production, but use strategies that minimize impacts to sensitive species; and highways are maintained and upgraded in ways that do not degrade habitats and hydrology for listed species. The Service has a tradition of developing project alternatives that have ensured a project was able to move forward to accomplish its original purpose (i.e., the bridge or highway was built), but ESA-listed species and their habitat were protected. It is critical that this balance between the federal action agency pursuing its specific mission and charge while also meeting its affirmative, overriding and mandatory duty to avoid jeopardizing the continued existence of listed species be maintained.

The Lepidopterists' Society believes the proposed changes to the section 7 regulations would, in many cases, be detrimental to listed species and habitat conservation on the ground. We understand that approximately 85% of Section 7 consultations are “informal”, reflecting the solid partnerships between federal agencies and the small impacts that most activities may have on listed species. We also understand that very large projects will likely require formal Section 7 consultations under the proposed rules. However, we worry that seemingly insignificant projects that have significant impacts to listed species will move forward without having the benefit and expertise of the FWS.

The proposed rule appears to provide nearly unilateral authority to federal action agencies, and shifts the threshold of impact that triggers a consultation away from species protection towards project imperatives. Threshold decisions are now placed in the hands of federal action agencies with incentives to move projects forward, not conserve our national natural heritage. There are likely thousands of examples across the country where action agencies have developed internal determinations of no or minimal effect on listed species that have been reversed following the Service's review. We believe that the proposed rule will create pressure within action agencies to ignore or downplay negative impacts to listed lepidopteran species. The proposed rule allows action agencies to remove from action those effects that are deemed “inconsequential, uncertain, unlikely or beneficial that they are, as a practical matter, tantamount to having no effect on a listed species or critical habitat.” These undefined qualifications provide substantial leeway for projects to move forward without consultation.

Moving initial determinations of impact to action agencies is further complicated by the proposed rule's new definition “effects of the action” and the new causation standard to be used for determining effects of agency actions. Based on our reading, ongoing impacts to listed species resulting from historical actions from action agencies will not be addressed unless a newly proposed action is determined by “in house” staff to exacerbate the ongoing negative impact. Again, the pressure to find “no effect of action” within action agencies will be intense.

Cumulative impacts to listed species from seemingly minor actions will likely be ignored. The resulting incremental impacts to habitat can create unstable conditions to populations, especially as habitats for listed species become increasingly fragmented.

The Lepidopterists' Society's Position on the Proposed Rule

The Lepidopterists' Society believes the proposed changes weaken the ESA by giving decision making authority for informal consultation to action agencies that have no vested interest in conserving listed species. Combined with newly proposed and ambiguous definitions and the shortened timelines for informal and formal consultation by the Services, the Section 7 consultation process will be severely weakened. If implemented, the proposed rule will give Federal action agencies unilateral authority to determine whether an informal consultation takes place. Many Federal actions would be expected to move forward with little to no involvement of the Services, to the detriment of the many listed lepidopteran species that are dependant upon federal lands, managers, and agencies.

In summary, the Lepidopterists' Society has strong concerns with the changes proposed by the Services in the proposed rule and believes these changes would allow Federal agency actions to move forward with little regard to their impacts on ESA-listed species and their habitat.



Dr. John A. Shuey
Chair of the Conservation Committee
Lepidopterists' Society
