The Consultation Provision of Section 7(a)(2) of the Endangered Species Act and Its Application to Delegable Federal Programs

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INTRODUCTION

The Endangered Species Act of 1973 (ESA)\(^1\) is widely heralded as the most comprehensive statute ever enacted for the protection of wildlife.\(^2\) One of the ESA's key provisions is section 7(a)(2), which

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requires "[e]ach Federal agency" to insure—in consultation with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS)—that "any action authorized, funded, or carried out by such agency" is not likely to jeopardize endangered or threatened species or to result in adverse modification of their critical habitat. This provision reflects Congress' intent that no federal activity contribute to the extinction of a species.

Congress, however, often has blurred the distinction between federal and nonfederal activity by enacting statutes creating regulatory programs that are designed to be carried out by the states with varying degrees of federal oversight and assistance. In general, a federal agency charged with administering one of these programs is authorized to delegate the program to a state if the state meets certain statutory requirements. If a state does not meet these requirements, or simply does not request delegation, the federal agency will implement the program directly. If a state does meet these requirements, the federal agency usually must delegate the program, but it typically retains oversight authority to insure that the state implements the program according to federal standards.

Section 7(a)(2), by its plain language, should apply to this type of program. The federal agency's "actions" in delegating the program and in overseeing its administration by a state fall within section 7(a)(2)'s triggering language: "any action funded, authorized, or carried out by such agency." Therefore, the federal agency should exercise its authority to insure, in consultation with Secretary, that the delegation and the state's subsequent administration of the federal program will not harm endangered or threatened species. It may even be argued that because the state, in essence, steps into the federal agency's shoes, state actions taken pursuant to the federal program should be deemed federal action, requiring the state to assume section 7(a)(2) obligations directly.

Despite the clarity of section 7(a)(2)'s language, the Federal Government appears to be in disarray as to whether the provision applies to delegable federal programs. The U.S. Environmental Protection Agency (EPA) and the Office of Surface Mining (OSM), for example, take inconsistent approaches to complying with section 7(a)(2) in delegating and overseeing some of these programs. Indeed, an FWS request to EPA for consultation over a delegable program touched off

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4. See infra notes 14-29 and accompanying text.
litigation that recently settled, but the issue is almost certain to arise again. A federal agency's reluctance to comply with section 7(a)(2)'s mandate is understandable. The agency may oversee hundreds of state actions each year taken pursuant to a delegated federal program that would require section 7(a)(2) scrutiny; complying with section 7(a)(2) could considerably expand agency activity and consume substantial agency resources. Nonetheless, this article concludes that the weight of authority and sound policy support applying section 7(a)(2) to all but a few delegable federal programs.

A. Section 7(a)(2) and the Duty To Consult

Section 7(a)(2) obliges federal agencies to consult with the Secretary before taking any action that may affect an endangered or threatened species and to use the information learned from consultation to insure that the subject species are not harmed.

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation with the affected States, to be critical.

Two agencies share responsibility for implementing the ESA; the Secretary of the Interior, acting through FWS, is responsible for terrestrial and freshwater species, and the Secretary of Commerce, acting through NMFS, oversees marine species.

On its face, section 7(a)(2) imposes two obligations on all action agencies. The primary obligation is the duty to insure that any action the agency funds, authorizes, or carries out is not likely to jeopardize listed species or adversely modify critical habitat. The second obli-

8. Id. §§ 1532(15), 1533. Usually this article refers to FWS and NMFS as the "Service," and uses "action agency" to designate the federal agency whose "action" triggers section 7(a)(2).
9. This article uses the phrase "listed species" to include both endangered and threatened species as determined by the Secretary under id. § 1533. An "endangered species" is defined as "any species which is in danger of extinction throughout all or a significant portion of its range." Id. § 1532(6). A "threatened species" is "any species which is likely to become an endangered species within the foreseeable future." Id. § 1532(20).
igation is the *duty to consult* with the Secretary in carrying out the duty to insure. This article focuses on the duty to consult, which appropriately has been called the "heart" of section 7. Through the consultation procedure an action agency obtains the information necessary to determine whether that activity may violate the ESA and, consequently, whether the proposed activity may proceed. If an agency exercises its duty to consult in good faith, its action becomes virtually immune to an ESA challenge.

Although the duties to insure and consult fall to the action agency, section 7(a)(2) applies to "any action," implying that the nature of the actual actor is unimportant so long as a federal agency at least authorizes or funds the activity. This aspect of the provision suggests that section 7(a)(2) may apply to state actions taken pursuant to delegated federal programs.

### B. Delegable Federal Programs

Congress is increasingly relying on delegable federal programs for initiatives that require widespread micromanagement or that may unduly intrude upon state interests. The Supreme Court calls this approach "cooperative federalism." Under this framework, the state is offered "the choice of regulating (private) activity according to federal standards or having state law pre-empted by federal regulation." A fundamental precept of cooperative federalism is that although the state will assume certain federally mandated duties, state sovereignty will be respected through carefully demarcated spheres of responsibility. Over the last thirty years, Congress has increasingly relied on cooperative federalism in environmental and land use regulation.

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12. See Houck, supra note 11, at 15,001-02.
13. See infra note 80 and accompanying text.
16. See infra notes 90, 211 and accompanying text.
Locally controlled management or implementation of federal laws regulating the environment or land use imparts the flexibility needed to accommodate regional variability. Also, federal environmental and land use statutes tend to be viewed as more intrusive on state interests than federal laws in other areas, such as economic regulation, resulting in increased political pressure to provide some measure of state control.\textsuperscript{18}

The Federal Water Pollution Control Act,\textsuperscript{19} popularly known as the Clean Water Act (CWA), utilizes a cooperative federalism approach in allowing EPA to delegate to the states administration of the National Pollutant Discharge Elimination System (NPDES).\textsuperscript{20} Section 402(a) of the CWA requires any person seeking to discharge a pollutant into the waters of the United States to obtain an NPDES permit from EPA.\textsuperscript{21} Under section 402(b), EPA must delegate the authority to issue NPDES permits to a state if that state meets certain criteria.\textsuperscript{22} After delegation, EPA may review and veto, if necessary, each state-proposed permit; the agency also must periodically review overall state administration for compliance with the CWA.\textsuperscript{23} This article will use the NPDES program as a model for analysis.

Even a partial list of other delegable federal programs reveals the importance of cooperative federalism and the scope of activity subject to federally directed state regulation. Agencies may delegate authority for administering the following programs: the CWA's section 404 dredge-and-fill permitting program;\textsuperscript{24} the new permitting program under title V of the Clean Air Act Amendments of 1990;\textsuperscript{25} the drinking water and ground water protection programs under the Safe Drinking Water Act;\textsuperscript{26} the coal mining permitting programs under the Surface Mining Control and Reclamation Act of 1977 (SMCRA);\textsuperscript{27}

\textsuperscript{18} Land use regulation, for example, has been considered as essential to state sovereignty. Providing a stable economy, on the other hand, is considered one of the Federal Government's central functions. Leman & Nelson, supra note 14, at 1003-04.


\textsuperscript{20} Id. § 1342(b).

\textsuperscript{21} Id. § 1342(a). The Act covers the discharge of pollutants into the "navigable waters" of the United States. Id. § 1311(a). Because this phrase is broadly defined to include intermittent streams and wetlands, see Frederick R. Anderson et al., Environmental Protection: Law and Policy 347-53 (1984), the NPDES program creates a pervasive regulatory scheme for discharges into surface waters. The NPDES program is discussed further infra part I.C.

\textsuperscript{22} Id. § 1342(b).

\textsuperscript{23} Id.

\textsuperscript{24} Under section 404, the Army Corps of Engineers (the Corps) may delegate to the states the authority to issue permits required for the discharge of dredged or fill material into the navigable waters of the United States. Id. § 1344(g)-(k).


\textsuperscript{26} 42 U.S.C. § 300g-2, 2(a) (1988).

\textsuperscript{27} 30 U.S.C. §§ 1234(a), 1253 (1988).
the hazardous waste tracking program under the Resource Conservation and Recovery Act;\textsuperscript{28} and a program for regulating certain hazardous material under the Atomic Energy Act.\textsuperscript{29} A state that agrees to accept all the federal programs that Congress has designated as delegable may end up administering thousands to tens-of-thousands of permit actions every year. If it applies, section 7(a)(2) may require a state to consult for each of these permit actions.

C. The Application of Section 7(a)(2)'s Consultation Requirement to Delegable Federal Programs

If a federal agency retains sole authority to administer a program, the law is fairly clear that the agency must comply with section 7(a)(2) in undertaking each action that may affect listed species. Unfortunately, there is virtually no authority bearing on whether section 7(a)(2) applies if the program is delegated and a state agency will be undertaking essentially the same action.\textsuperscript{30} The best guidance is the language of section 7(a)(2) and the implementing regulations jointly promulgated by FWS and NMFS (joint regulations).\textsuperscript{31} Although this language suggests that Congress did intend section 7(a)(2) to apply to delegated federal programs, it is far from conclusive.

Section 7(a)(2)'s applicability to delegable federal programs will turn primarily on the extent to which section 7(a)(2) provides independent or "cross-cutting" authority for agency action.\textsuperscript{32} The key issue is whether section 7(a)(2) requires an action agency to consider the impact of its action on listed species, and modify that action if necessary, even if the relevant programmatic statute limits the agency's discretion in undertaking that action. While the balance of authority does suggest that section 7(a)(2) applies regardless of any limitation on an action agency's discretion under its programmatic statute, a number of exceptions to this general proposition may exist depending on the particular programmatic statute at play.

\textsuperscript{28} 42 U.S.C. § 6926(b) (1988).
\textsuperscript{31} 50 C.F.R. §§ 402.01-402.16 (1993).
\textsuperscript{32} See generally Leman & Nelson, \textit{supra} note 14, at 1016 (using the term "cross-cutting" to define conditions placed on various statutory grant programs by environmental and other statutes).
The issue of section 7(a)(2)’s applicability to delegable federal programs is important because of the crucial role that section 7(a)(2) plays in protecting listed species. The consultation requirement ensures that the action agency will seriously consider the impact of its proposed action on listed species and take the necessary steps to prevent their jeopardy. Moreover, consultation is designed to occur sufficiently early in the planning process to allow agencies to consider the fullest possible range of less harmful alternatives. By choosing the alternative that provides for the maximum protection of listed species while allowing the perhaps modified project to proceed, the action agency avoids a potential all-or-nothing conflict between the species and the project. Given the tremendous breadth of state actions taken under delegated federal programs, applying the consultation requirement to such programs could greatly enhance listed species protection.

Moreover, this issue has recently surfaced in court. In June 1991, Edward Mudd sued EPA and the Alabama Department of Environmental Management (ADEM), alleging that the agencies had violated section 7(a)(2) by failing to consult for various actions taken in connection with ADEM’s administration of the NPDES program.33 The


Mudd claimed, among other things, that EPA had failed to consult formally in reviewing a proposed NPDES permit, in conducting the 1991 “triennial review” of Alabama’s water quality standards used in the NPDES program, in approving ADEM’s issuance of several general NPDES permits, and in granting ADEM federal funds to be used for the NPDES program. Mudd’s Motion for Summary Judgment, supra at 2-3, 5-6. Mudd pointed out that FWS had requested that EPA enter into formal consultation regarding EPA’s triennial review of Alabama water quality standards and its review of the general NPDES permits proposed by ADEM. Id. at 3-4.

EPA asserted that it was not obliged to consult on most of the actions. Memorandum of Law in Support of EPA’s Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgement, at 38-46, 55-59, Mudd v. Reilly [hereinafter EPA’s Memorandum in Support of Summary Judgment]. EPA claimed that it does not have to consult when it does not veto a state-proposed individual NPDES permit because consideration of the permit is not a “review” or “approval” of the permit and therefore is not a federal action. Id. at 38-42. EPA did not deny that it “approved” the general NPDES permits, but argued that since it had no discretion in the approval, it was not an “action” under section 7(a)(2). Id. at 55-57. In the alternative, EPA contended that general NPDES permits do not “affect” listed species because each general permit incorporates substantive standards equal to those for individual permits. Id. at 57-59. On the funding issue, EPA argued that providing the funds similarly did not have an “effect” on listed species because the funds were only for “administrative” support of the NPDES program and did not give EPA any control over the program. Id. at 42-46.

EPA did tacitly admit that it should consult on its “triennial review,” by asserting that it had informally consulted for the 1991 triennial review and would consult in conducting
case settled in May 1993, when EPA agreed to reopen and formally consult on its 1991 triennial review of Alabama’s water quality standards, and Mudd agreed to the dismissal with prejudice of his other claims.\textsuperscript{34} The settlement agreement states that no party admits liability or error,\textsuperscript{35} however, and the case has already drawn critical commentary.\textsuperscript{36} Thus, \textit{Mudd v. Reilly} is probably only an opening skirmish.

This article unfolds as follows. Part I provides some background, first discussing the various consultation processes and the importance of consultation to endangered species protection, and then describing the NPDES program in detail. Part II confronts the question of whether and to what extent section 7(a)(2) overrides the programmatic statutes otherwise controlling the delegation and oversight of federal programs. After concluding that section 7(a)(2) should override inconsistent programmatic statutes, this section next examines whether the provision’s reach can be limited in certain factual situations. Part III begins by analyzing how section 7(a)(2) could affect an action agency’s delegation decision and exercise of oversight authority. It then discusses two alternative methods for an action agency to comply with section 7(a)(2) in delegating and overseeing the state administration of federal programs: engaging in incremental consultation or delegating the duty to consult to the state.

\section*{I
BACKGROUND}

This part provides a backdrop for analysis. After describing the consultation procedure as set forth in section 7(a)(2) and the joint regulations, it discusses the value of consultation in protecting listed species. It closes by describing the NPDES program in detail.

\begin{footnotesize}
\begin{enumerate}
\item such reviews in the future. \textit{See id.} at 31-38. In asserting that it would consult in the future, EPA relied on a July 1992 memorandum of agreement with the Service. \textit{Id.} at 32-35 (\textit{citing Coordination Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Development of Water Quality Criteria and Standards Under the Clean Water Act (July 27, 1992) [hereinafter MOU]}). In the MOU, EPA agreed to enter into section 7(a)(2) consultation in establishing EPA water quality criteria and, in some cases, in reviewing state water quality standards during the triennial review. \textit{See EPA’s Memorandum in Support of Summary Judgement, \textit{supra}, at 32-35.}
\item Mudd v. Reilly, No. CV-91-P-1392-S (N.D. Ala. May 18, 1993) (settlement agreement) at 3-4. EPA also agreed to pay Mudd $39,000 in attorney fees. \textit{Id.} at 4.
\item \textit{Id.} at 3-4.
\item \textit{See, e.g., William H. Satterfield et al., Who’s Afraid of the Big Bad Beach House?, NAT. RESOURCES & ENV’T, Summer 1993, at 13. These commentators attack the notion that section 7(a)(2) may apply to federal oversight of state NPDES programs, claiming that such application “is clearly not required by the ESA” and “could seriously jeopardize the entire NPDES permitting system.” \textit{Id.} at 62.
\end{enumerate}
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A. Consultation and Action Agency Obligations

If a federal action may affect a listed species, the agency must enter into consultation with the Service. The consultation process culminates with a biological opinion from the Service stating whether the agency action is likely to jeopardize the listed species or adversely affect critical habitat. While the agency need not comply with the Service’s recommendations, courts give substantial deference to the Service’s position.

A federal agency about to authorize, fund, or carry out an activity must take one of two courses of action depending on the nature of the proposed activity. If the action is a construction project or an undertaking with a similar physical impact and would constitute a “major federal action significantly affecting the quality of the human environment” under the National Environmental Policy Act (NEPA), the action is deemed a “major construction activity.” For this type of activity, the agency, or a nonfederal applicant under agency supervision, must complete a biological assessment to determine whether formal consultation is necessary.

In the biological assessment process, the agency or applicant first determines whether any listed or proposed listed species, or their critical habitat, may be present in the area of the proposed action. If the species may be present, the agency or applicant must prepare an assessment evaluating the action’s “potential effects” on the species or habitat and “determine whether any such species or habitat are likely to be adversely affected.” If the biological assessment concludes that the proposed action “is not likely to adversely affect” a listed


39. 50 C.F.R. § 402.02 (1993). The preamble to the joint regulations gives the following examples of major construction activities: the construction of dams, buildings, pipelines, and roads, water resource developments, and channel improvements. Preamble to Final Rule, supra note 5, at 19,936.

40. An applicant is “any person” as defined by the ESA “who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.” 50 C.F.R. § 402.02.

41. 16 U.S.C. § 1536(c) (1988); 50 C.F.R. § 402.12(b).

42. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c). The area of the proposed action is not “merely the immediate area involved in the action” but “all areas to be affected directly or indirectly.” Id. § 402.02.

43. 50 C.F.R. § 402.12(a). The agency has 180 days to prepare the assessment. 16 U.S.C. § 1532(c)(1); 50 C.F.R. § 402.12(i).
species or critical habitat and the Service concurs in writing, the action may proceed. Otherwise, the agency must request formal consultation.

The action agency must determine "at the earliest time" whether the proposed action "may affect" listed species or critical habitat. If the "may affect" determination is affirmative, the action agency must enter into either informal or formal consultation. In informal consultation, the action agency determines whether the proposed action is likely to have an adverse effect on listed species or critical habitat. If the agency finds no likely adverse effect, and the Service concurs, consultation is terminated. Otherwise, formal consultation is required.

Formal consultation is triggered by a written request from the action agency. The request must provide detailed information about the proposed action, which includes "the best scientific and commercial data available" regarding the action's possible effects on listed species or critical habitat. The Service then has ninety days to analyze the information and make a jeopardy assessment in the form of a biological opinion. In assessing the information, the action agency has the burden of proving that the proposed action is not likely to

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44. 50 C.F.R. § 402.12(k); see also id. § 402.14(d)(3).
45. Id. § 402.14.
46. Id. § 402.14(a).
47. See GAO ESA STUDY, supra note 37, at 16. The regulations state that "[i]f such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section." 50 C.F.R. § 402.14(a). Paragraph (b) allows an action agency to forego formal consultation if, as a result of a biological assessment or "informal consultation," the action agency finds that the proposed action is not likely to affect adversely any listed species or critical habitat. Id. § 402.14(b)(1). In effect, paragraph (b) allows the action agency to postpone formal consultation until it finds that an adverse effect is likely, but the action agency may still request formal consultation at the "may affect" stage. See GAO ESA STUDY, supra note 37, at 37. The regulations define "informal consultation" as including "all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, [that are] designed to assist the Federal agency in determining whether a formal consultation is required . . . ." 50 C.F.R. § 402.13(a).
48. See generally Kilbourne, supra note 37, at 531 (observing that the consultation process involves three steps of increasing scrutiny, the "may affect" determination, the "adverse effect" determination, and the "jeopardy" determination).
49. See 50 C.F.R. § 402.14(b).
50. Id. § 402.14(c). Another, independent avenue to formal consultation is "early consultation." If a prospective applicant for a federal permit has "reason to believe" that a listed species or critical habitat may be affected by the proposed activity, the prospective applicant can prompt the action agency to consult with the Service. 16 U.S.C. § 1536(a)(3); see also 50 C.F.R. § 402.11(b). Early consultation concludes in the Service issuing a "preliminary biological opinion," id. § 402.11(c)-(d), which should be substantively the same as a biological opinion. 16 U.S.C. § 1536(a)(3)(B); 50 C.F.R. § 402.11(e).
51. 50 C.F.R. § 402.14(d).
52. See id. § 402.14(e). The Service then has 45 days in which to prepare the final biological opinion, although this deadline may be extended. Id.; see also Preamble to Final Rule, supra note 5, at 19,941, 19,951.
jeopardize listed species or adversely affect critical habitat. Before finalizing the biological opinion, the Service must discuss its findings and conclusions with the action agency and the applicant, if any. In practice, the Service usually provides the action agency with a draft biological opinion.

The biological opinion must include the Service's conclusion whether the action "is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat," the Service's reasoning and supporting data, and reasonable and prudent alternatives (RPA's), if any, that could be taken to avoid jeopardy. There are three types of biological opinions: a no-jeopardy opinion, a no-jeopardy opinion contingent on the implementation of specified RPA's, and a jeopardy opinion. A biological opinion may be accompanied by an incidental take statement, which allows the destruction of listed species to a specified extent if the taking is incidental to the activity and is not likely to result in jeopardy.

During consultation, section 7(d) bars the action agency and applicant, if any, from making "any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable or prudent alternative measures which would not violate section (7)(a)(2)." Formal consultation ends with the Service issuing the final biological opinion.

Notwithstanding the Service's opinion, the action agency has sole authority to decide whether the proposed action is likely to result in jeopardy or adversely modify critical habitat and, thus, whether to proceed with the action. If the action agency's decision is chal-

54. 50 C.F.R. § 402.14(g)(5).
55. Kilbourne, supra note 37, at 542.
56. 50 C.F.R. § 402.14(g)-(h); see 16 U.S.C. § 1536(b)(3)(a).
60. Id. § 1536(b)(3)(A); Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1450 (9th Cir. 1992).
61. E.g., Pyramid Lake Paiute Tribe v. Department of Navy, 898 F.2d 1410, 1414 (9th Cir. 1990); Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1037 (8th Cir. 1988); Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1460 (9th Cir. 1984), cert. denied, 471 U.S. 1108 (1985);
lenged, however, a court will afford the Service's opinion great weight in determining whether the action agency has complied with section 7(a)(2). If the Service has issued a no-jeopardy opinion contingent on implementation of RPA's, the action agency may institute its own alternatives and proceed with the action, but any significant deviation from the Service's RPA's increases the risk that the action agency has not fulfilled its duty to insure.

Even after the action agency has determined that no jeopardy will occur, new circumstances may require the agency to reinstitute formal consultation. Reasons for reinitiation include new information, project modifications creating unanticipated impacts, or a new listing or critical habitat designation. Upon reinitiation, the activity must halt until the Service issues another biological opinion.

Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1049 (1st Cir. 1982); Sierra Club v. Froehlke, 534 F.2d 1289, 1303 (8th Cir. 1976).


63. See, e.g., Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1193 (9th Cir. 1988) (quoting in part Village of False Pass v. Watt, 565 F. Supp. 1123, 1160-61 (D. Alaska 1983), aff'd sub nom., Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984)). In addition, the agency must still "use the best scientific and commercial data available," 16 U.S.C. § 1536(a)(2), when making its independent jeopardy assessment. If the agency did not forward the best data to the Service or ignores new data in making its jeopardy decision, the agency will be in violation of section 7(a)(2). See, e.g., Conner v. Burford, 848 F.2d 1441, 1453-54 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989); Roosevelt Campobello, 684 F.2d at 1049. To mount a successful challenge to an action agency's decision that is consistent with the biological opinion, the plaintiff must adduce, at a minimum, new information that the Service did not consider in formulating the opinion. See, e.g., Pyramid Lake, 898 F.2d at 1415; Resources Ltd. Inc. v. Robertson, 789 F. Supp. 1529, 1535 (D. Mont. 1991). Cf. Greenpeace Action v. Franklin, 982 F.2d 1342, 1355-56 (9th Cir. 1992) (holding that action agency did not violate section 7 because there was merely a difference in scientific opinion between the Service and plaintiff's expert).

64. Marsh, 816 F.2d at 1387; see also Tennessee Valley Auth. v. Hill, 437 U.S. 153, 186 (1978) ("[t]he clear Congress foresaw that § 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the [ESA]."); Conner, 848 F.2d at 1458 n.2 (stating that agencies have a duty of continued consultation when a biological opinion is based on inadequate data); Sierra Club v. Lyng, 694 F. Supp. 1260, 1270 (E.D. Tex. 1988) (noting that section 7 imposes a "continuing duty" for federal agencies to insure no jeopardy), aff'd in part & rev'd in part on other grounds sub nom., Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991). For a good discussion of reinitiation, see Deborah L. Freeman, Reinitiation of ESA § 7 Consultations Over Existing Projects, NAT. RESOURCES & ENV'T, Summer 1993, at 17.

65. 50 C.F.R. § 402.16; see Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1450-51 (9th Cir. 1992).

B. The Value of Consultation

The consultation process is crucial to section 7(a)(2)'s substantive goals. It is, to borrow Professor Houck's analogy, "the conscience of section 7." Its chosen mechanism was for agencies to utilize the expertise of the Service to identify a proposed project's potential effects on listed species and the means of reducing these effects early in the planning process.

Several aspects of the section 7 consultation procedure are key to its value in the agencies' decisionmaking process. First, the procedure attempts to divorce biological decisionmaking from policy decisionmaking. The assessment of biological data is entrusted to FWS and NMFS, which Congress created primarily to protect and conserve wildlife and which consequently have developed expertise in assessing human impacts on wildlife. In contrast, the action agencies may

67. See Houck, supra note 11, at 15,001.
69. See, e.g., H.R. Rep. No. 567, supra note 68, at 24-25; H.R. Rep. No. 1625, supra note 68, at 20 (1978). This mechanism was originally codified as a mere ten-word clause. The original Section 7 read, in full:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

71. See Erdheim, supra note 30, at 651-52. This expertise is provided by FWS' Office of Endangered Species and NOAA's Office of Marine Mammals and Endangered Species,
have little or no expertise in conserving species and may have potentially conflicting programmatic mandates.\textsuperscript{72} Also, FWS and NMFS are less susceptible to "capture" by prodevelopment interests than are action agencies, since FWS and NMFS are less likely to come into regular contact with such interests than action agencies.\textsuperscript{73} By requiring agencies to consult with the Service, Congress sought to eliminate the temptation for biological decisionmaking to be treated superficially or to be influenced by nonbiological factors.

Congress also designed the consultation process so that the Service would be engaged in the planning process as early as possible.\textsuperscript{74} This allows the action agency to identify the fullest range of alternatives. By maximizing the range of available alternatives, timely consultation increases the likelihood of finding an option that lets the project proceed while protecting the listed species, thereby avoiding an all-or-nothing conflict.\textsuperscript{75}

which are staffed with professional biologists specializing in endangered species protection. See YAFFEE, supra note 57, at 72, 107-09.

\textsuperscript{72} See YAFFEE, supra note 57, at 97, 117-20. For example, both Congress and courts have recognized the Federal Energy Regulatory Commission's (FERC) history of ignoring environmental considerations in hydropower licensing. See Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 876 F.2d 109, 117-18 (D.C. Cir. 1989) (citing and quoting congressional committee language to the same effect). The Bureau of Land Management (BLM), the largest land managing agency in the nation, similarly is claimed to have been a virtual captive of the livestock industry and other commodity interests throughout most of its history. See Rod Greeno, \textit{Who Controls the Bureau of Land Management?}, 11 J. ENERGY, NAT. RESOURCES & ENVTL. L. 51, 52, 61, 67 (1990); U.S. PUB. LAND LAW REVIEW COMM'N, \textit{ONE-THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND CONGRESS} 156-57 (1970). The same may be said for the Forest Service, the country's second largest land managing agency. See, e.g., Sierra Club v. Lyng, 694 F. Supp. 1260, 1268 (E.D. Tex. 1988), \textit{aff'd in part and rev'd in part on other grounds sub nom.}, Sierra Club v. Yeutter, 926 F.2d 429, 432 (5th Cir. 1991).

\textsuperscript{73} Capture typically occurs as the result of repeated and concerted lobbying of agency personnel by their regulated constituents, often well-financed industry groups. See, e.g., MARVIN H. BERNSTEIN, \textit{REGULATION OF BUSINESS BY INDEPENDENT COMMISSIONS} (1955) (describing agency influence and control by the regulated industry; a concept later termed "capture" by regulatory critics); Glen O. Robinson, \textit{The Federal Communications Commission: An Essay on Regulatory Watchdogs}, 64 VA. L. REV. 169, 191-92 (1978).


\textsuperscript{75} Numerous commentators have observed that political pressure from within the administration, as well as outside, caused the Service's objectivity to lapse on occasion, if not regularly, during the Reagan-Bush era. Houck, supra note 10, at 319-29; Dale D. Goble, \textit{Of Wolves and Welfare Ranching}, 16 HARV. ENVTL. L. REV. 101, 125-26 (1992); Doremus, supra note 2, at 311, 312 & n.309, 324-25; Richard J. Tobin, \textit{Interorganizational Implementation of the Endangered Species Act: A Hawaiian Case Study}, 4 J. LAND USE & ENVTL. L. 309, 319, 334 (1989); Plater, supra note 2, at 829; Coggins & Russell, supra note 2, at 1466.
In practice, the Service’s position is afforded great weight. The courts generally give substantial deference to the Service’s position regarding both the need to consult and the assessment of jeopardy, thereby giving action agencies significant incentive to take the Service seriously. In fact, in 1978 and again in 1979, Congress explicitly endorsed this now well-established deference. Not surprisingly, few cases have been reported since in which an action agency undertook an activity that was inconsistent with a biological opinion. In challenges to action agency decisions consistent with a biological opinion, the courts essentially view an action agency’s conformance as prima facie evidence of section 7 compliance.

The consultation process appears to meet Congress’ goal of reducing all-or-nothing conflicts between economic development and endangered species protection. The Endangered Species Committee (ESC)—widely known as the God Squad—has authority to exempt activities from section 7(a)(2). Consequently, an all-or-nothing pro-


79. The one case in which the court upheld an agency action that was inconsistent with a biological opinion is best considered an outlier. In Tribal Village of Akutan v. Hodel, 869 F.2d 1185 (9th Cir. 1988), the action agency had implemented measures different than those suggested by the Service to reduce the risk of oil spills during the proposed development of oil and gas leases. Id. at 1193. See also infra notes 360-61 and accompanying text.

80. See, e.g., Pyramid Lake Paiute Tribe v. Department of Navy, 898 F.2d 1410, 1415-16 (9th Cir. 1990); North Slope Borough v. Andrus, 642 F.2d 589, 610 (D.C. Cir. 1980); Village of False Pass v. Clark, 733 F.2d 605, 611 (9th Cir. 1984); Stop H-3 Ass’n v. Dole, 740 F.2d 1442, 1460 (9th Cir. 1984), cert. denied, 471 U.S. 1108 (1985); Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 684 (D.C. Cir. 1982).

81. See, e.g., Portland Audubon Soc’y v. Endangered Species Comm., 984 F.2d 1534, 1536, 1537 (9th Cir. 1993); ROHLF, supra note 37, at 29.

82. 16 U.S.C. § 1536(e)-(o) (1988). For a discussion of the ESC exemption process, see BEAN, supra note 10, at 370-73; Kilbourne, supra note 37, at 560-65; Coggins & Russell, supra note 2, at 1480-95.
ject-species conflict eventually culminates in an ESC hearing or withdrawal of the proposed project. Since it was established by the 1978 Amendments to the ESA, the ESC has considered only three projects, a remarkable record suggesting that consultation is successful in generating the alternatives necessary to avoid irresolvable conflicts. Moreover, several empirical studies of consultation also indicate its effectiveness in identifying alternatives to avoid completely abandoning a proposed project. A 1992 General Accounting Office (GAO) study of consultations during fiscal years 1987-91 found that over ninety percent of all formal consultations resulted in a no-jeopardy opinion, and that ninety percent of all the projects for which a jeopardy opinion had been issued were allowed to go forward after the project sponsor adopted the Service's suggested alternatives. A World Wildlife Fund study for the same time period obtained similar

83. In fact, only six exemption applications have ever been submitted, three of which were withdrawn by the applicant. See GAO ESA STUDY, supra note 37, at 19, 37-38. Of the three applications that made it to a final decision, the first requested the ESC to exempt the proposed Tellico Dam in Tennessee, which threatened the endangered snail darter. The ESC denied the exemption. See, e.g., BEAN, supra note 10, at 364-65; Ronald H. Rosenberg, Federal Protection of Unique Environmental Interests: Endangered and Threatened Species, 58 N.C. L. REV. 491, 521-23 (1980); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 161 (1978). The dam was nonetheless completed by way of an overruling rider to a 1980 appropriation statute. Energy and Water Appropriation Act of 1980, Pub. L. No. 96-69, tit. IV, 93 Stat. 449 (1979). The ESC next considered the Grayrocks Dam in Wyoming, which threatened habitat of the endangered Whooping Crane. It granted the exemption, but with substantial mitigation measures. See, e.g., C. Peter Goplerud, The Endangered Species Act: Does It Jeopardize the Continued Existence of Species, 1979 ARIZ. ST. L.J. 487, 506. Most recently, the ESC considered old growth timber harvesting on federal land providing habitat for the endangered spotted owl in Oregon, eventually granting an exemption for 13 of 44 proposed timber sales. 57 Fed. Reg. 23,405 (1992). After environmentalists subsequently won a circuit court decision ordering an investigation into allegations that the Bush White House had put illegal pressure on the ESC, see Portland Audubon Soc'y, 984 F.2d at 1534, the Clinton administration withdrew the exemption request. BLM Withdraws Exemption Request: God Squad Dissolved, IN BRIEF (Sierra Club Legal Defense Fund, S.F., Cal.), Spring 1993, at 3, 3.


85. See GAO ESA STUDY, supra note 37; WORLD WILDLIFE FUND, FOR CONSERVING LISTED SPECIES, TALK IS CHEAPER THAN WE THINK: THE CONSULTATION PROCESS UNDER THE ENDANGERED SPECIES ACT iii (1992) [hereinafter WWF REPORT]; U.S. GEN. ACCOUNTING OFFICE, ENDANGERED SPECIES: LIMITED EFFECT OF CONSULTATION REQUIREMENTS ON WESTERN WATER PROJECTS (1987); see also Houck, supra note 10, at 319-20 & app. I (reviewing 99 U.S. Fish & Wildlife jeopardy opinions in which a majority resulted in "reasonable and prudent" alternatives); YAFFEE, supra note 57, at 99-103 (discussing earlier studies that reached the same conclusion).

86. GAO ESA STUDY, supra note 37, at 2, 5, 19. These figures do not include 152 jeopardy opinions issued for an EPA action to allow the use of 100 pesticides on 165 listed species. Id. at 31. A 1993 study of 99 biological opinions issued between 1988-1992 suggests a much higher percentage of jeopardy to no-jeopardy opinions than that reported by the 1992 GAO study, but the researcher nonetheless concludes that "[n]o major public activity, nor any major federally-permitted private activity was blocked." See Houck, supra note 10, at 320.
results and, more importantly, found that less than one percent of all agency activities subject to formal consultation in those five years were stopped for section 7 reasons.87 This evidence suggests that action agencies often adopt the Service’s informal recommendations made before the issuance of an opinion, as well as formal recommendations made in a jeopardy opinion, thus allowing the vast majority of projects to proceed while accommodating the needs of listed species.

C. Delegation Under the NPDES Program

A detailed examination of the NPDES program under the Clean Water Act will illustrate the general nature of delegable federal programs and assist the upcoming analysis. The NPDES program was one of the first programs to use the cooperative federalism approach in an environmental regulatory context,88 and it has served as a model for other delegable federal programs.89 The Supreme Court recently characterized the CWA as “a partnership between the States and the Federal Government, animated by a shared objective: ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters’.”90 This subpart discusses the permitting procedure, the delegation process, and EPA’s role in overseeing state NPDES programs.

The CWA requires any person seeking to discharge a pollutant into navigable waters from a point source to obtain a NPDES permit.91 This permit limits the type and amount of pollutants that can be discharged according to federally established or approved effluent and water quality standards.92 Upon receiving a permit application, the

87. WWF REPORT, supra note 85.
89. See, e.g., Operating Permit Programs, 56 Fed. Reg. 21,712, 21,713 (1991) (noting that the title V permitting program under the Clean Air Act Amendments of 1990 is modeled after the NPDES program).
90. Arkansas v. Oklahoma, 112 S. Ct. 1046, 1054 (1992) (quoting 33 U.S.C. § 1251(a)). In Arkansas, the Court observed that in the CWA “Congress struck a careful balance among competing policies and interests” and “protected certain sovereign interests of the States.” Id. at 1057; see also NRDC v. EPA, 859 F.2d 156, 173, 184-85 (D.C. Cir. 1988) (noting that Congress intended states to play the primary role in administering the CWA in a “unique federal-state division of responsibilities”).
91. 33 U.S.C. §§ 1311(a), 1342(a), 1362(12). A pollutant is defined quite broadly; it includes dredged spoil, sewage, garbage, chemical wastes, rock, sand, and industrial, municipal, and agricultural waste. Id. § 1362(6). A point source encompasses “any discernible, confined and discrete conveyance, including . . . any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged.” Id. § 1362(14).
92. In general, a permit limits discharges according to both technology-based and water quality-based standards. EPA sets point source effluent limitation based on best available or best conventional technology. See id. §§ 1311(b), 1314(b). The state establishes water quality standards for each water body within its borders. These standards may
issuing agency (the EPA Regional Administrator or, if the program is delegated, the State Director)\textsuperscript{93} may prepare a draft permit. Draft permits must be made available for public comment.\textsuperscript{94} The Service may suggest permit conditions needed to protect fish and wildlife, which the issuing agency may impose.\textsuperscript{95} Once a permit is issued, the agency may modify, “revoke and reissue,” or terminate it “for cause,” as defined by the CWA.\textsuperscript{96} The issuing agency can also issue “general permits,” which cover a number of individual dischargers that are substantially similar in operation and pollutants discharged within a specific geographic area.\textsuperscript{97} General permits are governed by the same effluent and water quality requirements as individual permits.

To request that EPA delegate the NPDES program, the state must file a formal request accompanied by “a full and complete description of the program [the state] proposes to establish” and a statement from the state’s “chief legal officer” that state laws “provide adequate authority.”\textsuperscript{98} EPA must publish notice of the submission in the \textit{Federal Register} and provide for a comment period and a public hearing.\textsuperscript{99}

The CWA states that EPA “shall approve” the program if it meets certain requirements specified in section 402(b) of the CWA further restrict pollutant concentrations as necessary to protect human health, propagation of fish and wildlife, or certain designated uses. \textit{Id.} §§ 1312, 1313(c)(2)(A); see also 40 C.F.R. §§ 130.3, 131.10(a) (1993); \textit{Arkansas}, 112 S. Ct. at 1054. The state must establish these standards using recommended water quality criteria developed by EPA or criteria developed by other scientifically defensible methods. \textit{See} 40 C.F.R. § 131.11(b). If the state fails to establish water quality standards or establishes standards that do not comply with the CWA, EPA will promulgate the necessary standards. 33 U.S.C. § 1313(c)(3).\textsuperscript{93}

\textit{See} 40 C.F.R. § 122.2 (defining “director”).\textsuperscript{94}

\textit{Id.} § 124.10(a)(ii), (b)(1). A copy of the notice must be sent to “Federal and state agencies with jurisdiction over fish, shellfish, and wildlife resources.” \textit{Id.} § 124.10(c)(1)(iii).\textsuperscript{95}

If the issuing agency is EPA, the CWA regulations \textit{require} it to consult under section 7(a)(2) and to impose any conditions necessary to satisfy its section 7 obligations. \textit{See} \textit{id.} § 122.49(c). Once the state assumes issuing authority, however, consultation and the imposition of conditions recommended by the service are discretionary. \textit{See} \textit{id.} § 124.59(b), (c).\textsuperscript{96}

\textit{Id.} §§ 122.41, 122.62, 122.64, 124.5. Permits expire five years after being issued. \textit{Id.} § 122.46(a).\textsuperscript{97}

\textit{Id.} § 122.28(a).\textsuperscript{98}

33 U.S.C. § 1342(b). As of 1989, 39 states had been authorized to administer the NPDES program. American Paper Inst. v. EPA, 890 F.2d 869, 871 (7th Cir. 1989). In this article, EPA's approval of state NPDES programs is occasionally referred to as the “delegation” of the NPDES program. However, in the Conference Committee Report for the 1977 Amendments to the CWA, Pub. L. No. 95-217, 91 Stat. 1566, (1977), the conferees stated that a state NPDES program “is not a delegation of federal authority.” H.R. Rep. No. 830, 95th Cong., 1st Sess. 3 (1977), \textit{reprinted in} 1977 U.S.C.C.A.N. 4424, 4479. Consequently, this article uses “delegation” in the most generic sense.\textsuperscript{99}

\textit{40 C.F.R.} § 123.61(a)(1)-(2).
and counterpart regulations. These requirements primarily ensure that the state implements various technical and procedural aspects of the NPDES program. For example, the state program must provide public notice of each permit application and forward a copy of each permit application to EPA. None of the criteria for approving state assumption of the program require federal or state compliance with section 7 of the ESA. Within ninety days of the receipt of the complete proposed program, the Administrator must approve or disapprove the delegation. In conjunction with the delegation, the Administrator is authorized to grant federal funds to assist state implementation.

After delegation, EPA's oversight of a state NPDES program generally takes place through two mechanisms, individual permit review and program-wide review. The first mechanism occurs when the state submits a copy of an application for a permit it plans to issue. EPA has ninety days to review the application and to object to—or "veto," in CWA parlance—issuance of the permit. EPA may object only upon one of eight specified grounds, however, none of which refers to the ESA or to the protection of fish and wildlife in general.

100. 33 U.S.C. § 1342(b); 40 C.F.R. §§ 123.1(c), 123.61(b); see NRDC v. EPA, 859 F.2d 156, 174-75 (D.C. Cir. 1988). EPA is empowered to refine and supplement the criteria. Id. at 173. The supplemental criteria are codified at 40 C.F.R. § 123.
102. EPA does have authority, however, to establish and modify effluent limitations to attain or maintain water quality that assures the "protection and propagation of a balanced population of shellfish, fish, and wildlife." Id. § 1311(g)(2)(C); see also id. §§ 1311(h)(2), 1312(a). Section 303 similarly requires states to adopt water quality standards taking into account "propagation of fish and wildlife." Id. § 1313(e)(2)(A). These provisions indicate that although Congress intended the CWA to protect fish and wildlife, the primary mechanism to achieve this goal is by establishing effluent limitations and water quality standards, not by imposing permit-specific conditions.
103. 40 C.F.R. § 123.61(b). Once the program is delegated, either EPA or the state may revise the state NPDES program. Id. § 123.62(a). EPA must give notice and provide a comment period and opportunity to request a hearing only if it "determines that the proposed program revision is substantial." Id. § 123.62(b)(2). EPA must decide whether to approve the program based on the same requirements as those for the initial delegation. Id. § 123.62(b)(3).
106. EPA must make any objections in writing and suggest conditions that would make the application acceptable. 40 C.F.R. § 123.44(b)-(c). The eight specified grounds are: (1) the permit fails to comply with 40 C.F.R. § 123, which establishes the procedures used in approving a state program and the requirements a state program must meet to be approved; (2) the written recommendations of another affected state have been improperly addressed; (3) the procedures used to formulate the permit were improper; (4) the CWA and the regulations have been misinterpreted during issuance; (5) the permit provides for inadequate monitoring, record keeping, or reporting; (6) in the case of certain permits for sewage sludge, the permit fails to meet certain applicable standards; (7) the permit "would in any other respect be outside" the CWA's or the regulation's requirements; and (8) the permit's effluent limits fail to satisfy section 122.44(d), which requires permit conditions to
In practice, EPA may negotiate with a state issuing agency to resolve concerns that may otherwise draw an EPA veto.\textsuperscript{107} The regulations appear to limit EPA's veto power to proposed permits, as opposed to modifications of existing permits.\textsuperscript{108}

The CWA also gives EPA broad power to waive its permit review and veto authority. One provision allows EPA to waive the notification requirement and its veto authority at the time of delegation for any category of point sources.\textsuperscript{109} Another provision allows EPA to waive veto authority for any specific permit application after delegation.\textsuperscript{110} Conceivably, based on these two provisions, EPA could forgo this avenue of oversight altogether.\textsuperscript{111}

The second mechanism of EPA oversight applies to the state's administration of the program as a whole. EPA may withdraw approval of the state program at any time if it "determines after public hearing that [the] State is not administering a program . . . in accordance with requirements of this section," gives the state notice, and the state does not take corrective action within a reasonable time.\textsuperscript{112} The D.C. Circuit has characterized withdrawal as being "so drastic that EPA cannot be expected to use it except in egregious cases."\textsuperscript{113} To allow EPA to monitor state implementation, the regulations require the state program director to prepare and submit to EPA periodic reports that include descriptions of discharge violations and state enforcement actions.\textsuperscript{114}

\begin{footnotesize}
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\item[107.] See, e.g., Save the Bay, Inc. v. EPA, 556 F.2d 1282, 1287 (5th Cir. 1977).
\item[108.] Cf. 40 C.F.R. § 123.44(a)-(c), (j); see id. § 123.43(a). An action to "revoke and reissue" apparently triggers the entire permitting process anew. Id. § 122.62.
\item[109.] 33 U.S.C. § 1342(e). EPA has promulgated a regulation stating that it will not waive its review authority for a large number of certain source categories. See 40 C.F.R. § 123.24(d).
\item[110.] 33 U.S.C. § 1342(d)(3).
\item[111.] In District of Columbia v. Schramm, 631 F.2d 854 (D.C. Cir. 1980), the court partially relied on these waiver provisions to find that EPA's decision not to review or veto a particular state NPDES permit application was committed completely to its discretion and therefore was not judicially reviewable. Id. at 861.
\item[112.] 33 U.S.C. § 1342(c)(3); see also 40 C.F.R. §§ 123.63, 123.64(b).
\item[113.] NRDC v. EPA, 859 F.2d 156, 181 (D.C. Cir. 1988).
\item[114.] 40 C.F.R. § 123.45. EPA also conducts a programmatic review of state administration of the NPDES program through the so-called triennial review of state water quality standards. See supra note 92. At least every three years, states must review their water quality standards in light of any new scientific, technical, or environmental data to determine whether new standards are necessary. 33 U.S.C. § 1313(c). Upon completion, the state must obtain EPA approval or face the prospect of EPA promulgating replacement standards. See id. § 1313(c)-(d). Under an MOU with the Service, EPA has agreed to consult when it promulgates its recommended water quality criteria that are used to assess state water quality standards. See MOU, supra note 33, at 5-6. The MOU also provides for consultation prior to EPA approval of any state water quality standards that do not provide the same level of protection as the EPA-recommended water quality criteria devel-
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THE SCOPE OF SECTION 7(a)(2): DOES IT APPLY TO DELEGATED FEDERAL PROGRAMS?

This part examines whether section 7(a)(2) applies to a federal agency's decision to delegate a program to a state and, once the program is delegated, whether it applies to the agency's oversight of state implementation. The crux to answering these questions lies in the cross-cutting reach of section 7(a)(2), specifically whether section 7(a)(2)'s mandate requires a federal agency to consult with the Service and prevent an action in order to protect listed species despite the fact that its programmatic statute does not grant the agency that authority. After first discussing the reach of section 7(a)(2) and its potential applicability to delegable federal programs, this part considers a series of possible exemptions from section 7(a)(2)'s cross-cutting reach suggested by judicial or academic commentary.

A critical step in assessing section 7(a)(2)'s applicability to delegable federal programs is determining how section 7(a)(2)'s reach may be limited by the degree of discretion granted to the action agency under its programmatic statute. Section 7(a)(2) undoubtedly applies to actions in which the action agency's programmatic statute grants it discretion to consider the environmental consequences of the action and either refrain from acting or disapprove an action to prevent unacceptable harm to fish and wildlife. Similarly, section 7(a)(2) most likely applies if the programmatic statute allows the action agency to prevent an action in the "public interest," or pursuant to some other broad criterion that reasonably could be interpreted to include the preservation of fish and wildlife.

A tougher question is presented when the action agency's programmatic statute restricts the agency's discretion in undertaking the action. Some programmatic statutes may direct the action agency to consider only certain nonenvironmental criteria in deciding whether to act. An action agency constrained by one of these statutes could not prevent the action for environmental reasons absent some other statutory authority. The issue addressed in this section is whether section 7(a)(2) provides that authority.

Other programmatic statutes may not grant the action agency any discretion to refrain from acting or to disapprove an action. In other words, the statute provides a mandatory direction: "Agency X shall

opped through consultation. Id. at 7-9. Although the MOU reflects some recognition by EPA that it must comply with section 7(a)(2) in at least overseeing this aspect of a state NPDES program, EPA appears to deny that it has any further section 7(a)(2) obligations with respect to its other activities in delegating and overseeing state NPDES programs. See supra note 33 and infra note 118. For criticism regarding the legality of the MOU from an administrative law perspective, see Satterfield et al., supra note 36, at 63.
undertake the action." This ostensibly would override any conflicting, less absolute directive, such as section 7's consultation requirement. However, most if not all delegable federal programs are not so absolute. The delegable federal programs examined for the purposes of this article, for example, appear to grant the action agency some discretion to decline the delegation or disapprove a proposed state action under the program. The statutory provisions may not specifically allow the action agency to prevent the action to avoid harming listed species, but they do grant the action agency at least limited discretion to stop the activity under some other criteria.

Hence, the issue boils down to whether section 7(a)(2) applies to federal agency actions for which the relevant programmatic statute grants any discretion to refuse to act or disapprove an action, or only to federal agency actions for which the programmatic statute provides discretion to prevent an action for reasons compatible with the ESA. As this section will discuss, there is authority supporting both positions.

The consequences of applying each of these possible interpretations can be illustrated by considering the NPDES program. Recall that none of the criteria governing EPA's decision to delegate the NPDES program authorizes the Agency to refuse delegation to prevent harm to fish and wildlife or to satisfy any other federal statutes including the ESA. EPA has little discretion in deciding whether to make the delegation decision; if the narrow criteria specified in the CWA and its regulations are met, the delegation must be made. Similarly, the criteria governing EPA's exercise of its review and veto authority over state-proposed permits do not allow EPA to veto a permit to prevent harm to fish or wildlife or to avoid violating other federal statutes.

If section 7(a)(2) applies so long as the action agency has any discretion to prevent the action, however, it makes no difference that

115. See supra notes 100-02 and accompanying text. EPA can refrain from delegating the program if the state does not have adequate authority to enforce effluent limitations and water quality standards, both of which are established, in part, to ensure the protection and propagation of wildlife. See supra note 103. The criteria and procedures governing delegation, however, are distinct from those governing the establishment of effluent limitations and water quality standards. Congress provided for fish and wildlife protection under the CWA through the establishment of effluent limitations and water quality standards imposed in each permit, not by the delegation and oversight processes. Consequently, EPA's authority to decline delegation because the state has inadequate authority to enforce effluent limitations and water quality standards probably cannot be construed as discretionary authority to decline delegation to protect fish and wildlife. Similarly, the CWA's policy statement that the Act is intended to "restore and maintain the . . . biological integrity of the Nation's water," 33 U.S.C. § 1251(a), also cannot be used as a source of discretionary authority to decline delegation.

116. See supra note 106 and accompanying text.
the CWA and its regulations do not provide EPA with authority to refuse to delegate an NPDES program or veto a proposed permit to prevent harm to fish and wildlife. Because both the delegation and the exercise of review and veto authority fall within section 7(a)(2)’s definition of “any action” that is “authorized, funded, or carried out,” section 7(a)(2) is triggered. Under this view, EPA’s refusal to comply with section 7(a)(2) in exercising its delegation and oversight authority, as revealed in the CWA regulations,\(^{117}\) violates the ESA. If section 7(a)(2) applies only where the federal agency has discretion to prevent actions for reasons consistent with listed species protection, however, EPA may be off the hook.\(^{118}\)

**A. The Legal Bases for Construing Section 7(a)(2)’s Cross-Cutting Reach**

This subpart analyzes the reach of section 7(a)(2) by first examining the plain language of the provision, the Supreme Court's celebrated interpretation of the provision in *Tennessee Valley Authority v. Hill (TVA)*,\(^{119}\) and Congress' subsequent amendments. It then reviews the other relevant cases and touch on the policy arguments on both sides of the issue. Although two circuits appear to take a contrary position, the most reasonable interpretation of section 7(a)(2) is that it applies to any action in which the agency has discretion to prevent the action, regardless of whether that discretion is limited. Therefore, section 7(a)(2) should apply to both the delegation and oversight of cooperative federalism programs.

1. **Section 7(a)(2)’s Language**

Any analysis of the meaning of a statute must begin, of course, with its words. Here, the plain language of section 7(a)(2) indicates its broad applicability and belies any restrictions on its reach. The provision states: “Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency... is not likely to jeopardize” listed species or result in the “adverse modification” of their critical habitat.\(^{120}\) The use of “[e]ach Federal agency” and “any action au-

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117. *See supra* notes 93-95, 100-12 and accompanying text.
118. EPA recently made this argument in *Mudd v. Reilly*, No. CV-91-P-1392-S (N.D. Ala. filed June 16, 1991). *See supra* notes 33-36 and accompanying text. EPA contended that its approval of a state NPDES program is “mandatory” if the program meets the criteria set forth in the CWA. *See Reply to Briefs filed by Mudd and ADEM in Opposition to EPA’s Motion for Summary Judgment, at 24 n.16, Mudd v. Reilly*. Because section 7(a)(2) applies only to “discretionary” federal actions, EPA maintained, the provision did not apply to its approval of a state NPDES program. *Id.*
thorized, funded, or carried out,” and the lack of any limiting language suggest that Congress intended that section 7(a)(2) apply regardless of whether the action agency is independently authorized to prevent the action in order to protect fish and wildlife. Neither the word “action” nor the qualifying clause “authorized, funded, or carried out” suggests that the scope of “action” turns on the degree of discretion granted to the agency to decide whether to undertake the action. Thus, the plain language of the statute obliges all agencies—irrespective of any other statutory requirements that may restrict the agencies’ discretion—to refrain from undertaking any action without consulting and insuring no jeopardy.

2. The TVA Decision and Legislative History

A broad reading of section 7(a)(2)’s reach is supported by the Supreme Court’s 1978 decision interpreting section 7 and Congress’ subsequent reaction. Although Congress enacted the ESA in 1973, the scope of section 7 was not fully realized until the Supreme Court’s sweeping interpretation of the provision in TVA.

121. See, e.g., WEBSTERS NEW INTERNATIONAL DICTIONARY 21 (3d ed. 1986) (defining “action” as, among other things, “the process of doing; a thing done”).

122. Cf. Perrin v. United States, 444 U.S. 37, 42 (1979) (stating that interpretations of words used by Congress should presume use according to their ordinary meaning). Of course, this reasoning also supports the idea that section 7(a)(2) applies to mandatory directions. The appropriateness of this interpretation is largely irrelevant to whether section 7(a)(2) applies to the delegation and oversight of delegable federal programs. See supra notes 115-18.

123. A reviewing court could dispose of the cross-cutting issue as suggested in the text without any further analysis. It is well established that, “[i]f the intent of Congress is clear [from the statutory language], that is the end of the matter; for the court, as well as the agency, must give effect to unambiguously expressed intent of Congress.” Chevron U.S.A., Inc., v. NRDC, 467 U.S. 837, 842-43 (1984). Indeed, the Supreme Court has held that section 7 is unambiguous. See TVA, 437 U.S. 153, 184 & n.29 (1978).

124. For a more complete discussion of the ESA’s history, see ROHLF, supra note 37, at 23-24; YAFFEE, supra note 57, at 47-57; Doremus, supra note 2, at 295-302; Erdheim, supra note 30, at 632-42.


Court’s expansive view of section 7’s mandate was subsequently affirmed by Congress.

In TVA, the Court affirmed a Sixth Circuit decision enjoining the Tennessee Valley Authority (the Authority) from completing Tellico Dam.\(^{127}\) The dam threatened the snail darter, a small endangered fish living upstream of the dam site. At the time of the litigation, the dam had been “virtually completed” and was “essentially ready for operation.”\(^{128}\) Congress had appropriated monies for the dam every year since 1967. The appropriation committees that had approved the monies in 1975, 1976, and 1977 had been apprised that the dam would destroy the endangered snail darter’s only habitat.\(^{129}\) Nonetheless, the appropriation committees’ reports for those years stated the committees’ belief that section 7 did not apply to the dam, primarily because construction began before the snail darter was listed, and directed the Authority to complete it.\(^{130}\) Apparently as a result of the project’s advanced stage, Congress’ continued funding, and the appropriation committees’ directives, the Authority took the position that it had no discretion but to fill the reservoir.\(^{131}\)

Although the Court focused primarily on the Authority’s argument that section 7 does not apply to a virtually completed project, its reasoning appears to dispose of any argument that section 7 does not apply to actions in which an action agency’s discretion is limited by a programmatic statute. The Court first noted the sweep of section 7’s language, which it found could not be “any plainer.”\(^{132}\) The Court observed that the language “affirmatively command[s] all federal

\(^{127}\) See id. at 195.

\(^{128}\) Id. at 157-58. Congress had already spent $100 million in building the dam. Id. at 172.

\(^{129}\) Id., 437 U.S. at 163-71.

\(^{130}\) See id. at 164, 167, and 170-71.

\(^{131}\) The majority opinion noted that the Service and the Authority had consulted informally, but that the Authority had insisted throughout the discussions that the “only available alternative was to attempt relocating the snail darter population.” Id. at 162 (emphasis added).

\(^{132}\) Id. at 173. In 1978 section 7 was one paragraph that merged the language that is now in subsections 7(a)(1) and 7(a)(2). See supra note 69. The Court, however, relied on the language giving rise to subsection 7(a)(2) to decide the case. See, e.g., 437 U.S. at 173. It is clear, moreover, that the Court realized that the two phrases later divided into subsections (a)(1) and (a)(2) created independent obligations. In tracing section 7’s history, the Court quoted language from the House Report explaining that the House bill’s language (later adopted by the Conference Committee) created two separate obligations:

This subsection requires the Secretary and the heads of all other Federal departments and agencies to use their authorities in order to carry out programs for the protection of endangered species, and it further requires that those agencies take the necessary action that will not jeopardize the continuing existence of endangered species or result in the destruction of critical habitat of those species.

Id. at 182-83 (quoting H.R. Rep. No. 412, supra note 125, at 14.)
agencies" to insure no jeopardy and that it "admits of no exception."\textsuperscript{133}

Turning to the provision's legislative history, the Court noted that the endangered species legislation preceding the ESA had directed all federal agencies to protect endangered species "insofar as is practicable and consistent with the[ir] primary purpose,"\textsuperscript{134} and that the initial bills introduced in 1973 had similar limiting language.\textsuperscript{135} Thus, the Court found it "very significant" that in the final version of the 1973 Act, this type of limiting language had been "carefully omitted."\textsuperscript{136} The Court concluded that the legislative history:

reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.\textsuperscript{137}

The Court adopted Representative Dingell's interpretation of section 7 that "['the] agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear."\textsuperscript{138}

Based on section 7's "stringent, mandatory" language and Congress' intent to "halt and reverse" the trend toward species extinction at "whatever the cost,"\textsuperscript{139} the Court went so far as to comment that section 7 applies to ongoing projects.\textsuperscript{140} Moreover, in response to a charge by the dissent that the Court was making section 7 retroactive,

\textsuperscript{133} 437 U.S. at 173. The only actions exempt from section 7, the Court remarked, were those meeting the requirements in section 10 of the Act. \textit{Id.} at 188. Section 10, as amended, provides several minor exceptions, such as allowing the Secretary to permit the taking of listed species for scientific purposes or if incidental to activities approved in a conservation plan. 16 U.S.C. § 1539(a),(b) (1988).

\textsuperscript{134} 437 U.S. at 175, 188 (citing section 1(b) of the Endangered Species Act of 1966, repealed by the ESA of 1973).

\textsuperscript{135} 437 U.S. at 181.

\textsuperscript{136} \textit{Id.} at 182. In a case decided three years before \textit{TVA}, the Court held that a federal agency need not comply with NEPA's environmental analysis requirement because the agency could not possibly comply with both its programmatic statute and NEPA at the same time in undertaking the activity at issue. Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 788-89 (1975). The Court relied heavily on the fact that NEPA explicitly states that it is to be applied "to the fullest extent possible," \textit{id.} at 787 (citing 42 U.S.C. § 4332), which implied that Congress anticipated situations in which NEPA compliance would not be possible. Thus, \textit{Flint Ridge}, although not mentioned in \textit{TVA}, supports \textit{TVA}'s statutory analysis.

\textsuperscript{137} \textit{TVA}, 437 U.S. at 185 (emphasis added).

\textsuperscript{138} \textit{Id.} at 184 (emphasis added by the Court; citing 119 Cong. Rec. 42,913 (1973)) (remarks of Rep. Dingell, floor debate during House consideration of and agreement to the Conference Report). Representative Dingell was the House manager of the successful House bill.

\textsuperscript{139} 437 U.S. at 183-84.

\textsuperscript{140} \textit{Id.} at 186.
the majority stated that retroactivity was a legal impossibility under the provision's terms.\textsuperscript{141} This implies that the only "action" that does not fall under section 7 is an action that is impossible to stop; whether or not the acting agency has discretion to act is largely irrelevant.\textsuperscript{142}

Admittedly, \textit{TVA} does not \textit{hold} that section 7 overrides an explicitly conflicting congressional mandate; the Court did not view the appropriation committees' language directing the dam to be completed regardless of section 7 as representing the intent of Congress.\textsuperscript{143} Nevertheless, the Court does not appear to have been concerned with whether the Authority had sufficient discretion under either the appropriations act or the Authority's authorizing statute to halt the dam's completion to prevent harm to fish and wildlife. And the majority's clearly articulated reasoning giving full breadth to section 7's language, albeit perhaps dicta, should control lower courts' and the executive branch's construction of section 7(a)(2). In sum, although the Court did not expressly pass on the argument that section 7 does not apply to actions in which the agency's discretion is limited by a programmatic statute to nonbiotic considerations, that argument should be foreclosed by the Court's rationale.

The 1978 Amendments to the ESA affirmed the Supreme Court's reading of section 7, and, more importantly, did not substantively modify section 7.\textsuperscript{144} The 1978 legislative history reveals that Congress

\begin{itemize}
  \item \textsuperscript{141} \textit{Id.} at 187 n.32. The majority stated: Our holding merely gives effect to the plain words of the statute, namely, that § 7 affects all projects which remain to be authorized, funded, or carried out. Indeed under the Act there could be no "retroactive" application since, by definition, any prior action of a federal agency which would have come under the scope of the Act must have already resulted in the destruction of an endangered species or its critical habitat. In that circumstance the species would have already been extirpated or its habitat destroyed; the Act would then have no subject matter to which it may apply. \textit{Id.} (emphasis in the original). For a criticism of this passage, see \textit{Bean, supra} note 10, at 363-64.
  \item \textsuperscript{142} \textit{See Bean, supra} note 10, at 363; \textit{Lundberg, supra} note 30, at 106.
  \item \textsuperscript{143} The Court noted that the appropriation acts themselves did not identify the projects to be funded and that there was no evidence that Congress as a whole was aware of the Authority's position. 437 U.S. at 189 n.35, 192. The Court construed the committee reports as expressing only the opinions of the committee members themselves. \textit{Id.} at 189.
  \item \textsuperscript{144} This is clearly indicated by the legislative history. \textit{See Coggins & Russell, supra} note 2, at 1494; \textit{Erdheim, supra} note 30, at 636. For example, the Conference Report states, "[t]he basic premise of [the legislation] is that the integrity of the interagency consultation process designated under section 7 of the act be preserved." H.R. \textit{Conf. Rep. No. 1804, supra} note 68, at 18. The report also states that the new section 7, designated 7(a), "essentially restates section 7 of existing law." \textit{Id.} at 18. Because this language was drafted four months after the \textit{TVA} decision, of which Congress undoubtedly was aware, it seems to endorse \textit{TVA}'s reading of section 7. (The Conference Report was issued October 15, 1978, and the decision was handed down June 15, 1978.) Similarly, the record of the floor debates is peppered with the remarks of Senators and Representatives indicating approval of the original section 7 language and the \textit{TVA} decision. \textit{E.g., Legislative History, supra,} at 957 (remarks of Sen. Culver, floor debate dur-
agreed with (or at least did not dispute) TVA's conclusion that agency action under section 7 "admits of no exception." For example, the Senate defeated an amendment proposed by Senator Stennis that would have required federal agencies to comply with section 7 only "insofar as practicable and consistent with their primary responsibilities." During the floor debate, Senator Stennis paraded the "horribles" of the then-existing version of section 7, as interpreted by the Court, as well as the new section 7 that would result if the pending Senate bill were passed without his amendment:

Let me emphasize, so that we do not lose sight of it, that this law and its potential impact is not limited to Federal projects. It applies to any project, Federal, State, municipal, or private, which is supported by Federal funds, including grants or loans, or which requires Federal approval by licensing, permitting or otherwise. The scope of the reach of the law must be recognized before its potential impact is fully understood.

As the law now stands, any Federal project or any project involving Federal action, even though it involved the highest national interest, could be stopped cold . . . . This would still be entirely possible under the bill reported by committee.

The defeat of the Stennis Amendment suggests that Congress was fully aware that section 7 would override any other inconsistent statutory obligations.
A passage in the Senate Report compels the same conclusion. The report observes that "section 7 might . . . conflict with a number of administrative processes, for example, Federal licensing and permitting of private activities." However, it states that "appropriate consultation" will occur and that, if there is an irresolvable conflict, the action agency can petition for an exemption from the Endangered Species Committee. Senator Culver essentially repeated this observation during the floor debate. These statements imply an intent that section 7 override any inconsistent administrative directives, apparently even if fixed by a programmatic statute.

The most reasonable conclusion to draw from the TVA Court's reading of the ESA and Congress' 1978 response is that Congress intended that section 7(a)(2) apply to any discretionary federal agency action, regardless of whether the agency's programmatic statute allows the agency to act or refrain from acting to protect fish and wildlife. Because Congress has never changed the language in section 7 that TVA found "admits of no exception," the Court's conclusion

149. Id. The passage closes by commenting: "This is a reasonable policy for responding to this type of Federal action which might occur on private or Federal lands." Id.
150. See Legislative History, supra note 11, at 963 (remarks of Sen. Culver).
151. A floor speech by Representative Bowen supports the TVA Court's broad dictum that section 7 applies to ongoing activities, which belies the notion that the agency must have discretion to act for reasons compatible with section 7(a)(2) for it to apply. Bowen, who was one of the floor managers of the House bill, stated:

I recall from the debate that took place before the Supreme Court on the Tellico Dam case that Mr. Justice Marshall, I believe it was, asked a question of one of the witnesses from the Department of the Interior as to whether or not, if he located a species in the basement of the [Supreme Court] building which was listed as endangered, and whose continued existence was jeopardized by the presence of the Supreme Court Building, would that mean that the building was going to have to be torn down. The answer was yes, the building would have to be torn down. . . . That is an actual application of the way the present law could be administered. The courts made it clear that they can go no other way, as the law is now written. . . .

Legislative History, supra note 11, at 802 (floor debate during House consideration and passage of H.R. 14,104 (Oct. 14, 1978)) (emphasis added).
152. 437 U.S. at 173. Of the amendments to the ESA since 1978, the 1979 Amendments wrought the most important changes to section 7 for the purposes of this article, but Congress did not significantly alter the original section 7 language interpreted in TVA nor limit section 7's reach. See Sierra Club v. Marsh, 816 F.2d 1376, 1383 n.10 (9th Cir. 1987). The 1979 Amendments divided paragraph 7(a) into subparagraphs (a)(1) and (a)(2), the latter of which incorporated the dispositive language interpreted in TVA. See Pub. L. No. 96-159, § 4(1)(C), 93 Stat. 1225, 1226 (codified as amended at 16 U.S.C. § 1536(a)(1)-(2)). The duty to consult was written into both. Id. Congress also redrafted the phrase requiring agencies to insure that their actions "do not" jeopardize, changing "do not" to "is not likely to." Id. The Conference Report indicates that this change was made to align the provision with existing Service practice and case law and to allow jeopardy assessments to be made on less-than-conclusive data. See H.R. Conf. Rep. No. 697, supra note 53, at 12. The courts and the Service have viewed the new language as not reworking the obligations of agencies to comply with the procedural or substantive provisions of section 7(a)(2). See, e.g., Marsh, 816 F.2d at 1383 n.10; Roosevelt Campobello Int'l Park Comm'n v. EPA, 684
that Congress intended for endangered species to be given the "highest of priorities" remains binding law. Consequently, section 7(a)(2) should override any inconsistent programmatic statute that might otherwise limit the action agency's discretion to fulfill its duties to insure and consult.

3. Other Cases Addressing Section 7(a)(2)'s Cross-Cutting Reach

The cases following TVA appear to fall on both sides of the "cross-cutting" issue. One year after the Supreme Court decided TVA, the First Circuit considered this issue in Conservation Law Foundation v. Andrus. An environmental group had sought to enjoin an off-shore oil and gas lease sale on the grounds that it would violate section 7(d), which bars agencies from "making an irreversible and irretrievable commitment of resources" that will foreclose implementation of RPA's. The plaintiffs claimed that the Outer Continental Shelf Lands Act (OCSLA), under which the lease sale was to proceed, had less stringent protective provisions than the ESA, and that once the Agency (the Secretary of the Interior) sold the leases, OCSLA would be the sole statute under which the leases would be regulated. Hence, they argued, sale of the leases would foreclose future implementation of RPA's required by ESA.

F.2d 1041, 1048-49 (1st Cir. 1982); North Slope Borough v. Andrus, 486 F. Supp. 332, 350 n.44 (D.D.C. 1979), aff'd in part & rev'd in part, 642 F.2d 589 (D.C. Cir. 1980); Preamble to Final Rule, supra note 5, at 19,926; Bean, supra note 10, at 359 n.198; Erdheim, supra note 30, at 640. The Amendments also added to section 7(a)(2): "In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

Pub. L. No. 96-159, § 4(1)(C), 93 Stat. 1225, 1226 (codified at 16 U.S.C. § 1536(a)(2)). These are the last changes that have been made to subsections 7(a)(1) and (a)(2).

153. 437 U.S. at 185.

154. See, e.g., Lindahl v. Office of Personnel Management, 470 U.S. 768, 782 n.15 (1985) (stating that there is a presumption that Congress is "aware of an administrative or judicial interpretation of a statute and [adopts] that interpretation when it reenacts the statute without change"); Lorillard v. Pons, 434 U.S. 575, 581 (1978) (where "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

Indeed, recent opinions have used language as sweeping as that in TVA to characterize section 7(a)(2). Only three years ago, the Eighth Circuit wrote:

It cannot be denied that Congress has chosen expansive language which admits to no exceptions. Reduced to its simplest form, the statute clearly states that each federal agency must consult with the Secretary regarding any action to insure that such action is not likely to jeopardize the existence of any endangered species.


155. 623 F.2d 712, 715 (1st Cir. 1979).


The court disagreed, holding that the ESA applied "of its own force" and "by its terms" to "all action by the Secretary."158 "Therefore," the court stated, "any contract which [the Secretary] enters into (e.g., a lease) which requires a future action on his part (e.g., approval of plans) will contain as an implied term a condition that the Secretary will behave lawfully (e.g., not violate the ESA)."159 It is unclear from the opinion whether the Secretary's authority under the terms of the lease allowed him to act for section 7(a)(2) purposes,160 but the opinion clearly recognizes that section 7(a)(2) provides an independent source of authority that is in addition to the authority the Agency is granted in its programmatic statutes. This proposition is now well established in the case law.161

A potentially more significant case is Defenders of Wildlife v. EPA.162 In Defenders, several environmental groups sued EPA under the ESA's citizen suit provision,163 seeking to force the Agency to cancel the registration of a pesticide that was harmful to listed species. The plaintiffs argued that EPA violated section 7(a)(2) by maintaining the registrations and, consequently, allowing continued use of the pesticide.164 In response, EPA asserted that the plaintiffs had failed to exhaust an administrative appeal procedure provided by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),165 the programmatic statute governing pesticide registration.166

The Eighth Circuit agreed with EPA's claim that FIFRA "provide[s] the exclusive means of canceling a registration," but rejected the assertion that the plaintiffs were required to exhaust the FIFRA administrative appeal procedure before bringing suit under the ESA.167 The court held that "[e]ven though a federal agency may be acting under a different statute, that agency must still comply with the ESA."168 Thus, the plaintiffs could properly proceed under the ESA's citizen suit provision to challenge EPA's decision not to cancel the

158. Andrus, 623 F.2d at 715 (emphasis added).
159. Id. (emphasis added).
160. The court did find "persuasive" the Secretary's argument that the standards of OCSLA and the ESA "are complementary," id., but the court's analysis did not turn on this assertion.
162. 882 F.2d 1294 (8th Cir. 1989).
163. 16 U.S.C. § 1540(g)(1).
164. 882 F.2d at 1298, 1300.
166. See 882 F.2d at 1298.
167. Id. at 1298-99 (emphasis added).
168. Id. at 1299.
registration. In light of the court's agreement that the FIFRA administrative appeal procedure was "exclusive," its decision to allow the plaintiffs to bring a section 7(a)(2) claim without exhausting that remedy suggests that it viewed section 7(a)(2) as overriding any inconsistent programmatic statute. Indeed, the court's statement that "FIFRA does not exempt the EPA from complying with the ESA requirements" implies that the cross-cutting effect of section 7(a)(2) can be limited only by explicit direction from Congress.

Two cases have been reported, however, which undermine the position that section 7(a)(2) applies to any action that the federal agency has discretion to prevent, regardless of how that discretion may be constrained. In Riverside Irrigation District v. Andrews, the Corps of Engineer (the Corps) had declined to allow developers to apply a "nationwide" dredge-and-fill permit under section 404 of the CWA to a dam on a Platte River tributary. Basing its action on section 7(a)(2), the Corps refused to issue the permit because the dam would alter water flow, adversely affecting downstream critical habitat of the endangered whooping crane. The dam's developers sued, claiming that section 404 authorized the Corps to consider only the dam's downstream effects on water quality, not quantity.

The district court first considered the effect of section 7(a)(2). After quoting language from TVA, the court stated:

> While the Endangered Species Act does not expand the scope of federal agencies' authority, its clear language "shall insure" directs them to exercise their authority under other statutes to the fullest extent possible to carry out its aims . . . . If [the Corps'] action was permissible under the Clean Water Act, then it was required under the Endangered Species Act.

169. Id.
170. It may be argued that the court's apparent holding applies only to procedural provisions in programmatic statutes. The relevant substantive provisions of the ESA and FIFRA do seem to be consistent, and this may serve as a basis to distinguish Defenders. FIFRA allows EPA to cancel registration if the pesticide is found to "generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(D). This probably provides sufficient authority, standing alone, to allow EPA to meet the substantive requirements of section 7(a)(2) (i.e., to consult and cancel registration to prevent jeopardy). EPA's action in the Defenders case, however, indicates that it will not always use that authority to protect endangered species.
171. Defenders, 882 F.2d at 1299.
172. 568 F. Supp. 583 (D. Colo. 1983), aff'd, 758 F.2d 508 (10th Cir. 1985). For a discussion of the district court opinion and the factual scenario leading up to it, see Tarlock, supra note 78, at 21-26.
174. 568 F. Supp. at 585.
175. See id.
176. Id. at 588 (emphasis added).
The court then proceeded to analyze the Corps' authority under section 404, eventually holding that this provision gave the Corps adequate authority to deny the permit. While the Court's statement that ESA "does not expand the scope of agencies' authority" implies that the Corps could not deny a permit solely under section 7(a)(2), the court did not provide any rationale or cite any authority for that implication.

The Tenth Circuit Court of Appeals affirmed on the same basis, but recharacterized the issue as one of jurisdiction. The only language in the appellate court's opinion bearing on the cross-cutting issue reads: "The Endangered Species Act does not, by its terms, enlarge the jurisdiction of the Corps of Engineers under the [CWA]." For this proposition, the panel cited to the lower court's opinion—which, of course, it was reviewing (presumably, de novo)—and a Third Circuit decision that did not involve the ESA.

*Riverside Irrigation* may be correctly decided, but its section 7(a)(2) analysis is arguably incorrect. In effect, the district court read into section 7(a)(2) the same limiting language (i.e., "insofar as practicable and consistent with their primary authority") that Congress purposely omitted in enacting the ESA in 1973 and in amending it in 1978. The Tenth Circuit's decision is not as obviously suspect, but its essentially unsupported statement is open to the same criticism. Both courts' refusal to find that section 7(a)(2) provides an independent source of authority for agency action is inconsistent with the Supreme Court's reasoning in *TVA*, Congress' subsequent ratification of *TVA*, and cases such as *Conservation Law Foundation* and *Defenders of Wildlife*. In light of this contrary authority, the *Riverside Irrigation* court's section 7(a)(2) discussions probably should be considered misguided dicta. Both decisions found sufficient authority under the CWA to deny the permit and therefore never needed to address the question of section 7(a)(2)'s scope.

177. The court concluded:

Because the Clean Water Act allows federal agencies to consider deleterious downstream environmental effects from a project and because the Endangered Species Act requires federal agencies to take whatever measures are necessary, *within their authority*, to protect an endangered species and its habitat, the [Corps] in the present case was required to halt the plaintiffs from proceeding under the nationwide permit ....

*Id.* at 589 (emphasis added).


179. *Id.* at 512.

180. *Id.* Also, the court of appeals miscites the district court's decision as being reported in the *Federal Reporter, Second*, rather than the *Federal Supplement*. The Third Circuit opinion that was cited is United States v. Stoeco Homes, Inc., 498 F.2d 597, 607 (3rd Cir. 1974).

The second reported case viewing section 7 narrowly is *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC (Platte River II)*, in which the D.C. Circuit considered a dispute over hydroelectric dam licensing on the Platte River, upstream of endangered whooping crane habitat. A critical issue in the case was whether FERC could unilaterally impose conditions to protect wildlife in an interim annual operating license issued to Central, the operator of a hydroelectric facility. The Federal Power Act (FPA) required FERC, in this situation, to issue interim annual licenses to licensees whose long-term licenses were about to expire, but only "under the terms and conditions of the existing license[s]." Central's long-term license, however, did not authorize such conditions. Among other issues, the Trust appealed FERC's decision not to impose the conditions, claiming that FERC had independent authority under section 7 to amend Central's license.

The D.C. Circuit rejected this claim. The panel characterized the Trust's argument as asserting that section 7 obliges FERC to do "whatever it takes" to protect listed species and that "any limitations on FERC's authority contained in the FPA are implicitly superseded by this general command." Although the court noted that the Supreme Court in *TVA* read the ESA as requiring agencies to afford "first priority" to listed species preservation, it found the Trust's argument "far-fetched." The court relied on two bases. First, it declared, "[t]he statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act." Second, it stated that *TVA*, "which did not even consider whether section 7 allows agencies to go beyond their statutory authority to carry out the purposes of the ESA, is hardly authority to the contrary."

The panel's reasoning used to reject the Trust's contention is somewhat tortured. The court appears to have confused section 7(a)(1), which contains language authorizing federal agencies to "utilize their authorities" to conserve listed species, and section 7(a)(2), which imposes no similar qualification to the mandate to prevent

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184. *Platte River II*, 962 F.2d at 30 (quoting 16 U.S.C. § 808(a)(1) (1988)). The FPA also provides that licenses issued under the statute may be altered only "upon mutual agreement" between the licensee and FERC. 16 U.S.C. § 799.
185. *Platte River II*, 962 F.2d at 32; *Platte River I*, 876 F.2d at 112.
186. *Platte River II*, 962 F.2d at 33 & n.2.
187. Id. at 34.
188. Id.
189. Id. (emphasis in original).
190. Id.
jeopardy. The court’s apparent focus on section 7(a)(1), however, may be due to the Trust’s requested relief. From the face of the opinion, it appears that the Trust was requesting that FERC impose additional protective conditions on the interim annual licenses.\textsuperscript{191} This would be an affirmative exercise of power, which the court found section 7 does not authorize because of paragraph (a)(1)’s apparently limiting language. The Trust ostensibly did not request that FERC refrain from issuing the license, which would have turned solely on paragraph (a)(2)’s prohibition of “any action” likely to result in jeopardy. Thus, to the extent that the D.C. Circuit was considering section 7(a)(1) as a source of power affirmatively to impose conditions not authorized by the FPA, the court’s decision is not inconsistent with the view that section 7(a)(2), once triggered, trumps the FPA’s requirement that FERC must issue interim annual licenses as a matter of course pending relicensing.\textsuperscript{192}

To the extent that the D.C. Circuit was construing section 7(a)(2), however, its decision is more troubling. As with the district court’s rationale in \textit{Riverside Irrigation}, the implication in \textit{Platte River II} that section 7(a)(2) does not allow the agency to decline action for reasons not otherwise authorized by its programmatic statute is contradicted by \textit{TVA}, subsequent legislative history, and other case law. Moreover, the D.C. Circuit’s reading of \textit{TVA} appears to be extremely crabbed. Although the Tennessee Valley Authority did not point to an inconsistent programmatic statute, it did rely on continued appropriations and fairly clear legislative history to argue that Congress intended for it to complete the dam notwithstanding section 7.\textsuperscript{193} The Supreme Court’s firm rejection of this argument at least should call into doubt \textit{Platte River II}’s snide dismissal of the case as “hardly authority to the contrary.”\textsuperscript{194} Finally, again like Riverside Irrigation, the Platte River II court did not have to limit section 7(a)(2)’s scope to reach the conclusion it did.\textsuperscript{195}

\textsuperscript{191} See id. at 32-33.

\textsuperscript{192} This distinction may help to bring \textit{Platte River II} in line with other authority interpreting section 7(a)(2)’s reach. I suggest later that, despite \textit{Platter River II}, section 7(a)(1) also may have some cross-cutting reach. See infra notes 383-99 and accompanying text.


\textsuperscript{195} When Central entered into its original long-term licensing agreement with FERC in 1941, \textit{Platte River II}, 962 F.2d at 30, the FPA provided that upon expiration, FERC would issue interim annual licenses under the same terms and conditions as expired licenses, pending a new long-term licensing agreement. Federal Power Act, ch. 285, § 15, 41 Stat. 1072 (1920) (codified at 16 U.S.C. § 808(a)(1)). Upon passage in 1973, section 7 arguably gave FERC additional authority to impose protective conditions in any new
The case law following TVA thus presents a less than clear front from which to determine section 7(a)(2)'s cross-cutting reach. In light of TVA and its subsequent ratification by Congress, however, what is arguably dicta in Riverside Irrigation and Platte River II should not invalidate the conclusion that section 7(a)(2) applies to any action in which the agency has discretion to prevent the action, regardless of how that discretion may be constrained.

4. The Services' Interpretation of Section 7 in the Joint Regulations

The conflict in the case law is not helped by the Services' approach in the joint regulations. On the one hand, the regulations appear to embrace the sweeping notion of "action" articulated in TVA. Section 402.02 of the regulations interprets "action" as used in section 7(a)(2) to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies . . .". On the other hand, section 402.03 states that "[s]ection 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." One commentator maintains that section 402.03's use of "discretionary" means that "where a federal agency is under a mandatory duty to undertake an action, neither the substantive nor procedural aspects of section 7 apply to that action." Neither the regulations nor the preamble explain what is meant by "discretionary Federal involvement or control." However, this apparent restriction can still accommodate the notion that section 7(a)(2) applies even though the action agency's programmatic statute limits its discretion to prevent the action to reasons that do not include protecting fish and wildlife. There is still "discretionary" federal involvement, although it is constrained.

licenses. However, this authority could not be used to alter the preexisting contractual relationship embodied in the original long-term licensing agreements, which included provisions for interim licenses. Even though section 7(a)(2) provides an independent source of authority, it should not be construed to give federal agencies the authority to alter unilaterally preexisting contractual relationships with nonfederal entities unless the agreement so provides. This principle is recognized in the preamble to the joint regulations. The preamble states that it is inappropriate to reinitiate consultation for actions to be taken under an existing permit or license "unless the permitting or licensing agency retained jurisdiction over the matter under the terms of the permit or license or as otherwise authorized by law." Preamble to Final Rule, supra note 5, at 19,926. The effect of section 7(a)(2) on existing agreements with nonfederal entities is further discussed infra notes 221-32 and accompanying text.

196. 50 C.F.R. § 402.02 (1993).
197. Id. § 402.03 (emphasis added).
198. See Kilbourne, supra note 37, at 529.
5. The Policy Bases for Construing Section 7(a)(2) Broadly and the Cooperative Federalism Ideal

In addition to the legal authority, sound policy also militates in favor of interpreting section 7(a)(2) as applying to actions in which the agency has any discretion to prevent the action, even when weighed against the political ideal of cooperative federalism. The ESA's essential policy goal is to prevent further species extinction at the hands of humankind unless there has been, at the least, serious deliberation at the highest levels of government. This policy, which is even more important today than it was twenty years ago, should prevail over the cooperative federalism ideal of a federal-state partnership delineated by carefully defined spheres of responsibility.

Given that Congress intended for endangered species protection to be afforded the "highest of priorities," it is incongruous to interpret section 7(a)(2) as applying only to federal agency actions in which the agency has discretion to prevent an action for reasons that include avoiding harm to fish and wildlife. The ESA, particularly section 7, reveals Congress' desire to "halt and reverse" human-caused extinction "whatever the cost." This intent resulted in the "stringent, mandatory language" in section 7(a)(2), language that "admits of no exception." Congress has now provided for exceptions to section 7(a)(2)'s sweep in provisions other than section 7(a)(2), but none work to qualify section 7(a)(2)'s language.

Moreover, the impetus for section 7(a)(2)'s all-inclusive language only has grown in the twenty years since section 7's enactment. The motivation for the ESA's demanding provisions was Congress' realization that the extirpation of other species by humans had reached a critical point. This crisis still exists; indeed, the extinction rate continues to rise. Some scientists estimate that as many as 100 species per day are becoming extinct. Thus, unless Congress explicitly ex-
empts a federal program or activity from section 7(a)(2)’s sweep, the duties to insure and consult should apply.

With respect to delegable federal programs in particular, the policy rationale supporting a broad view of section 7(a)(2)’s cross-cutting reach should continue to be dispositive. Given the well-founded importance\(^\text{206}\) that Congress ascribed to endangered species protection, it makes little sense to exempt a federally created program from section 7(a)(2)’s protection because a state, rather than the delegating federal agency, will be administering it. This is especially true when the delegating federal agency exercises oversight to ensure that the state administers the program according to the same federal standards that the federal agency would have applied.\(^\text{207}\) Otherwise, even though the same standards apply to regulate the same type of environmental impacts, section 7(a)(2)’s applicability would depend solely on the fortuitous circumstance of whether the proposed action would occur in a state authorized to conduct the program.\(^\text{208}\) This incongruity is evident in EPA’s approach to the NPDES program. There is no doubt that, if EPA administers the NPDES program, section 7(a)(2) applies to each permitting action. EPA, however, apparently takes the view that neither the delegation to the state nor the oversight of a state NPDES program is subject to section 7(a)(2).\(^\text{209}\)


\(^{207}\) Such an approach also would ill serve Congress’ statutory framework for endangered species protection. In the ESA, Congress has created a statutory scheme restricting federal action under section 7 to a much greater degree than it restricts state and private actions under section 9. 16 U.S.C. §§ 1532(13), 1538(a)(1)(B)-(C). Whereas section 7 is prospective, section 9 is primarily reactive because it is triggered only after the harmful act occurs. See id. § 1540. Section 9’s only prospective effect is deterrence, which is of questionable value on both theoretical and actual grounds. Moreover, whereas section 7 expressly applies to both listed species and their critical habitats, section 9 is directed primarily to protecting only the species themselves by prohibiting their “taking.” See id. § 1532(19). But see Cheever, supra note 2, at 177-91 (arguing, rather convincingly, that section 9 can be used to protect habitat). Placing more severe ESA obligations on federal agents than on nonfederal entities is logical because Congress’ authority is at its height in managing the Federal Government. Thus, sections 7 and 9 provide a comprehensive endangered species protection program that establishes two schemes of regulation according to the federal or nonfederal nature of the targeted activity. By interpreting the ESA to allow states to conduct federally created and supervised programs free of section 7, this apparently intentional symmetry of the ESA is upset, and Congress’ intent to halt and reverse extinction to the fullest extent possible arguably is undermined.

\(^{208}\) Cf. Crown Simpson Pulp Co. v. Costle, 445 U.S. 194, 196-97 (1980) (holding that EPA’s veto of a state-proposed NPDES permit is reviewable in the court of appeals because otherwise, “denials of NPDES permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits”).

\(^{209}\) See supra notes 33-36 and accompanying text.
Admittedly, the policy in favor of applying section 7(a)(2) to delegable federal programs must be weighed against the policy of cooperative federalism, with its underlying presumption that a clear division of authority will prevent undue federal intrusion into state sovereignty. Programs built on the cooperative federalism model are typically thought to create a partnership among coequal sovereigns, each with well-defined, largely nonoverlapping duties.\(^\text{210}\) For example, several courts interpreting the CWA have said that in creating the NPDES program, Congress intended that states play a major or dominant role in implementation and that there be a clear demarcation of responsibility between the two governments.\(^\text{211}\) In fact, a number of federal statutes creating delegable programs, including the CWA provisions governing the NPDES program, require the state to enact legislation and promulgate rules to administer the program.\(^\text{212}\) Thus, while a state-administered program must meet federal standards, the state may be administering it completely under state law.\(^\text{213}\) For these types of programs, one could argue that applying section 7(a)(2) to a federal agency’s delegation and oversight would upset the cooperative federalism policy underpinning the program by giving more power to the federal partner than Congress intended.

The cooperative federalism policy should not be overemphasized, however. For many delegable federal programs, Congress has authorized regulatory structures so permeated with mandatory federal standards and so laden with federal oversight that states essentially have become agents for the Federal Government.\(^\text{214}\) Indeed, a common pattern is for Congress to enact a cooperative federalism program and

\(\text{210. See Lyons, supra note 14, at 934-35; see also supra notes 14-18 and accompanying text.}\)

\(\text{211. See, e.g., NRDC v. EPA, 859 F.2d 156, 173, 185 (D.C. Cir. 1988); District of Columbia v. Schramm, 631 F.2d 854, 860 (D.C. Cir. 1980); Save the Bay, Inc. v. EPA, 556 F.2d 1282, 1294 (5th Cir. 1977); see also supra note 90 and accompanying text. These courts place heavy emphasis on section 101(b) of the CWA, which recites the policy of Congress to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.” 33 U.S.C. § 1251(b) (1988).}\)

\(\text{212. See, e.g., 33 U.S.C. § 1342(b).}\)

\(\text{213. See, e.g., H.R. REP. NO. 830, 95th Cong., 1st Sess. 3 (1977), reprinted in 1977 U.S.C.C.A.N. 4423, 4479 (stating that a state NPDES program “does not involve a delegation of Federal authority”); Save the Bay, 556 F.2d at 1291 (stating that “[p]ermits granted under state NPDES programs are state issued permits, not EPA-issued”). Cf. Schramm, 862 F.2d at 631 (agreeing with another court that even though EPA has review and veto authority over state-proposed NPDES permits, it is the state that approves the permit and therefore issuance is not a major federal action under NEPA).}\)

\(\text{214. See James R. Harris & Carl C. Close, Redefining the State Regulatory Role, 12 ENVTL. L. 921, 922-24 (1982); Lyons, supra note 14, at 931, 935; Leman & Nelson, supra note 14, at 987, 1012-14. Cf. Crown Simpson Pulp Co. v. Costle, 445 U.S. 194, 196 (1980) (“EPA’s veto of a state-issued permit is functionally similar to its denial of a permit in States which do not administer an approved permit-issuing program.”); NRDC, 859 F.2d at 183 (“States issuing permits pursuant to § 1342(b) stand in the shoes of the agency . . . .”).}\)
then later strengthen federal oversight to such a degree that the state loses most of the independent authority it had under the program originally.\textsuperscript{215}

This suggests, for at least some delegable federal programs, that the cooperative federalism ideal may be largely political rhetoric\textsuperscript{216} and that aspirational policy language respecting state sovereignty in programmatic statutes should not trump the more specific, clear-cut commands of section 7(a)(2).\textsuperscript{217} There may be, of course, other delegable federal programs for which the cooperative federalism ideal is more manifest in the substantive provisions of the programmatic statute. However, section 7(a)(2)'s applicability should not turn on the technical nuances of the division of authority between governments. At bottom, the weight to be afforded to cooperative federalism is a political issue, and courts should not read an exception into section 7(a)(2) for delegable federal programs unless Congress has unambiguously struck the balance in favor of exempting the program.\textsuperscript{218}

\section*{B. Section 7(a)(2)'s Applicability to Delegable Federal Programs}

At this point, a preliminary assessment of section 7(a)(2)'s applicability to delegable federal programs is possible. As the foregoing should suggest, the weight of authority and sound policy favors a broad interpretation. Section 7(a)(2) should apply to any action in which the agency has authority to prevent the action from occurring, even if the agency may exercise its discretion only for reasons that do not include protecting fish and wildlife. Section 7(a)(2)'s effect, however, may hinge on whether the agency is making the decision to delegate or is overseeing an already delegated program. It is relatively

\begin{footnotesize}
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\item[215.] See Stewart, \textit{supra} note 17, at 1196, 1197-98; Anderson et al., \textit{supra} note 21, at 342.
\item[216.] \textit{Cf.} Anderson et al., \textit{supra} note 21, at 130 (noting that Congress gradually shifted the focus of power under federal air pollution control statutes to the Federal Government while maintaining that air pollution control was "the primary responsibility of states and local government" (citation omitted in the original)). See generally Leman & Nelson, \textit{supra} note 14 (discussing the shifting political, socioeconomical, and structural considerations involved in determining the appropriate federal-state balance to achieve a set of goals).
\item[217.] \textit{Cf.} Lyons, \textit{supra} note 14, at 939 (noting that despite the cooperative federalism ideal, the letter of the law controls).
\item[218.] Furthermore, there are some incentives for states to accept the application of section 7(a)(2) to the delegation and federal oversight of delegable programs. If the federal action agency meets the rigors of section 7(a)(2) in its delegation and oversight of a program, the implementing state may be assured that its conduct under the program will not run afoul of section 9's taking prohibition and sanctions. See 16 U.S.C. §§ 1538, 1532(13) (effectively making states subject to section 9 sanctions). Also, states undertaking or authorizing actions that will be subjected to section 7(a)(2) analysis could obtain or secure for their permitees incidental take permits under section 7(b)(4), which otherwise is not an available option. See id. § 1536(b)(4).
\end{enumerate}
\end{footnotesize}
simple to argue that the law requires an agency to consult when it is faced with a delegation decision, but where delegation has already occurred, contract and constitutional bars may hinder the agency from correcting what would appear to be an ongoing ESA violation.

Under a broad reading of section 7(a)(2), a federal action agency deciding whether to delegate a program must comply with section 7(a)(2) even if the agency’s programmatic statute does not authorize it to prevent the delegation to protect fish and wildlife. For example, the CWA and its regulations appear implicitly to prohibit EPA from considering whether state administration of the NPDES program may have an effect on listed species or critical habitat—the trigger for consultation—or from refusing to delegate the program because the state may issue permits that are likely to cause jeopardy or adversely affect critical habitat. The statutory and regulatory criteria that EPA is authorized to consider in determining whether to delegate the program are specific and narrow; these criteria cannot be construed fairly as granting the Agency discretion to comply with section 7(a)(2). Nonetheless, under the view espoused here, section 7(a)(2) requires EPA to assess the delegation’s effect on listed species and critical habitat and disapprove the delegation if necessary to prevent jeopardy. It thus overrides any inconsistent statutory or regulatory provisions under the CWA.

For programs that already have been delegated, section 7(a)(2), at first blush, also would seem to apply to a federal agency’s exercise of oversight authority. Nonetheless, if the controlling programmatic statute, the relevant regulations, or the delegation agreement with the state restrict the federal agency’s discretion in such a way that it cannot comply with section 7(a)(2) in exercising its oversight authority (e.g., by preventing a state-proposed activity), the federal agency may not be able to act for section 7(a)(2) purposes. The delegation agreement, as authorized by the programmatic statute and pertinent regulations, can be viewed as a contract. In exchange for accepting increased authority over activities within its borders and, possibly, federal assistance, the state agrees to comply with the federal program’s standards (as well as to provide personnel and perhaps additional monies for implementation). As a contract, the delegation agreement should not be unilaterally modified for section 7(a)(2) purposes.

219. See supra notes 100-02 and accompanying text.
220. It could be argued that section 7(a)(2) does not apply to the delegation “action” because EPA retains sufficient review and veto authority over state permits to allow it to meet its section 7(a)(2) obligations. Variations of this argument are addressed infra notes 253-61, 304, and accompanying text.
221. See, e.g., Bowen v. Agencies Opposed to Social Security Entrapment, 477 U.S. 42 (1986); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981); McGee v. Mathis, 71 U.S. (4 Wall.) 143, 155 (1866); FEDERAL APPROPRIATIONS LAW, supra note 1,
unless the agreement provides the federal agency with the authority to make such a modification. At best, the action agency could have the delegation agreement set aside as an illegal contract under some appropriate common law or equitable doctrine.

There also may be constitutional bars to unilaterally changing the terms of a delegation "contract" to accord with section 7(a)(2). In Pennhurst State School and Hospital v. Halderman, the Supreme Court held that if Congress, acting under the Spending Clause, desires to impose a condition on the grant of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." The basis for this rule was the Court's assessment that such a grant is "in the nature of a contract." Although the ESA apparently was enacted under the Commerce Clause, the Pennhurst principle may prevent the Federal Government from unilaterally imposing conditions for section 7(a)(2) purposes on a state administering a delegated federal program with or without federal financial assistance. There seems to be no good reason to limit the Pennhurst principle to cases at 10-9 (stating that federal grants create legal obligations flowing in both directions and enforceable by application of basic contract rules).

222. See Preamble to Final Rule, supra note 5, at 19,956; Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 962 F.2d 27, 34 (D.C. Cir. 1992); see also supra notes 182-95 and accompanying text. Cf. Freeman, supra note 64, at 19 (arguing that absent a reopener or retained-jurisdiction provision, existing federally licensed or permitted actions should not be subject to section 7(a)(2)); Lundberg, supra note 30, at 112 (arguing that section 7 cannot be used to give Secretary residual power over issued land patents).


227. 451 U.S. at 17.

228. See Palila v. Hawaii Dep't of Land & Nat'l Resources, 471 F. Supp. 985, 995 (D. Haw.), aff'd, 639 F.2d 495 (9th Cir. 1981); Tarlock, supra note 78, at 26; Byron Swift, Note, Endangered Species Act: Constitutional Tension and Regulatory Discord, 4 COLUM. J. ENVTL. L. 97, 113 (1977). Some commentators claim that the ESA was also enacted under the Treaty Clause in art. II, § 2, cl. 2. See Tarlock, supra note 78, at 26; Swift, supra, at 113. One claims that it was enacted under the Property Clauses in art. 1, § 8, cl. 17 and art. IV, § 3, cl. 2. See Lundberg, supra note 30, at 99 & n.34. See generally Doremus, supra note 2, at 290-94 (discussing Congress' constitutional powers to regulate wildlife). Evidently, the ESA and its legislative history does not indicate the constitutional provision under which it was enacted.

229. U.S. CONST. art. I, § 8, cl. 3.

involving federal funds; consequently, it should extend to any case in which the Federal Government entices a state into a contractual agreement. In addition, if the delegation agreement has created some sort of vested right in the state, modifying the agreement to allow the federal oversight agency to satisfy its section 7(a)(2) obligations may constitute a taking under the Fifth Amendment.\footnote{231}

All this suggests that if the programmatic statute, relevant regulations, or the delegation agreement do not reserve authority to the action agency, that agency appears to have only two recourses: Either persuade the state to accept whatever modifications to the program or measures that are necessary for the federal agency to meet its section 7(a)(2) obligations, or attempt to invalidate the delegation.\footnote{232} Returning to the NPDES example, there appears to be no express reopener provision in the CWA or its regulations allowing EPA to restructure unilaterally a delegation agreement to accommodate section 7(a)(2) considerations.\footnote{233} Thus, for those delegated federal programs over which the responsible federal agency cannot exercise its oversight authority for section 7(a)(2) purposes, there may be an ongoing ESA violation. Under this scenario, if the federal agency cannot act to comply with section 7(a)(2), both its and the state agency’s actions may be susceptible to injunction.\footnote{234}

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\footnote{231} U.S. CONST. art. V; see also 16A AM. JUR. 2D Constitutional Law § 592 (1979) ("Valid contracts have the status of property for the purpose of the due process clause, and such are protected from being taken without just compensation.") (citing Lynch v. United States, 292 U.S. 571 (1933)). Cf. Bowen v. Agencies Opposed to Social Security Entrapment, 477 U.S. 42, 54-56 (1986) (holding that state’s contractual right under an agreement entered into pursuant to the Social Security Act is not "property" within the meaning of the Fifth Amendment because, among other things, agreement gave Congress right to modify it).

\footnote{232} The action agency also could argue that the delegation agreement contained as an implied condition the right to take any actions necessary to meet its section 7 obligations. See Conservation Law Found. v. Andrus, 623 F.2d 712, 715 (1st Cir. 1979); cf. Bowen, 477 U.S. at 52-53 ("C]ontracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority."). This would appear contrary to Pennhurst and it is doubtful that a reluctant state could be forced to comply under this theory if it would suffer any meaningful erosion of its authority or any increased bureaucratic or financial burden.

\footnote{233} See 33 U.S.C. § 1342 (Supp. IV 1992). But see 40 C.F.R. § 123.62 (1993) (authorizing EPA to initiate state program revision when the controlling federal statutory or regulatory authority for the particular program is modified or supplemented).

\footnote{234} See, e.g., Lane County Audubon Soc’y v. Jamison, 958 F.2d 290, 295 (9th Cir. 1992); Sierra Club v. Yeutter, 926 F.2d 429, 439-40 (5th Cir. 1991); Sierra Club v. Marsh, 816 F.2d 1376, 1382-84 (9th Cir. 1987); Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985); Hill v. Tennessee Valley Auth., 549 F.2d 1064, 1074-75 (6th Cir. 1977), aff’d, 437 U.S. 153 (1978); Nebraska v. Rural Electrification Admin., 12 Env’t Rep. Cas. (BNA) 1156, 1180-81 (D. Neb. 1978). The typical requirements for an injunction—likelihood of success, possibility of irreparable harm, and the balance of equities—do not apply because Congress has already determined that extinction is an incalculable harm and the public interest tips heavily in favor of protecting listed species. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 187-88 (1978); Marsh, 816 F.2d at 1383.
C. Possible Exceptions to Section 7(a)(2)’s Cross-Cutting Reach

A review of the case law and secondary literature suggests several theories that may exempt some delegable federal programs from section 7(a)(2)’s sweep. This subpart first discusses the doctrine of repeal by implication and how it may limit section 7(a)(2)’s application. The next two parts discuss theories that hinge on section 7(a)(2)’s use of “action” to describe the triggering event, namely, whether an activity can be segmented into several “actions” and whether section 7(a)(2) applies to agency “inaction.” The fourth part examines the apparent position of the Service that section 7(a)(2) applies only to activities that “but for” the federal agency’s action would not occur. Finally, I address an emerging theory that section 7(a)(2) does not apply to federal actions that are “environmentally neutral.” While some of these theories may operate to limit section 7(a)(2)’s applicability in particular situations, none of them should exempt the full array of delegable federal programs from the consultation requirement.

1. The Doctrine of Repeal by Implication

A potentially important theory for exempting some delegable federal programs from section 7(a)(2) is the doctrine of repeal by implication. This doctrine dictates that if a later-enacted statute contradicts an earlier-enacted statute, the earlier statute is overridden to the extent that the statutes are inconsistent.235 When viewed in the context of section 7(a)(2), this theory is similar to the cross-cutting issue explored above. It turns, however, on one additional factor: The inconsistent programmatic statute must have been enacted at least after 1973, when the ESA was signed into law, or perhaps after 1978 or 1979, when Congress was clearly aware of the scope of federal actions to which section 7(a)(2) would apply.236 Thus, for early delegable federal programs, such as the NDPES program created by the CWA in 1972,237 the repeal-by-implication doctrine is inapposite. Yet it may be significant for other programs, such as the airborne pollutant permitting program adopted in the Clean Air Act Amendments of 1990.238

235. 1A Norman J. Singer, Sutherland Statutory Construction § 23.09 (4th ed. 1985). Underlying this rule is the presumption that Congress intends to achieve a consistent body of law. Id. Hence, in enacting the later, contradictory statute, Congress is presumed to have intended to repeal the previous statute.

236. See Legislative History, supra note 11, at 823 (remarks of Rep. Leggett, floor debate during consideration and passage of H.R. 14,104 (Oct. 14, 1978)) (“Federal agencies were not put on notice of the full meaning of section 7 until the Tellico decision.”); see also supra part II.A.2.

237. See supra note 88.

The leading case for exploring the repeal-by-implication doctrine in the ESA context is *TVA*, which appears to limit the doctrine's applicability to section 7(a)(2). In *TVA*, the dam's sponsor argued that appropriations made after the ESA's 1973 enactment for the continued construction of the Tellico Dam constituted an implied repeal of section 7(a)(2) to the extent it applied to the dam. The appropriation acts themselves were silent as to their effect on the ESA, but the House and Senate Reports indicated that the ESA should not apply to the dam and directed the dam to be completed. The Court rejected the argument, citing the principle that "repeals by implication are not favored." Three aspects of *TVA*, however, may have left the door open for a repeal-by-implication argument to be made in future section 7(a)(2) cases. First, the Authority's argument, as the Court noted, relied solely on committee reports, rather than on any actual, inconsistent statutory language. Second, the Court pointed out that the doctrine disfavoring repeal-by-implication applies with "greater force" when "the subsequent legislation is an appropriations measure." Finally, the Court observed that there was really no irreconcilable conflict between the Tellico Dam appropriations and the ESA because the appropriation committees had some basis for believing that the snail darter would be relocated.

The only other reported cases to have addressed the issue of repeal by implication in the ESA context are two district court decisions that dealt primarily with section 7(a)(1). In *Texaco v. Andrus*, a D.C. district court found that section 7(a)(1) did not override several "express, subsequent" provisions of the SMCRA. The court attempted to distinguish *TVA* on two grounds. First, *TVA* involved the subsequent passage of an inconsistent statute and, second, *TVA* involved an action that would result in jeopardy, whereas, in the case at bar, there had been no such showing. By distinguishing

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240. *Id.* at 189.
241. *Id.* at 170-71, 189; *see supra* notes 129-31 and accompanying text.
242. *437 U.S.* at 189 (citations omitted).
243. *See id.* at 189 n.35, 192.
244. *Id.* at 190 (citations omitted; emphasis in original); *see also Plater, supra* note 2, at 842-43 (presenting further arguments against implied repeals by appropriation measures).
245. *437 U.S.* at 192-93.
246. 11 Env't L. Rep. (Env't L. Inst.) 20,179 (D.D.C. Aug. 15, 1980); *see Macleod et al., supra* note 37, at 710 n.112.
247. 11 Env't L. Rep. at 20,182 (citing SMCRA § 522(a)(3), 30 U.S.C. § 1272(a)(6) (1988)). The court cited to subsection 7(a) of the ESA, but quoted the "conservation" language found in paragraph (a)(1).
248. 11 Env't L. Rep. at 20,182 n.3.
TVA, although somewhat superficially, Texaco's holding does not undermine the conclusion that a repeal by implication of section 7(a)(2) will continue to be disfavored. Moreover, the second reported district court case is directly contrary to Texaco. In Organized Fishermen of Florida v. Andrus, the plaintiffs apparently argued that the Magnuson Fishery Conservation and Management Act of 1976 overrode section 7(a)(1). A Florida federal district court, citing TVA responded: "That Act cannot be said to have either expressly or impliedly repealed the high priority accorded the protection of animal life under the [ESA]."

In summary, courts will probably "disfavor" the application of the repeal-by-implication doctrine to section 7(a)(2), citing TVA, but there is no dispositive law ensuring that a court will never apply the doctrine. Thus, the success of a repeal-by-implication argument probably depends on the facts (and judge) of each case.

2. Segmentation Into Distinct "Actions"

Another possible theory to exempt some stages of or perhaps entire delegable federal programs from section 7(a)(2) is to break the agency "action" into distinct segments, one or more of which may not trigger the need for consultation. Section 7(a)(2) applies to "any action authorized, funded, or carried out by such agency." For activities that take place in clearly distinct stages, this language might allow each segment to be viewed as a separate "action." For example, an

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249. Although TVA did not involve the subsequent passage of an inconsistent programmatic statute, it did address the effect of the subsequent passage of several appropriation acts funding a program that clearly violated section 7(a)(2). Also, while TVA did deal with a repeal-by-implication argument in the context of section 7(a)(2)'s jeopardy prohibition, the court did not explain why the repeal-by-implication argument carried less weight in the context of section 7(a)(1)'s affirmative command to adopt conservation programs. Perhaps the court, sub silentio, ruled on the basis of section 7(a)(1)'s language that the Secretary "utilize" the "programs administered by him" for conservation purposes. 16 U.S.C. § 1536(a)(1). If this is the basis of the court's reasoning, it need not have gone into the repeal-by-implication issue.


254. "Segmentation," or the piecemealing of a federal action into several independent actions for the purposes of limiting environmental review, is a classic NEPA problem. See generally Daniel R. Mandelker, NEPA Law and Litigation § 9.04 (1992). As the text will suggest, however, the NEPA cases should have little or no impact in the application of section 7. See infra notes 271-73 and accompanying text.
action agency faced with a delegation decision could designate the delegation stage and the implementation stage as two independent "actions," and initially review only the "delegation" action, ignoring any effects that might follow from the "implementation" action. Since the agency will almost certainly find that the first action has no effect on species, consultation is not necessary, and the delegation may proceed. If there is no federal oversight of state implementation, it could be maintained that there is no federal action to trigger consultation for this stage. Thus, segmentation may allow this type of delegable federal program to evade section 7(a)(2) review.

The segmentation theory, however, appears to be foreclosed by case law and the joint regulations. Courts uniformly hold that agency "action" under section 7(a)(2) is to be interpreted broadly. Accordingly, it is well established that federal activity that is divided into distinct stages is one "action" for the purposes of section 7(a)(2), even if the stages are statutorily mandated. In addition, for federal activities that indirectly cause nonfederal activities, the case law establishes that the effects caused by those nonfederal activities must be considered the effects of the initial federal "action." Hence, for federal leasing or permitting activities, a nonfederal applicant's actions flowing from the lease or permit are subsumed into the federal "action" in approving the activity.

The joint regulations track the case law. An "action" under section 7 is defined as

all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies . . . . Examples include, but are not limited to:

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255. Neither the ESA nor its legislative history explicitly bear on this theory's validity. See Erdheim, supra note 30 at 675, 677.

256. See, e.g., Lane County Audubon Soc'y v. Jamison, 958 F.2d 290, 294 (9th Cir. 1992); Defenders of Wildlife v. Lujan, 911 F.2d 117, 122-24 (9th Cir. 1990), rev'd on other grounds, 112 S. Ct. 2130 (1992); Conner v. Burford, 848 F.2d 1441, 1453 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989); North Slope Borough v. Andrus, 642 F.2d 589, 608 (D.C. Cir. 1980).


258. See, e.g., National Wildlife Fed'n v. Coleman, 529 F.2d 359, 373-74 (5th Cir.), cert. denied, 429 U.S. 979 (1976). National Wildlife Federation was endorsed by Congress in enacting the 1979 Amendments, see H.R. CONF. REP. NO 697, supra note 53, at 53, and its holding was essentially codified in the joint regulations' definition of "effects of the action," 50 C.F.R. § 402.02 (1993); see Preamble to Final Rule, supra note 5, at 19,932. This topic is discussed further infra, notes 355-66 and accompanying text.

259. See, e.g., Conservation Law Found. v. Andrus, 623 F.2d 712, 715 (1st Cir. 1979) ("[T]he strictures of the ESA apply to lease applicants as well as the government."). See generally Coggins & Russell, supra note 2, at 1513-22 (discussing the variety of federally authorized activities to which section 7 may apply).
(c) the granting of licenses, contracts, leases, rights-of-way, permits, or grants-in-aid; or
(d) actions directly or indirectly causing modifications to the land, water, or air.\textsuperscript{260}

This sweeping definition should forestall most attempts to segment a federal activity and a resultant nonfederal activity into two "actions" under section 7.

Furthermore, an expansive notion of agency action accords with congressional intent and sound policy. Congress intended that consultation take place as early as possible in the life of a project so that a broader range of alternatives would be available to decisionmakers, thereby increasing the chance of finding an alternative that would avoid an irresolvable project-species conflict.\textsuperscript{261} Segmenting a project into separate "actions" makes the early identification of alternatives inconsequential and frustrates Congress' intent. In short, a multi-stage program, including one in which a nonfederal actor implements the latter stages, cannot be segmented under the ESA.

3. \textit{Section 7(a)(2)'s Application to "Inaction"}

Another potential exemption theory turning on section 7(a)(2)'s use of "action" is that Congress did not intend for section 7(a)(2) to apply to agency "inaction." For example, if a federal agency has general review authority over certain state activity taken under a delegated federal program, but the agency is not obligated to exercise that authority in any specific manner, it may conclude that it has no section 7(a)(2) duties after delegation. This theory is analogous to an argument sometimes used by courts under NEPA\textsuperscript{262} holding that NEPA's environmental analysis obligation does not apply to inaction because NEPA is triggered only by federal "action."\textsuperscript{263} This line of reasoning

\textsuperscript{260} 50 C.F.R. § 402.02 (emphasis added).
\textsuperscript{261} See supra notes 69-74 and accompanying text.
\textsuperscript{263} See, e.g., Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1242-43 (D.C. Cir. 1980); Alaska v. Andrus, 591 F.2d 537, 541 (9th Cir. 1979). However, there also are NEPA cases that appear to reject the inaction-action distinction. See, e.g., Sierra Club v. Hodel, 848 F.2d 1068, 1091 (10th Cir. 1988); Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271, 275-78 (3d Cir. 1983). The NEPA regulations, promulgated by the Council on Environmental Quality, also seem to reject the inaction-action distinction. The regulations interpret NEPA to apply to "the circumstances where the responsible officials fail to act and that failure to act is reviewable by the courts or administrative tribunals under the Administrative Procedure Act or another applicable law as agency action." 40 C.F.R.
could be used to argue that EPA's review of individual state-proposed NPDES permits and its periodic review of the overall state administration of the NPDES program are exempt from section 7(a)(2). The CWA and its regulations apparently do not require EPA, while conducting these reviews, to undertake any affirmative action (such as making a finding of compliance), and unless EPA acts, the responsible state agency will continue issuing permits as a matter of course.

On balance, however, the action-inaction distinction has little support. First, the Court in TVA read section 7(a)(2) as applying to ongoing projects. Logically, this embraces the type of "inaction" at issue here, and Congress was almost certainly aware of the Court's reasoning when it endorsed TVA in 1978. Second, and perhaps more importantly, the consequences of "inaction" to a listed species may be as dire as "action." Congress, viewing endangered species to be of incalculable value, intended that their protection be afforded the highest national priority and that human-caused extinction be prevented at any cost. To effectuate this intent, Congress drafted stringent and sweeping substantive provisions. Limiting "action" to affirmative acts would violate the spirit if not the letter of the ESA.

Finally, the ESA's substantive basis effectively distinguishes those NEPA cases suggesting the "inaction" exception. As the Court noted in TVA, "NEPA essentially imposes a procedural requirement on agencies, requiring them to engage in an extensive inquiry as to the effect of federal actions on the environment; by way of contrast, the

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§ 1508.18 (1993). For a discussion of the inaction/action distinction in the NEPA context, see MANDELKER, supra note 254, § 8.05[3], [6].

264. EPA has made this argument with respect to its review of state NPDES permits in recent litigation. See EPA's Memorandum in Support of Summary Judgment, supra note 33, at 55-57.

265. See supra notes 106-14 and accompanying text. A number of courts have held that EPA's refusal to veto a state-proposed NPDES permit does not constitute an "action" under NEPA and therefore is not subject to NEPA review. See, e.g., District of Columbia v. Schramm, 631 F.2d 854 (D.C. Cir. 1980); Chesapeake Bay Found., Inc. v. Virginia State Water Control Bd., 453 F. Supp. 122, 125 (E.D. Va. 1978).


267. See supra note 144 and accompanying text. Justice Powell, in dissent, emphasized the majority's reading by stating that under the Court's view, section 7 "covers every existing federal installation." 437 U.S. at 203. During the floor debates for the 1978 Amendments, Representative Bowen, a manager of the House bill, characterized the Court's reading of the law as requiring that the Supreme Court building be torn down if it was found to jeopardize a listed species. See supra note 151 and accompanying text. Despite these characterizations of section 7(a)(2), Congress retained its language virtually intact, compelling the conclusion that section 7(a)(2) applies to "inaction" as well as "action."


269. TVA, 437 U.S. at 184, 187, 194.
[ESA] is substantive in effect, designed to prevent the loss of any endangered species, regardless of cost. Based on this and other differences between the acts, NEPA case law purportedly supporting any limitation on section 7's scope should be viewed skeptically.

The preceding discussion strongly suggests that courts will reject an argument relying on an inaction-action distinction. Consequently, section 7(a)(2) should apply, for example, to EPA's exercise of both its permit review and veto authority and its general oversight authority under the CWA, even though no affirmative federal action is required for the state to continue issuing permits.

4. The "But For" Causation Requirement

Another theory to exempt certain federal actions from section 7(a)(2)'s cross-cutting reach is premised on practicality. If the state's proposed activity may proceed and have the same impact on listed species regardless of any federal involvement, why should the action agency consult with the Service or refrain from participating? Even if the action agency consults and consequently decides not to participate in the activity, the same impact will occur. Accordingly, section

270. *Id.* at 188 n.34 (1978) (emphasis in original). The Ninth Circuit has repeatedly stated that section 7's procedural requirements should be more stringently enforced than NEPA's procedural requirements should be. See Conner v. Burford, 848 F.2d 1441, 1457-58 n.40 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989); Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985); Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1509 (D. Or. 1992) ("The purpose of the [ESA] and the purpose of NEPA are not the same.").

271. For example, NEPA requires environmentally "significant" governmental action, whereas "under § 7, the loss of any endangered species has been determined by Congress to be environmentally 'significant.'" *TVA*, 437 U.S. at 188 n.34. In addition, NEPA applies only "to the fullest extent possible," 42 U.S.C. § 4332 (emphasis added), whereas section 7(a)(2)'s sweep is unrestricted. See *supra* note 136 and accompanying text.

272. Section 7(a)(2) also must be read in conjunction with the affirmative obligation set forth in section 7(a)(1). 16 U.S.C. § 1536(a)(1). This provision requires all federal agencies to "utilize their authorities" to improve the status of listed species. *Id.* This mandate to take affirmative action is contrary to a restrictive interpretation of "action" in section 7(a)(2). As one prominent commentator has argued, "[t]o meet [section 7(a)(1)'s] requirement, agencies should at least examine whether nonuses of their authority comply with the conservation requirement." *Erdheim*, *supra* note 30, at 675.

273. Several cases have held that EPA's consideration of state NPDES permits is not generally reviewable, particularly when EPA does not exercise its veto authority. See, e.g., District of Columbia v. Schramm, 631 F.2d 854, 859, 862 (D.C. Cir. 1980); Save the Bay, Inc. v. EPA, 556 F.2d 1282, 1295-96 (5th Cir. 1977). *But see* NRDC v. EPA, 859 F.2d 156, 184 (D.C. Cir. 1988) (stating that EPA's discretion to oversee state permits is not "unfettered" and that various CWA provisions "operate[ ] as a significant check on the agency's discretion"). The reasoning of these courts is that the relevant CWA provisions are drawn so broadly that there is no law to apply. See, e.g., *Schramm*, 631 F.2d at 861; *Save the Bay*, 556 F.2d at 1293-94. However, section 7(a)(2)—as a cross-cutting, substantive mandate—should provide sufficient standards by which to gauge agency behavior. Therefore, section 7(a)(2) should be able to bootstrap EPA's consideration of state NPDES permits into a reviewable agency action. *Cf. Save the Bay*, 556 F.2d at 1293 ("A long-standing and strong presumption exists that action taken by a federal agency is reviewable in federal court.").
7(a)(2) should attach only to federal agency decisions but for which the proposed activity could not proceed. The Service evidently takes this view.\(^\text{274}\)

For many delegable programs, such as the NPDES program, application of the but for test most likely would not exempt the program from section 7(a)(2). Under the CWA, an NPDES permit, whether issued by a federal or state agency, is required for any point source to discharge any pollutant into navigable waters. Thus, although a state may be free to regulate pollution sources as an exercise of its inherent police power, a discharge cannot lawfully occur unless the state is delegated the authority to issue the necessary NPDES permit or this authority is exercised by a federal agency.

 Nonetheless, the applicability of section 7(a)(2) to some delegable federal programs may turn on validity of the but for theory. Some federal programs may provide financial or technical assistance that is not necessary for the ultimate action to occur. For example, under a federal "block grant" program, a federal agency provides financial assistance to state or local agencies for a variety of activities in a broad functional area, and some of these programs may partially fund state or local activities with significant environmental impact.\(^\text{275}\) This type of program generally requires the federal agency to oversee or occasionally audit the disbursements.\(^\text{276}\) Hence, these programs share a similar structure to delegable federal programs regulating environmental impact. A state does not necessarily have to accept a block grant program, however, for it to undertake or sponsor the activity that the program would affect.\(^\text{277}\)

Section 7(a)(2) and its legislative history do not cast any light on the correctness of the but for theory.\(^\text{278}\) However, the joint regula-

\(^{274}\) See infra notes 279-84 and accompanying text; see also Freeman, supra note 64, at 63-64; Carter, supra note 58, at 153-54.

\(^{275}\) Federal Appropriations Law, supra note 1, at 10-35, -36.

\(^{276}\) For example, under the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-5320 (1988), grantees of block grants must submit annual performance reports to the Secretary of Housing and Urban Development, who is required to review and audit the disbursements to ensure compliance with the applicable provisions of the Act. Id. at § 5304(e).

\(^{277}\) EPA appears to have raised a but for causation argument with respect to its grant of federal funds to assist state administration of the NPDES program. See supra notes 33-36 and accompanying text. Focusing solely on whether its funding triggered section 7(a)(2), EPA argued that the funding was for "administrative purposes" and gave it no control over state implementation. See EPA's Memorandum in Support of Summary Judgment, supra note 33, at 44-45. Therefore, EPA maintained, its action in providing the funds was not the cause of any environmental impact that state permitting might cause. Id.

\(^{278}\) Section 7(a)(2)'s language may be viewed as undermining the but for argument, but the most reasonable conclusion is that the provision is ambiguous on this point. Section 7(a)(2) applies to "any action funded, authorized, or carried out" by a federal agency that "is not likely to jeopardize" listed species or "result" in the adverse modification of
tions and the preamble indicate, although somewhat circuitously, that this theory has been adopted by the Service. Under the regulations, a jeopardy assessment and, ostensibly, the "may affect" assessment must consider the "direct and indirect effects of an action on the species or critical habitat that are interrelated or interdependent with that action." The rules explain that "indirect effects" are "those that are caused by the proposed action and are later in time, but still reasonably certain to occur." The causation language in this latter definition implies that the action agency (or the Service) need only consider effects that are actually caused by the action—in other words, effects that, but for the agency action, would not occur. The preamble's discussion of what is meant by "interrelated" and "interdependent" actions further supports this reading. After describing the terms' definitions, the preamble adds that "the 'but for' test should be used to assess whether an activity is interrelated with or interdependent to the proposed action." Hence, it seems safe to say that the Service takes the position that section 7(a)(2) is triggered only for those effects that would not occur but for the federal agency's action.

The Service's view appears to have the support of at least one circuit. In *Sierra Club v. Marsh* the Ninth Circuit considered whether the Corps had to consult over its participation in a highway project. In addressing the issue of whether a planned development

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279. The rules use "effects of the action" to describe the scope of the proposed activity's environmental effects that must be considered in making the jeopardy assessment. "Effects of the action" are defined as "the direct and indirect effects." See 50 C.F.R. § 402.02 (1993).

280. The rules do not explicitly state that the "effects of the action" definition apply to the "may affect" assessment necessary to deciding whether to consult. However, this seems to be a reasonable construction. See Kilbourne, *supra* note 37, at 531.

281. 50 C.F.R. § 402.02.

282. Id. (emphasis added).


284. Some provisions in the regulations, however, suggest that any action in which there is federal involvement is sufficient to trigger section 7(a)(2) scrutiny. For example, one rule states that section 7(a)(2) applies to activities "of any kind authorized, funded, carried out, in whole or in part" by the federal agency. 50 C.F.R. § 402.02 (emphasis added). Another states that section 7 applies to "all actions in which there is discretionary Federal involvement or control." Id. § 402.03 (emphasis added).

285. 816 F.2d 1376 (9th Cir. 1987).

286. The Corps and a local governmental sponsor of the proposed highway agreed that the Corps would construct a flood control channel for the highway in return for the sponsor's conveyance of certain lands to the Federal Government to mitigate the project's destruction of endangered shorebirds' habitat. Id. at 1380-81, 1385. On this basis, the Service issued a no-jeopardy opinion for the Corps's activity. Id. at 1379, 1385. The sponsor, however, subsequently insisted on retaining easements to the mitigation lands so that nearby property could be developed. The Service then requested reinitiation of formal
by a local agency could trigger the consultation requirement, the court held that the planned development could not, alone, trigger reinitiation because there was insufficient federal involvement in the project. 287 In reaching this conclusion, the court applied the but for test set forth in the preamble for interrelated or interdependent activities: The court held that it could not say that "but for the federal project, [the planned development] would not occur." 288

Although the authority supporting the but for theory is not strong, this causation limitation on section 7(a)(2)'s cross-cutting reach may be unassailable. 289 The simple logic on which it is predicated—that the nonfederal activity would take place regardless of the federal involvement—is difficult to rebut. 290 Moreover, under well-established principles of administrative law, the Service's acceptance of this theory most likely will carry significant weight if the issue is litigated. 291

5. The "Environmental Neutrality" Exception

Another potential exception to section 7(a)(2)'s reach is the emerging "environmental neutrality" theory. In Marin Audubon So-
ciety v. Seidman, a district court coined this term in holding that the Federal Deposit Insurance Corporation’s (FDIC) sale of a secured note to a developer was not subject to section 7(a)(2). The note was secured by undeveloped property alleged to be wetlands habitat for the endangered salt marsh river mouse. Although the property was in foreclosure, the FDIC conveyed the note to the developer without entering into consultation.

The court dismissed the subsequent citizen suit for failure to state a claim, reasoning that the FDIC’s transfer of the note was “environmentally neutral with regard to its potential impact on the mouse and its habitat.” On appeal, the Ninth Circuit affirmed, holding that “[t]he FDIC action was neutral because it did not alter the legal barriers to development.” The FDIC’s action, the panel found, simply “had no effect on any development or restrictions on development of the land.”

At bottom, Marin Audubon arguably is a straightforward but for causation case. Throughout the factual history of the case, the property had been owned by a private party who could have developed his land at any time. Thus, although the sale of a security interest in the property to the developer may have facilitated eventual development, it did not affect the actual ability of the then-existing property owner to develop his land. Since it cannot be said that but for the FDIC’s action, development would not occur, the nexus between the federal and private action is insufficient to trigger section 7(a)(2) under the but for theory.

However, the language of both opinions suggests that the courts were working from a different perspective, one that focuses on the “neutrality” of the agency action. Although the analytical basis for this approach is unclear from the opinions, it seems that the two courts saw an exception from section 7(a)(2) for federal actions that are not intended to or typically do not have any environmental effect.

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295. 1991 U.S. Dist. LEXIS 17322, at *6. Specifically, the court stated that “FDIC’s action had neither a direct or indirect effect on the mouse or its environment” because “[n]o evidence has been presented . . . which would indicate that the transfer of the note permits previously precluded uses, authorizes development, or effects any changes in the property.” Id. at *5.

296. 1993 U.S. App. LEXIS 18198, at *2. The opinion is preceded by a statement declaring that the opinion is not to be cited to or by the courts of the circuit. Id. at *1.

297. Id. at *3.

298. See id. at *2.

299. See also Freeman, supra note 64, at 18 (implying that the key to Marin Audubon is the causative connection between the federal action and the effect on listed species.)
Indeed, citing to the *Marin Audubon* district court opinion, EPA recently advocated this type of theory in defending against a 7(a)(2) claim regarding a state’s general permitting authority under the NPDES program. EPA argued that its approval of general permitting authority for a state with an existing state NPDES program does not have, as a matter of law, any effect on listed species because general permits use the same technology-based and water quality-based requirements as individual permits. In other words, EPA was contending that its action could have no environmental effect (i.e., was environmentally neutral) because a discharger covered under a general permit would otherwise have to obtain an equally stringent individual permit.

The environmental neutrality theory, despite its present amorphousness, may be valid in certain situations. For example, when a federal agency exercises discretionary authority to transfer some functions to another federal agency it undertakes a federal “action” that enables further activity that may affect listed species. This action should not trigger section 7(a)(2), however, if the receiving agency will be able to comply fully with section 7(a)(2).

So framed, the environmental neutrality theory might support exempting the initial stages of some delegable federal programs from section 7(a)(2). It could be argued that if a federal agency will retain sufficient authority to consult with the Service and to prevent on-the-ground impact for any state activity taken pursuant to the program, the delegation decision should not be considered a section 7(a)(2) “action” because the delegation itself is not intended to and will not have any environmental effect. This argument may be difficult to rebut. If

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300. The case settled, however, before the court could reach the merits of EPA’s argument. See Mudd v. Reilly, No. CV-91-P-1392-S (N.D. Ala. filed June 17, 1991, settlement agreement filed May 13, 1993); see also supra notes 33-36 and accompanying text.

301. See EPA’s Memorandum in Support of Summary Judgment, supra note 33, at 57-58.

302. The environmental neutrality theory’s capacity for confusion is evident in the assertions of recent commentators. One commentator appears to rely on this theory in arguing that “the mere sale by [the Resolution Trust Corporation] or FDIC of a covered property back to the private sector, whence it came into the federal government’s hands in the first place, by itself has no real net environmental effect” and therefore should not fall under section 7(a)(2). J.B. Ruhl, *Innovative Proposals for Familiar Statutes: Are Environmental Laws the Silver Lining of the Lending Industry Cloud?*, NAT. RESOURCES & ENV’T, Summer 1990, at 40, 41. If the touchstone of Ruhl’s theory is whether the federal action by itself has no net environmental effect, it misperceives the law. It is well established that section 7(a)(2) looks beyond the federal action “by itself” and requires the examination of the effects flowing from any nonfederal action made possible by the federal action; it makes no distinction for when the action agency is acting only in some intermediate capacity. See infra notes 306-15 and accompanying text. If FDIC’s sale of a property interest would, with reasonable certainty, cause impacts that may affect a listed species, FDIC must consult. See also Lundberg, supra note 30, at 112-13 (making an argument similar to Ruhl’s).
EPA were to draft a delegation agreement for an NPDES program allowing it to consult on each state-proposed NPDES permit and veto that permit for ESA purposes, EPA might justifiably argue that the delegation is not an "action" under section 7(a)(2). But where the Federal Government would lose authority to comply with section 7(a)(2) for an activity affecting listed species, the delegation "action" probably cannot be characterized as environmentally neutral.303

6. **Summary of the Exception Theories**

The five theories examined in this section for exempting certain "actions" from section 7(a)(2) range from having little merit to being potentially applicable. The segmentation and inaction theories, both of which originated largely in the NEPA context, most likely have no application under the ESA. The repeal-by-implication theory has some legal support, but it should control only when Congress clearly intended the later-enacted programmatic statute to override section 7(a)(2). The environmental neutrality theory is supported primarily by common sense, but its parameters are unclear and it most likely will succeed only in limited circumstances. The "but for" causation theory is the best supported of the arguments examined here and potentially has the widest application. In short, these theories may support exempting some delegable federal programs from section 7(a)(2), but none should completely override the general rule that section 7(a)(2) applies to the delegation and oversight of delegable federal programs.

III

THE MECHANICS OF COMPLYING WITH SECTION 7(a)(2) IN DELEGATING AND OVERSEEING FEDERAL PROGRAMS

This part examines how section 7(a)(2) may affect delegable federal programs and how federal agencies may comply with their duties to insure and consult during and after delegation. Admittedly, the variety in delegable federal programs makes this exercise susceptible to

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303. Similarly, if the federal agency can establish, in consultation with the Service, enforceable substantive criteria for program implementation to ensure that the state's administration of the program would not cause jeopardy, the delegation decision and any subsequent oversight arguably should not be considered "actions" under section 7(a)(2).

This may be EPA's current position with respect to the NPDES program. In Mudd v. Reilly, No. CV-91-P-1392-S (N.D. Ala. filed June 17, 1991, settlement agreement filed May 18, 1993), EPA tacitly admitted that section 7(a)(2) applied to its review of state water quality standards but denied that section 7(a)(2) applied to virtually all of its other functions in delegating and overseeing the NPDES program. *See supra* notes 33, 114, 118, and accompanying text. In taking this litigation stance, EPA's position may be that so long as it consults in approving state water quality standards, and forces the necessary changes to insure no jeopardy, it will satisfy section 7(a)(2), and any subsequent EPA involvement with the state program will be environmentally neutral.
overgeneralization and speculation. Nonetheless, analyzing section 7(a)(2)'s potential effect on delegable federal programs will allow an assessment of the actual feasibility of complying with section 7(a)(2) in delegating and overseeing federal programs. The conclusions gleaned from such an assessment may be crucial—if a federal agency cannot possibly meet both its section 7(a)(2) and programmatic obligations, an argument that Congress did not intend for section 7(a)(2) to apply to the program may be considerably more persuasive.

Part III.A. considers some of the problems that might arise when section 7(a)(2) is applied to the delegation decision. I focus on section 7(a)(2)'s impact on delegation, rather than on oversight, because the one feature that all delegable programs have in common is the delegation decision, and because programs delegated in violation of section 7(a)(2) probably will need to be redelegated. Part III.B. examines two methods by which an action agency might be able to avoid the more serious problems posed by applying section 7(a)(2). The first method is "incremental consultation," an extra-statutory process created by the Service for multiple-stage programs. Close examination reveals that incremental consultation is largely unsuitable for delegable federal programs under the courts' interpretation of section 7(a)(2). The second method is the product of common sense: Delegate the duty to consult under section 7(a)(2) to the state along with the delegable program. Although this method may require a change in the Service's position and further rulemaking, section 7(a)(2) and its legislative history may allow this interpretation if the delegation is structured so that the action agency retains its duty to insure.

A. The Potential Effects of Section 7(a)(2) on the Delegation of Federal Programs

Section 7(a)(2) requires two analytical steps that could affect its application to the delegation of a federal program: (1) the "may affect" assessment, which determines whether consultation is required, and (2) the jeopardy assessment, which determines whether delegation should proceed.

304. See supra notes 221-32 and accompanying text. An action agency faced with a delegation decision probably would not have to do a biological assessment because the delegation is not a major construction activity or an activity with similar physical impact. See supra notes 38-39 and accompanying text. Although the delegation may enable the state to initiate such activity, its effects probably would be considered "indirect," see infra note 307 and accompanying text, whereas the biological assessment requirement seems targeted to only those actions with "direct" effects equivalent to construction activity. Cf. Preamble to Final Rule, supra note 5, at 19,937 (stating Service's view that development and production activities under OCSLA would require a biological assessment but leasing and exploration activities generally would not).
I. The "May Affect" Assessment and the "Reasonably Certain To Occur" Limitation

To determine whether to consult, an action agency must determine whether its action, here the delegation, "may affect" listed species or critical habitat. The first step for making the "may affect" assessment is to identify the "effects of the action," which are divided into "direct" and "indirect" effects. The rules do not clearly define these terms, but the preamble suggests that a "direct effect" is that effect over which the federal agency has immediate control and an "indirect effect" is that over which a nonfederal entity has immediate control. There is a clear difference in the scope of the two terms. Direct effects are any impacts caused by the action whereas indirect effects are "those that are caused by the proposed action and are later in time, but still reasonably certain to occur." Once these effects are identified, the action agency ascertains the listed species or critical habitat in the "action area" and assesses whether they may be affected.

Applying this analysis to delegable federal programs is troublesome because of the regulation's definition of indirect effects as only those effects that are "reasonably certain to occur." Presumably, the delegation itself would be considered a direct effect while state implementation and its consequent environmental impact would be considered an indirect effect caused by the delegation. Yet a federal action agency considering whether to delegate a program may not be able to determine with "reasonable certainty" the state actions that will be taken after delegation. Therefore, under a strict reading of the rules,

305. See supra notes 46-47 and accompanying text.

306. The regulations use "effects of the action" to describe the scope of effects that will be considered in a formal consultation or in assessing whether an action is likely to have an adverse effect. See 40 C.F.R. §§ 402.12(f)(4), 402.14(g)(3) (1993). See generally Freeman, supra note 64, at 64 (clarifying the steps for determining the "effects of the action"). The regulations do not describe explicitly the scope of effects that should be considered in making the "may affect" assessment. A tenable conclusion is that the "effects of the action" analysis used in making the jeopardy assessment should be used in making the "may affect" assessment because section 7(a)(2)'s duty to insure provides the substantive underpinning of both determinations. Yet it is also possible that the "effects of the action" analysis only applies to the jeopardy assessment or the "likelihood of adverse effect" assessment, and not to the broader "may affect" assessment. See Kilbourne, supra note 37, at 531. The discussion in the text assumes that the former conclusion is correct.

307. See Preamble to Final Rule, supra note 5, at 19,932, 19,933. One commentator has relied on the NEPA regulation's definition of "direct action," 40 C.F.R. § 1508.8(a), to define the term under the ESA regulations as "those effects that are caused by the action and that occur at the same time and place." Freeman, supra note 64, at 20, 63.

308. 50 C.F.R. § 402.02 (1993) (emphasis added).

309. The "action area" is that area that may be "affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." Id.; Kilbourne, supra note 37, at 531.
the federal agency need not evaluate their potential impacts in making the “may affect” assessment.

The “reasonably certain to occur” standard, however, probably is not as rigorous as it sounds. The preamble states that the “reasonably certain to occur” limitation will be interpreted to be consistent with *National Wildlife Federation v. Coleman.*\(^{310}\) In *Coleman*, the Fifth Circuit held that private development likely to follow from the construction of a federally funded highway must be considered under section 7 even though the nature, extent, and specific location of the development were unknown.\(^{311}\) The only evidence before the court suggesting that private development was likely were assertions in the highway’s environmental impact statement that private development “always” follows highway construction and “predictions” of the Federal Highway Administration and other agencies that private development would occur.\(^{312}\) The district court had found that this was “mere speculation,” but the Fifth Circuit found it to be sufficient.\(^{313}\) Thus, under *Coleman*, a nonfederal entity’s activity apparently is an “indirect effect” for section 7(a)(2) purposes as long as an expert agency can reasonably anticipate that the activity will follow the federal action.\(^{314}\)

The preamble further states that “reasonably certain to occur” means something more than “a mere possibility,” but less than “a guarantee,” that the effect will occur.\(^{315}\) This statement and the preamble’s incorporation of *Coleman* indicate that the “reasonably certain to occur” limitation should be viewed liberally. Accordingly, with respect to delegable federal programs, it seems that so long as the action agency can anticipate the types of state actions under the program, their approximate location, and typical environmental impact, the state’s actions should be deemed “reasonably certain to occur” and considered in the “may affect” assessment.\(^{316}\)

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\(^{310}\) Preamble to Final Rule, *supra* note 5, at 19,932.

\(^{311}\) 529 F.2d 359, 364-65, 373-75 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976).

\(^{312}\) *Id.* at 373.

\(^{313}\) *Id.*

\(^{314}\) Nor should *Coleman* be construed as the outer limit of the scope of nonfederal effects that must be considered under section 7(a)(2). There is no suggestion in that case that the court was in any way uncomfortable with subjecting the private activity stimulated by the highway to section 7(a)(2) analysis.

\(^{315}\) Preamble to Final Rule, *supra* note 5, at 19,933.

\(^{316}\) This accords with the Ninth Circuit’s decision in *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989). There, the court held that the Service must consider the future activities of private oil and gas lessees in a biological opinion formulated at the leasing stage, even though “the precise location and extent of future oil and gas activities [are] unknown.” *Id.* at 1453. The court noted that the opinion could at least consider available “information about the behavior and habitat of the species in the area covered by the leases” and “determine[ ] whether post-leasing activities in particular areas [are] fundamentally incompatible with the continued existence of the species.” *Id.* at
To illustrate, EPA, in determining whether to delegate an NPDES program, should be able to project with "reasonable certainty" the types and locations of discharges that the state will permit. EPA also should be able to obtain data showing the waterways within the state that contain listed species, critical habitat, and species or habitat likely to receive ESA protection in the future. Thus, although the nature, extent, and location of future permitting actions and consequent discharges are actually unknown, EPA should have sufficient information to meet the Service's standard.

2. The Jeopardy Assessment, Insufficient Information, and Section 7(d)

If the federal action agency determines that the delegation is likely to adversely affect a listed species or critical habitat, it must formally consult with the Service. With respect to formal consultation, the most obvious potential issues stem from an inevitable degree of uncertainty about the state's future actions. The law seems settled that, once formal consultation is initiated, the Service must reach a conclusion as to jeopardy at the end of the ninety-day consultation period regardless of the sufficiency of the information. Although the Service must use the "best scientific and commercial information available" in assessing jeopardy, Congress intended for formal consultation to have an endpoint even if the "best" information is inadequate to reach a definitive jeopardy conclusion.

Accordingly, because the Service will not be able to determine definitively whether the delegation and the subsequent implementa-

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1453-54. Even if an agency may be able to use the "reasonably certain to occur" limitation to avoid undertaking a section 7 analysis of state actions in making a delegation decision, section 7 most likely would come into play at some point after delegation by virtue of the agency's oversight authority.

317. See supra notes 48-49 and accompanying text.

318. 50 C.F.R. § 402.14(e), (h)(3) (1993); see id. § 402.02 (defining a "biological opinion"); Cumulative Impacts under Section 7 of the Endangered Species Act (Solicitor's Op. No. M-36938), 88 Interior Dec. 903, 907 n.4 (1981) ("[W]e conclude that the 1979 Amendments to the Act requires some sort of final biological analysis and recommendation to result from the consultation process."); 16 U.S.C. § 1536(b)(3)(A) (1988) (requiring 90-day formal consultation period (extendable in some situations)). But see Rohlf, supra note 37, at 130 ("[I]t is not certain whether the [Service] may issue a 'best guess' biological opinion based on whatever information is then available, or whether the [Service] must refrain from issuing a biological opinion until [it] acquires sufficient data for a dependable conclusion."); Houck, supra note 11, at 15,011 (arguing that Congress has not required the Service to make a "best guess" and that the Service should have the option of issuing inconclusive opinions); Erdheim, supra note 30, at 662 (concluding that Congress did not intend that the Service come to a conclusion when the information necessary to assess jeopardy fully is unavailable).


320. See, e.g., H.R. CONF. REP. No. 697, supra note 53, at 12; Preamble to Final Rule, supra note 5, at 19,951.
tion may result in jeopardy, it will be forced to produce a "best guess" biological opinion at the end of formal consultation. How the lack of information will influence the Service's best guess conclusion, however, is something of a wild card. On the one hand, the Service will not issue a jeopardy opinion solely on the basis of inadequate information.\(^3\) On the other hand, in formulating the opinion, the Service will place the burden on the action agency to prove that the delegation will not result in jeopardy and will give the benefit of the doubt to the listed species that may be affected.\(^2\) Thus, although inadequate information will not trigger an automatic jeopardy opinion, the less that is known about the delegation's ultimate effects, the more likely that the action agency cannot meet its burden to insure no jeopardy.

Whether the Service finds jeopardy may also turn on the degree of oversight authority that the action agency will retain after delegation. If the proposed delegation agreement provides the federal action agency with sufficient oversight authority to consult formally for state-proposed actions and to prevent actions likely to result in jeopardy, the Service almost certainly will issue a no-jeopardy opinion.\(^3\) On the other hand, if the federal action agency will lose authority to consult for, modify, or reject a state-proposed action, it will not be able to meet its burden to insure no jeopardy, and a jeopardy opinion should be forthcoming. This effect may be proportional: the more authority given up by the federal action agency in making the delegation, the greater the chance that the Service will issue a jeopardy opinion.\(^2\)

\(^3\)21. See, e.g., H.R. CONF. REP. No. 697, supra note 53, at 12; North Slope Borough v. Andrus, 642 F.2d 589, 610 n.131 (D.C. Cir. 1980); Carter, supra note 58, at 143-44; Houck, \(\text{\textsuperscript{supra}}\) note 11, at 15,007; Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1460 (9th Cir. 1984), cert. denied, 471 U.S. 1108 (1985). \(\text{\textsuperscript{But see}}\) Sierra Club v. Lujan, 1993 WL 151,353, at *2 (W.D. Tex. Feb. 1, 1993) (stating that, in the face of inadequate information, "any permitted deviations from the natural conditions . . . should be assumed to harm [listed] species").

\(^3\)22. This cornerstone of section 7 law stems from a passage in the Conference Report for the 1979 Amendments. It states that section 7(a)(2), as amended, "continues to give the benefit of the doubt to the species, and it would continue to place the burden on the action agency to demonstrate to the consulting agency that its action will not violate Section 7(a)(2)." H.R. CONF. REP. No. 697, supra note 53, at 12. Numerous courts have relied on this passage in interpreting section 7(a)(2). See, e.g., Conner v. Burford, 848 F.2d 1441, 1454 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989); Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987); Roosevelt Campobello Int'l Park Comm'n v. Environmental Protection Agency, 684 F.2d 1041, 1049 (1st Cir. 1982).

\(^3\)23. Alternatively, the action agency could argue that section 7(a)(2) is inapplicable because the delegation is environmentally neutral. See \(\text{\textsuperscript{supra}}\) part II.C.5.

\(^3\)24. A jeopardy opinion, of course, would essentially bar the action agency from delegating the program unless it could restructure its oversight authority to provide it with sufficient post-delegation control. But because section 7(a)(2) only provides the action agency with authority to refuse to act or to disapprove a proposed action in order to prevent jeopardy, the agency will be able to restructure its oversight authority only if its programmatic statute or some other statutory provision grants it the authority to do so. I suggest later that section 7(a)(1) of the ESA may provide federal agencies with some au-
Even if the Service issues a no-jeopardy opinion for a delegation, the fact that it is based on inadequate information may trigger section 7(d) and preclude the federal action agency from making the delegation. Section 7(d) states:

After initiation of consultation required under subsection (a)(2) the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section. 325

Section 7(d) unquestionably stays in effect at least during the consultation process. 326 It is not so clear, however, that section 7(d) lifts when formal consultation results in a "best guess" no-jeopardy opinion. Congress may have intended that section 7(d) stay in effect so long as the Service is not able to make a definitive jeopardy assessment. 327 Strong dicta in at least one decision directly supports this proposition, 328 although other cases touching on the issue point in both directions. 329 The argument is based on the sensible premise that

325. 16 U.S.C. § 1536(d) (emphasis added).
326. See, e.g., 50 C.F.R. § 402.09; Preamble to Final Rule, supra note 5, at 19,940; Sierra Club v. Marsh, 816 F.2d 1376, 1389 (9th Cir. 1987); North Slope Borough v. Andrus, 642 F.2d 589, 611 n.143 (D.C. Cir. 1980); Conservation Law Found. v. Andrus, 632 F.2d 712, 715 n.1 (1st Cir. 1979).
327. See Houck, supra note 11, at 15,008-09; Erdheim, supra note 30, at 661-63.
328. In North Slope Borough v. Andrus, 486 F. Supp. 332, 354 (D.D.C. 1979), aff’d in part & rev’d in part on other grounds, 642 F.2d 589 (D.C. Cir. 1980), the district court wrote, “[t]he duty to consult does not end until a biological opinion, based upon adequate information, is written. While a biological opinion can be based on inadequate information, in such cases the obligation to consult continues.” In that case, however, the court found that “there is no biological opinion, . . . much less an opinion based on adequate data” and that, therefore, “the consultation process has not ended.” Id. On appeal, the D.C. Circuit found that the Service letter was sufficient to constitute a no-jeopardy biological opinion, reversing the district court on this point. It then went on to agree with the district court’s finding of no section 7(d) violation. 642 F.2d at 610-11. Because the panel reached the section 7(d) violation issue, it apparently was operating under the assumption that section 7(d) applied even though a “best guess” no-jeopardy opinion had been issued. The panel, however, explicitly disavowed deciding whether consultation was still ongoing, id. at 611 n.143, which weakens the opinion’s usefulness on this issue.
329. Compare Pyramid Lake Paiute Tribe v. Department of Navy, 898 F.2d 1410, 1415 (9th Cir. 1990) (stating that even when a no-jeopardy opinion is based on “‘admittedly weak’ information,” the action agency’s reliance on it “will satisfy its obligations” under the ESA) (citation omitted) and Sierra Club v. Froehlke, 534 F.2d 1289, 1303-05 (5th Cir. 1976) (holding that the Corps could construct dam and reservoir even though Interior Department warned the Corps that reservoir could harm listed bat and requested moratorium for further study) with Conner v. Burford, 848 F.2d 1441, 1458 n.42 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989) (stating that agency’s “duty of continued consultation” does not end when a biological opinion relies on incomplete information, after noting a six pages earlier that section 7(d) stays in effect “during the consultation process”) and Village of False Pass v. Watt, 565 F. Supp. 1123, 1155 (D. Alaska 1983), aff’d, 733 F.2d 605 (9th
an action agency cannot meet its statutory burden to "insure" no jeopardy when the information used to assess jeopardy is inadequate to reach a definitive conclusion. Therefore, the agency must continue to obtain information, to consult informally, and to refrain from committing resources.

If section 7(d) does bar resource commitments under a best guess no-jeopardy opinion, a critical issue will be whether a delegation in which the federal action agency gives up authority to act for section 7(a)(2) purposes would constitute a section 7(d) commitment. Such delegation is a "commitment of resources" in the sense that it essentially divests the agency of section 7(a)(2) authority; it is "irrevers-

Cir. 1984) (stating that section 7(d) remains in place "until a definitive biological opinion can be prepared") and Nebraska v. Rural Electrification Admin., 12 Envtl Rep. Cas. (BNA) 1156, 1171, 1173 (D. Neb. 1978) (holding that regulation containing section 7(d) language precluded federal defendants from building federal dam because the existing information about the dam's impact on listed species was insufficient to guarantee no jeopardy).

330. See Houck, supra note 11, at 15,007; Erdheim, supra note 30, at 661-62.

331. Legislative history and administrative interpretation fail to clarify what section 7(d) actually prevents. The most cited legislative comment supposedly casting light on section 7(d) is from the 1979 Conference Report: "The conferees do not believe that any Federal agency or permittee should make any irreversible or irretrievable commitment of resources for the purpose or with the intent of foreclosing otherwise reasonable alternatives or in order to secure an exemption pursuant to § 7(h)." H.R. Conf. Rep. No. 697, supra note 53, at 12 (emphasis added). This passage suggests a mental state requirement that is absent on the face of section 7(d). The regulations merely parrot the language of section 7(d), see 50 C.F.R. § 402.09, and the preamble only suggests that monetary investments are not per se "irreversible" or "irretrievable." See Preamble to Final Rule, supra note 5, at 19,955.

The case law is slightly more helpful, but it is too inconsistent and limited to provide clear direction. One case suggests that the linchpin of a section 7(d) commitment is whether the resource expenditure creates bureaucratic momentum. See Nebraska, 12 Envtl Rep. Cas. at 1172. A number of other cases, all dealing with oil and gas lease sales under OCSLA, 43 U.S.C. §§ 1331-1353 (1988), have held that such a lease sale is not a section 7(d) commitment, largely because the Secretary of the Interior under OCSLA must undertake a new environmental analysis for any subsequent exploration and production phase and may prohibit further development for section 7(a)(2) purposes. See, e.g., Village of False Pass v. Watt, 565 F. Supp. 1123, 1157 n.20, 1163 (D. Alaska 1983), aff'd on other grounds sub nom., Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984); California v. Watt, 520 F. Supp. 1359, 1387 (C.D. Cal. 1981), aff'd in part & rev'd in part on other grounds, 683 F.2d 1253 (9th Cir. 1982), rev'd on other grounds sub nom., Secretary of the Interior v. California, 464 U.S. 312 (1984); Cf. No Oilport! v. Carter, 520 F. Supp. 334, 364-65 (W.D. Wash. 1981) (finding no section 7(d) violation where the Secretary granted a right-of-way permit for a proposed oil pipeline because no work could be done in the right-of-way without a Notice to Proceed explicitly contingent on compliance with the ESA).

332. See Macleod et al., supra note 37, at 711 (stating that when OSM delegates the SMCRA program to the states, it requires the states to assume section 7(a)(2) obligations directly so that the delegation can proceed without violating section 7). Cf. Conservation Law Found. v. Andrus, 623 F.2d 712, 715 (1st Cir. 1979) (rejecting an argument that a lease sale under OCSLA constituted a section 7(d) commitment by holding that the action agency could still act for section 7(a)(2) purposes even after the leases were sold). In addition, the financial resources and time necessary to prepare a delegation may be considered a "commitment of resources" under section 7(d).
ible and irretrievable” because the delegation agreement can only be set aside by legal action or with the consent of the state; and it has the “effect of foreclosing” alternatives because it eliminates the possibility of delegating the program with additional safeguards allowing either the federal or state agency to meet section 7(a)(2)’s requirements.

These issues can be illustrated by briefly considering the scenarios that may unfold if section 7(a)(2) is applied to EPA’s delegation of the NPDES program. Assume that the receiving state could issue a permit likely to cause jeopardy or adverse modification of critical habitat. If, under the delegation agreement, EPA retains its review and veto authority over each state proposed permit, the Service probably would issue a no-jeopardy opinion for the delegation decision. If EPA plans to waive its review and veto authority over permitting actions for any category of discharges, however, it may run a substantial risk of receiving a jeopardy opinion—the Service would be hard pressed to conclude that EPA has met its burden to insure no jeopardy.

In sum, even if the Service issues a no-jeopardy opinion for the proposed delegation of the NPDES program, the fact that it will necessarily be a best guess opinion raises the possibility that the delegation would be barred by section 7(d). Whether section 7(d) prohibits the delegation may depend on the degree of oversight authority EPA will retain—if plenary and consistent with section 7(a)(2)’s requirements, section 7(d) may not prevent the delegation, but if restricted such that section 7(a)(2) could be frustrated, the delegation may not be able to go forward.

B. Methods for Complying with Section 7(a)(2)

This subpart examines two approaches that may allow an action agency to comply with the consultation requirement in delegating and overseeing the state administration of federal programs and avoid some of the problems discussed in part III.A. Incremental consulta-

333. See supra notes 221-32 and accompanying text.
334. EPA actually may not have sufficient authority to comply fully with section 7(a)(2). Under the CWA, EPA has only 90 days in which to review and veto a state-proposed permit. 33 U.S.C. § 1342(d)(2) (1988). Because consultation may require at least 90 days, and an additional 180 days if a biological assessment is necessary, see supra notes 43, 52, and accompanying text, the delegation agreement, by incorporating the CWA’s 90-day requirement, would appear to restrict EPA’s authority more than the limits established in section 7(a)(2) and the joint regulations.
335. See supra notes 109-11 and accompanying text.
336. Even assuming that the state, motivated by civic responsibility or reverence for section 9, will voluntarily take any necessary steps to prevent harm to species or habitat in administering the NPDES program, the state will not have the benefit of consultation, which is crucial to insuring no jeopardy. See supra part I.B.
tion, as set forth in the joint regulations, might allow an agency to proceed with the delegation despite the impossibility of determining the program’s ultimate effects or a loss of authority to ameliorate those effects. The courts’ interpretation of section 7(a)(2), however, appears to limit severely the usefulness of this mechanism. Another, seemingly more promising approach is to delegate the duty to consult to the state. Although this may avoid the limited information and loss-of-authority problems, it might require a shift in the Service’s thinking and impose a new, possibly unwelcome administrative burden on the states.

1. Incremental Consultation

a. The Procedure and Its Elements

In general, incremental consultation allows the Service to issue a biological opinion on each incremental step of an action agency's multi-phased action. The regulations authorize “incremental consultation” under the following circumstances:

When the action is authorized by a statute that allows the agency to take incremental steps toward completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible and irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.\textsuperscript{337}

Incremental consultation is an exception to the normal consultation process.\textsuperscript{338}

The concept of incremental consultation apparently derives from case law. The preamble states that section 402.14(k) was “sanctioned

\textsuperscript{337} 50 C.F.R. § 402.14(k).

\textsuperscript{338} Preamble to Final Rule, supra note 5, at 19,955.
by the court in *North Slope Borough v. Andrus,*" and the regulation apparently was written based on the district court’s analysis in that case.

In *North Slope Borough*, the Secretary of the Interior argued that each stage under OCSLA—lease, exploration, and development and production—constituted an independent “agency action” within the meaning of section 7(a)(2). The district court rejected this argument, holding that the entire OCSLA process constituted one “action.” The court, however, held that the lease stage could proceed without violating section 7(a)(2) if (1) there is a reasonable likelihood of ultimate compliance; (2) no irreversible or irretrievable commitment of resources is made during the lease stage; and (3) the lease stage itself does not violate section 7(a)(2), as established by a definitive no-jeopardy opinion for that stage. On appeal, the D.C. Circuit did not comment on the district court’s scheme, but by affirming the lower court’s conclusion that no section 7(a)(2) violation had occurred, may have ratified it. Subsequent OCSLA cases have applied analyses similar to the circuit court’s to reject section 7(a)(2) challenges to proposed offshore oil and gas lease sales.

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340. Somewhat surprisingly, the preamble admits that incremental consultation “is not a product of statute.” Preamble to Final Rule, supra note 5, at 19,955.  
342. 486 F. Supp. at 350.  
343. *Id.* at 351.  
344. *See id.* at 357-58. Of these criteria, the “reasonable likelihood of compliance” is the most unclear, at least from the face of the opinion. The court found that this criterion was satisfied because the Service had not issued a jeopardy opinion, there was no evidence of bad faith, and the BLM essentially could cancel the leases should an ESA problem arise. *Id.* The first basis for the court’s finding, standing alone, is largely superfluous because a jeopardy opinion at any stage essentially kills the project. The second basis also seems superfluous because agencies are presumed to act in good faith; see Conner v. Burford, 848 F.2d 1441, 1448 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989). Additionally, it is unlikely that agencies that have acted in bad faith would leave a smoking gun. Consequently, the nub of the “reasonable likelihood of compliance” criterion appears to be whether the action agency retains sufficient authority to halt any further activity. *Cf. id.* at 1463 (Wallace, J., dissenting) (arguing that the determinative requirement of incremental consultation is whether agency approval is required for each subsequent stage). For a different view and criticism of this criterion, see ROHLF, supra note 37, at 124 n.96, 143-44.  
A general picture of incremental consultation emerges from these authorities. It is well established that section 7(a)(2) requires the Service to assess jeopardy for the entire action. Incremental consultation effectively allows an action agency and the Service to divide an action into stages so that the action agency may proceed with the activity by obtaining individual no-jeopardy opinions for each stage. Supposedly, this fits within the general scheme of section 7(a)(2) because each stage does not constitute a prohibited commitment of resources and, by the time the ultimate stage is reached, the Service will have completed no-jeopardy opinions for all phases of the project.

The critical effect of incremental consultation is to reduce the possibility that the Service will be forced to issue a “best guess” jeopardy opinion because the specific environmental impact of the project's latter stages is uncertain or unforeseeable. The procedure is invoked primarily when the action agency will relinquish some authority in undertaking the initial stage, such as binding itself to the terms of an agreement or a development plan, but not so much authority that the action is disqualified for incremental consultation by drawing a jeopardy opinion for the initial stage or by triggering section 7(d).

In essence, incremental consultation minimizes the risk that the lack of information about the environmental effects of later stages, and the action agency's loss of authority in the initial stage, will compel a jeopardy opinion for the entire action. Because these two factors—uncertainty as to ultimate effects and loss in authority—may exist when a federal program is delegated to a state, incremental consultation would appear to provide a federal agency with a mechanism to proceed with the delegation while satisfying its section 7(a)(2) obligations.

b. The Limits of Incremental Consultation

While the Service expressly refused to limit section 402.14(k) to OCSLA, subsequent judicial decisions may have severely restricted its applicability in other contexts. In Conner v. Burford, a Ninth Circuit panel considered whether incremental consultation is appropriate for oil and gas leasing under the Mineral Leasing Act (MLA). The Service had issued no-jeopardy opinions for the oil

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348. In almost all reported decisions involving incremental consultation, the action agency had entered into an oil and gas lease agreement that granted the lessee certain rights to conduct future activities while restricting the action agency's authority to assess or to prevent those activities. See, e.g., supra notes 256-60 and accompanying text.
350. Preamble to Final Rule, supra note 5, at 19,955.
351. 848 F.2d 1441 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989).
and gas leases and proposed to engage in incremental consultation for the post-leasing stages, in accordance with *North Slope Borough* and section 402.14(k). Relying on the Service's opinion, the BLM began selling leases that reserved the authority to preclude surface occupancy, effectively allowing the BLM to prevent any activity that might affect listed species.

A majority of the panel rejected the BLM's argument that because it retained authority to halt any action likely to harm listed species, a comprehensive biological opinion was unnecessary at the lease stage. The court characterized this argument as an attempt to carve out a judicial exception to the requirement that a biological opinion address the effects of the entire agency action. Because the biological opinion covered only the effects of the lease sale, and not the potential subsequent stages, the court found that the BLM violated the "best scientific and commercial information" requirement of section 7(a)(2). The court then distinguished *North Slope Borough* and a previous Ninth Circuit case, *Village of False Pass v. Clark*, which had followed *North Slope Borough*. It reasoned that the programmatic statute at issue in those cases, OCSLA, specifically provided for a system of checks and balances designed to ensure compliance with all environmental statutes at each stage of development. It found that the MLA, on the other hand, did not provide the same level of stage-by-stage environmental protection.

The Conner majority correctly identified the unique structure of OCSLA and distinguished the MLA. Between the lease stage and subsequent stages under OCSLA, the process essentially starts anew; the Secretary must perform another environmental analysis and re-

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353. *Conner*, 848 F.2d at 1444, 1452.
354. *Id.* at 1443-44.
355. *Id.* at 1455-56.
356. *Id.* at 1455.
357. 733 F.2d 605 (9th Cir. 1984).
359. *See id.* at 1456-57 & n.38. The dissent argued that "the determinative factor in *False Pass* was that the proposed plan of resource exploitation was segmented in such a way as to require agency approval prior to the commencement of each new stage of development." *Id.* at 1463 (Wallace, J., dissenting). In short, the dissent reasoned that the MLA's structure "will serve precisely the same function and have precisely the same effect as a practical matter" as OCSLA's structure, *id.* at 1464, since the MLA allows the BLM to impose administratively an equally rigorous stage-by-stage environmental review requirement and assume equivalent post-leasing authority. The majority responded that the lease stipulations at issue "do not guarantee that the [Service] will examine leased land before surface-disturbing activities begin and do not expressly permit the Federal surface management agency to halt surface-disturbing activities once they have begun." *Id.* at 1457 n.39. The majority also noted that even the joint regulations require the program to be "statutorily segmented." *Id.*
consider the merits of undertaking the next stage. The district court in *North Slope Borough* construed this process as indicating a congressional intent that the lease stage be viewed essentially as a discrete and complete activity, valuable in its own right as a source of information. In contrast, Congress does not appear to view the lease stage under the MLA as an independent, inherently valuable activity. By not explicitly requiring inter-stage environmental analyses in the MLA, Congress arguably built in a presumption that oil and gas development will follow the lease sale. Thus, the entire MLA leasing-to-production process is truly one “agency action.”

Despite a possible Achilles heel, the *Conner* majority’s view has prevailed, at least in the Ninth Circuit. In *Bob Marshall Alliance v. Hodel*, a different panel applied *Conner* to reject incremental consultation for MLA leasing and to require a biological opinion to address all MLA stages, even if the jeopardy assessment would be based on insufficient information to reach a definite conclusion. Accordingly, an agency seeking to use incremental consultation outside of the OCSLA context will face an uphill struggle unless the applicable programmatic statute is closely patterned after OCSLA. OCSLA is a unique statute, however, and consequently few other

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360. For each of OCSLA’s statutorily mandated stages—lease, exploration, and development and production—the Secretary is required to analyze the environmental effect of the activity proposed by undertaking a NEPA analysis. See 30 C.F.R. § 250.33(g), .34(j) (1993); Secretary of the Interior v. California, 464 U.S. 312, 337-40 (1983); Wiygul, *supra* note 341, at 100-02, 115-16, 133. The Secretary also can halt activity at any stage that may harm listed species. *North Slope Borough*, 486 F. Supp. at 350.

361. See 486 F. Supp. at 357. Paradoxically, the OCSLA cases deemed the entire leasing-to-production process as one “agency action” under the ESA. E.g., *North Slope Borough v. Andrus*, 642 F.2d 589, 608-09 (D.C. Cir. 1980) (agreeing with the district court, 486 F. Supp. at 351. Consequently, several commentators think that the OCSLA cases may violate the spirit of section 7(d). E.g., Coggins & Russell, *supra* note 2, at 1484. *But see* Erdheim, *supra* note 30, at 650-51 (arguing that section 7(d) is not violated by engaging in lease stage activities under OCSLA because the “steps of OCSLA should be viewed as separate agency actions”).

362. *See supra* note 359.

363. 852 F.2d 1223 (9th Cir. 1988).

364. *Id.* at 1227-28.

programmatic statutes may qualify\textsuperscript{366} for incremental consultation. On the other hand, because the Ninth Circuit’s position is in tension with both the joint regulations\textsuperscript{367} and the OCSLA cases, other circuits may disagree.\textsuperscript{368}

c. Applying Incremental Consultation to Delegable Federal Programs

To be suitable for incremental consultation, a program must at least meet the regulations’ requirements for incremental consultation. Probably the most important of these is that a program may qualify for incremental consultation only if the initial stage, delegation, does not constitute an irreversible and irretrievable commitment of resources under section 7(d), and the program is “statutorily segmented.” These two restrictions, standing alone, may significantly limit incremental consultation’s usefulness with respect to delegable federal programs.\textsuperscript{369}

The rules devolving from \textit{Conner} further circumscribe the universe of delegable federal programs amenable to incremental consultation. Even if the program is “statutorily segmented”—for example, consisting of a delegation stage and a federally supervised implementation stage—the programmatic statute must at least authorize stage-by-stage environmental review and grant the action agency authority to prevent activity during any stage for environmental purposes. Under a strict reading of \textit{Conner}, the action agency probably must explicitly state in the delegation agreement or governing regulations that this authority will be exercised for section 7(a)(2) purposes.\textsuperscript{370}

by the actual exploratory drilling that takes place during the lease stage could the precise location and quality of these reserves be determined. \textit{See id.} at 71, reprinted in 1978 U.S.C.C.A.N. at 1460.

\textsuperscript{366} But see Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923, 934-35 (D. Mont. 1992) (rejecting a section 7 challenge to a no-jeopardy opinion for a forest management plan under the National Forest Management Act, 16 U.S.C. §§ 1601-1612 (1988 & Supp. IV 1992), because the planning stage in that Act is similar to the leasing stage in OCSLA).

\textsuperscript{367} Neither the joint regulations nor the preamble suggest that the only programs qualifying for incremental consultation are those where Congress has provided for stage-by-stage, mandatory comprehensive environmental review. The preamble seems to focus simply on whether the statute authorizes the action to proceed in steps or increments. Preamble to Final Rule, \textit{supra} note 5, at 19,955.

\textsuperscript{368} Park County Resource Council, Inc. v. U.S. Dep’t of Agric., 817 F.2d 609 (10th Cir. 1987), another MLA leasing case, appears to be contrary to \textit{Conner}, see Kilbourne, \textit{supra} note 37, at 550, but it is distinguishable as a NEPA rather than an ESA case. \textit{Park County} involved some section 7 claims, but these were not appealed to the Tenth Circuit and the district court’s analysis of them do not undermine \textit{Conner}. See Park County Resource Council, Inc. v. U.S. Dep’t of Agric., 613 F. Supp. 1182, 1188 (D. Wyo. 1985).

\textsuperscript{369} \textit{See supra} notes 331-33 and accompanying text.

\textsuperscript{370} \textit{See supra} note 359.
Applying these limitations to the NPDES program under the CWA illustrates why incremental consultation may indeed be problematic for many delegable federal programs. To begin with, it is unclear whether section 402 of the CWA, which authorizes the delegation and oversight of state NPDES programs, is "statutorily segmented." More critically, the CWA exempts EPA from complying with the environmental review requirements of NEPA in delegating and overseeing a state NPDES program, and nothing in section 402 authorizes EPA to exercise its authority to prevent harm to fish and wildlife.

Thus, if NPDES can be considered a typical delegable federal program, Conner could rule out the use of incremental consultation. A federal agency facing a delegation decision may not be able to use incremental consultation to avoid the problems of insufficient information on the delegation's ultimate effects or the agency's reduced authority resulting from the delegation. An agency in this situation would have to consult for the entire action—delegation and state implementation—and accept the risk of obtaining a jeopardy opinion.

Of course, federal agencies wishing to take advantage of incremental consultation as set forth in the regulations could adapt a litigation strategy that would eventually lead to Supreme Court review of the Conner ruling. Underlying the Ninth Circuit's view, however, is TVA's expansive reading of agency "action" in section 7(a)(2). Thus, because the present Court may find this aspect of TVA binding, the only recourse may be to seek an amendment to section 7 allowing segmentation. Yet segmentation could frustrate Congress' intent for the Service to consult as early in the life of a project as possible. The purpose of this design is to facilitate the identification of the widest possible array of alternatives and thus decrease the likelihood of an all-or-nothing project-species conflict. Congress should not abandon this approach unless the approach is clearly outweighed by a well-defined policy goal at least as compelling as species preservation.

2. Delegating the Duty To Consult

Another possible mechanism that may allow a federal action agency to comply with section 7(a)(2) in delegating the program is for the action agency to delegate the duty to consult along with the federal program, while retaining sufficient authority to satisfy its duty to insure. This approach may satisfy both section 7 and the relevant programmatic statute and allow the action agency to avoid the

372. See supra notes 127-43 and accompanying text.
373. See supra notes 68-69 and accompanying text.
374. See supra text accompanying note 261.
problems created by uncertainty over the program's effects on species or a loss of authority to prevent those effects.

Under this scheme, the state agency effectively steps into the federal action agency's shoes in fulfilling the duty to consult for future activity under the program. Consequently, the Service could issue a definitive no-jeopardy opinion at the time of delegation. The federal agency could satisfy its duty to insure by requiring the state to seek its review and authorization whenever the state does not agree with the Service's recommendations concerning the proposed activity. This would satisfy section 7(a)(2), allow the federal agency to meet its programmatic obligation to delegate the program, and render moot the possibility that section 7(d) prohibits delegation under a "best guess" biological opinion. And for the vast majority of state actions under the program, this should eliminate the need to involve the federal action agency except as required by the governing programmatic statute.

Despite these advantages, there are several potential obstacles to adopting such a proposal. One of the most critical issues is whether the action agency has the authority to delegate the duty to consult to a state. We have seen that section 7(a)(2)'s prohibitive mandate should apply to any action in which the agency may refuse to act or disapprove an action, regardless of how the programmatic statute limits the agency's discretion in making that decision. It is highly doubtful, however, that this provision provides an affirmative source of power to allow a federal agency to restructure the program so that it may delegate an obligation that is not authorized by the applicable programmatic statute. A possible source of affirmative authority lies in section 7(a)(1), which generally requires all federal agencies to use their authority to improve the status of listed species. This subpart discusses this provision and considers whether the section 7(a)(2) duty to insure requirement prohibits the delegation of the duty to consult.

a. Finding the Authority To Delegate the Duty To Consult: Section 7(a)(1)

A federal agency may only delegate the duty to consult if it has the statutory authority to do so. The statute governing the delegable federal program may grant the agency sufficient discretion to tailor the program for environmental reasons. Alternatively, section 7(a)(1) of the ESA may furnish sufficient authority. Section 7(a)(1) states:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter.

375. See supra notes 327-30 and accompanying text.
376. See supra part II.A.
All other Federal agencies shall, in consultation with and with the
assistance of the Secretary, utilize their authorities in furtherance of
the purposes of this chapter by carrying out programs for the conser-
vation of [listed species].

A key provision here is the requirement that all federal agencies util-
ize their programs or authorities “in furtherance of the purposes” of
the ESA.

The ESA expressly seeks “to provide a means whereby the eco-
systems upon which endangered species and threatened species de-
pend may be conserved” and “to provide a program for the conserva-
tion of such endangered species.” The ESA defines “con-
serve” or “conservation” as “to use and the use of all methods and
procedures which are necessary to bring any [listed species] to the
point at which the measures provided by [the ESA] are no longer nec-
essary.” The cases interpreting section 7(a)(1) uniformly hold that
it imposes an affirmative duty on federal agencies to use all methods
and procedures necessary to increase the population of listed spe-
cies. Beyond this general rule, however, the nature of the authority
conferred by section 7(a)(1) authority is unsettled, especially when a
federal agency uses it as an enabling clause.

378. Some commentators argue that the two sentences of section 7(a)(1)—the first
applying to the Departments of the Interior and Commerce and the second applying to all
other federal agencies—impose different obligations depending on the agency, see, e.g.,
Macleod et al., supra note 37, at 707, but this argument is unpersuasive. See Pyramid Lake
Paiute Tribe v. Department of Navy, 898 F.2d 1410, 1416-17 n.15 (9th Cir. 1990); Preamble
to Final Rule, supra note 5, at 19,934; Rosenberg, supra note 83, at 511.
379. 16 U.S.C. § 1531(b) (emphasis added).
380. Id. § 1532(3) (emphasis added). The 1973 Conference Report adds that this
definition include[s] generally the kinds of activities that might be engaged in to improve
the status of [listed species] so that they would no longer require special treat-
ment. The concept of conservation covers the full spectrum of such activities:
from total ‘hands off’ policies involving protection from harassment to a careful
and intensive program of control.

H.R. CONF. REP. NO. 740, supra note 125, at 23.
381. See, e.g., Pyramid Lake Paiute Tribe, 898 F.2d at 1416-17; Carson- Truckee Water
Conservancy Dist. v. Clark, 741 F.2d 257, 259-61 (9th Cir. 1984) (incorporating Carson- Truckee
Water Conservancy Dist. v. Watt, 549 F. Supp. 704, 709-10 (D. Nev. 1982)), cert. denied,
384, 387 (D. Wyo. 1987); Sierra Club v. Clark, 577 F. Supp. 783, 789 (D. Minn. 1984), aff’d
in part & rev’d in part on other grounds, 755 F.2d 608 (8th Cir. 1985); Organized Fishermen
382. The Service appears not to have taken a formal position with respect to the au-
thority conferred by section 7(a)(1). The preamble states that the joint regulations do not
“address how other Federal agencies should implement and exercise their authority to
carry out conservation programs for listed species under section 7(a)(1).” Preamble to
Final Rule, supra note 5, at 19,929. Yet it adds that the Service agreed with a congressional
committee’s statement that “we do not believe that it was intended that § 7(a)(1) require
The pivotal question is whether section 7(a)(1) confers independent, cross-cutting authority or is limited by the discretion granted the agency in its programmatic statute. This issue is similar to that discussed in part II of this article. Section 7(a)(1), however, states that, to carry out conservation programs, federal agencies must "utilize their authorities" or, in the case of the Interior and Commerce Departments, "utilize" the programs that they "administer." Congress' intent in using these phrases is not clear from either section 7's language or its legislative history.

From the face of section 7(a)(1), it may be argued that utilizing a program authorized by Congress is not the same as restructuring a program to meet the ESA's ends. Put simply, Congress could have chosen a more appropriate phrase if it wished federal agencies to have authority under section 7(a)(1) beyond that granted by their programmatic statutes. Since Congress chose "utilize," the argument goes, federal agencies may undertake conservation efforts only if their programmatic statutes grant them discretion to do so.

The Service's interpretation of section 7(a)(1) undermines this argument, although its position is not totally clear. The preamble to the joint regulations sends a mixed message: "Section 7(a)(1) has a limited purpose under the Act: to authorize Federal agencies to factor endan-

developmental agency actions to be treated as conservation programs for [listed] species." Id. at 19,954 (quoting House Committee on Merchant Marine and Fisheries) (emphasis added). Although some commentators view "developmental actions" to include such things as issuing a permit for a coal mine, Macleod et. al., supra note 37, at 708, the preamble does not explain what is meant by "developmental action." More importantly, this view is not supported either in the text nor the legislative history and does not accord with Congress' intent to "halt and reverse" listed species decline. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1973) (emphasis added).

383. Another important issue, treated only briefly here, is whether the record must show that the conservation program is "necessary" for species survival and recovery, tracking the language of section 3(3), 16 U.S.C. § 1532(3). At least one court has rejected demands that an agency adopt a conservation program because the plaintiffs failed to demonstrate that the program was "necessary" to species survival and recovery. See Enos v. Marsh, 616 F. Supp. 32, 59 (D. Hawaii), aff'd, 769 F.2d 1363 (9th Cir. 1985).

However, if a state will be taking actions under a delegated federal program that may affect listed species, it may be reasonably contended that state consultation for those actions is "necessary" for species recovery. The consultation mechanism proposed here would oblige the state to act in accord with the Service's opinion unless the state objects and takes an "appeal" to the federal action agency, which is not likely to support the state because of the great deference given to Service opinions by courts. Thus, consultation as proposed here almost certainly would prevent some action that could cause jeopardy and therefore should be deemed "necessary" to species recovery. Cf. National Wildlife Fed'n, 669 F. Supp. at 388-89 (stating that the Secretary is required to develop a listed species recovery plan only if he or she "reasonably believes that it would promote conservation").

384. See Preamble to Final Rule, supra note 5, at 19,934.

gered species conservation into their planning processes, *regardless of other statutory directives*. Thus, the Service appears to recognize the cross-cutting authority of section 7(a)(1), while at the same time envisioning the provision’s purpose as limited.

The case law presents a similar enigma, with one court apparently recognizing that section 7(a)(1) has some cross-cutting reach while another finds none whatsoever. In *Pyramid Lake Paiute Tribe v. Department of Navy*, the Ninth Circuit considered an allegation that the Navy’s diversion of water from a tributary to Pyramid Lake contributed to the population decline of an endangered fish, the Cui-ui. The plaintiffs claimed that under section 7(a)(1), the Navy had an affirmative obligation to reduce its use of water to conserve the listed species; they also claimed that the Navy violated this obligation by refusing to adopt the plaintiff’s suggested reduction method. The Navy argued that section 7(a)(1) requires agencies to promote conservation of listed species only in a manner consistent with the agencies’ primary missions. The Ninth Circuit rejected the Navy’s interpretation as inconsistent with the Supreme Court’s rejection of a similar argument under section 7(a)(2) in *TVA*. The court also refused to adopt the plaintiffs’ interpretation, stating that the Navy is to be afforded “some discretion in ascertaining how best to fulfill the mandate to conserve.”

Because the trial court had found that the plaintiffs’ suggested method would only insignificantly affect the supply of water to Pyramid Lake, the Ninth Circuit found that the plaintiffs’ suggested method would not significantly affect the supply of water to Pyramid Lake, and therefore did not have a cross-cutting reach under section 7(a)(1).

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386. Preamble to Final Rule, *supra* note 5, at 19,934 (emphasis added).
387. 898 F.2d 1410 (9th Cir. 1990).
388. *Id.* at 1417.
389. *Id.*
391. 898 F.2d at 1418; *accord National Wildlife Fed’n v. National Park Serv.*, 669 F. Supp. 384, 388 (D. Wyo. 1987). For its holding that an action agency has some discretion under section 7(a)(1) to implement conservation programs, the *Pyramid Lake* court cited to *Carson Truckee Water Conservancy District v. Clark*, 741 F.2d 257 (9th Cir. 1984), *cert. denied*, 470 U.S. 1083 (1985), and a Service regulation, 50 C.F.R. § 402.14(j) (1988), which gives action agencies discretion to decide whether to implement conservation recommendations that may accompany a biological opinion. 898 F.2d at 1418 & n.18. However, both of these bases are weak. The court in *Carson-Truckee* said nothing about the discretion of the action agency in implementing a conservation activity, only observing that the Secretary “decided” to implement the plan. 741 F.2d at 261. Moreover, the regulation relied upon explicitly states that a conservation recommendation in a biological opinion is advisory and not intended to have binding legal force. In contrast, the language of section 7(a)(1) is clear: All federal agencies “shall” carry out conservation programs. Nonetheless, common sense suggests that a court must afford an agency some discretion in choosing appropriate conservation measures given inevitable budgetary, personnel, and political constraints.
the Ninth Circuit found that the Navy had not abused its discretion.\textsuperscript{392} The court made clear, however, that section 7(a)(1) imparts affirmative authority to conserve listed species even in the face of conflicting agency purposes.

The D.C. Circuit appears to read section 7(a)(1) differently. In \textit{Platte River II},\textsuperscript{393} the court relied primarily on section 7(a)(1)'s "utilize their authorities" language to hold that section 7 "does not expand the powers conferred on an agency by its enabling act."\textsuperscript{394} The plaintiff had argued that even if FERC's programmatic statute did not authorize it to impose conditions on a hydropower facility's annual license, section 7 independently provided the necessary authority.\textsuperscript{395} Notwithstanding the \textit{Platte River II} court's pronouncement to the contrary, section 7(a)(1) arguably provides at least some independent authority to modify programs created under other statutes, as suggested by \textit{Pyramid Lake}.\textsuperscript{396} Although section 7(a)(1) mandates agencies to "utilize" their "authorities" or "programs," the provision does not contain the explicit limiting language found in earlier endangered species legislation or in the section 7 amendments rejected by Congress in 1978 (e.g., "insofar as practicable and consistent with their primary responsibility").\textsuperscript{397} This suggests that section 7(a)(1) should be liberally construed.

More importantly, the affirmative authority conferred by section 7(a)(1) should be interpreted consistently with the sweeping prohibitive obligation of section 7(a)(2) and Congress' overriding intent to afford listed species the "highest of priorities."\textsuperscript{398} Where some cross-cutting affirmative authority is necessary to effectuate Congress' intent in section 7(a)(2) to prevent extinction regardless of other statutory directives, section 7(a)(1) should be interpreted broadly to provide that authority.\textsuperscript{399} Moreover, if the programmatic statute reveals a strong congressional preference for state administration of

\textsuperscript{392} 898 F.2d at 1419.
\textsuperscript{393} 962 F.2d at 34 (emphasis in the original).
\textsuperscript{394} \textit{Id.} at 33.
\textsuperscript{395} \textit{Pyramid Lake} and \textit{Platte River II} can be harmonized, to a degree. In \textit{Pyramid Lake}, the Ninth Circuit apparently was not faced with a specific, inconsistent programmatic statute, as was the D.C. Circuit in \textit{Platte River II}.
\textsuperscript{398} Of course, there must be limits to such reasoning. At its extreme, this theory would allow an action agency to modify actions commanded by a mandatory directive from Congress. Nonetheless, where the agency has discretion to refrain from taking an action, even if limited to only nonenvironmental reasons, reliance on section 7(a)(1) to effectuate section 7(a)(2) may be reasonable.
the program, broadly interpreting section 7(a)(1) to allow delegation would further fulfill Congress' intent. Although imposing the duty to consult on a state may increase its administrative burden, this may be outweighed by the benefits flowing from delegation of the program. Hence, section 7(a)(1) should be construed liberally to provide sufficient authority to delegate the duty to consult to the state along with the program. This delegation may not be possible in all cases. In each case, a federal agency seeking to do so will need to undertake a careful analysis of the interplay between section 7(a)(1) and the relevant programmatic statute to ensure that delegation is within its statutory bounds.400

b. Does Section 7(a)(2) Preclude Delegating the Duty To Consult?

Even if section 7(a)(1) provides adequate authority for action agencies to delegate the duty to consult to the states, it may be contended that section 7(a)(2) precludes this option. Section 7(a)(2)'s language is not dispositive, however, and despite some apparently contrary authority, the statute and its legislative history may have sufficient play to allow a federal agency to delegate the duty to consult.

Section 7(a)(2) places the duty to insure squarely on federal agencies,401 but the language of the provision is less clear with regard to the duty to consult. It states that "[e]ach Federal agency shall, in consultation and with the assistance of the Secretary, insure that any

400. As an aside, section 7(a)(1) also may be used as a source of authority for a federal agency to restructure or modify a program that it plans to delegate so that it retains sufficient oversight authority to comply with section 7(a)(2). The federal agency could place conditions in the delegation agreement to allow it to review each state-proposed action, formally consult with the Service for that action, and disapprove it if necessary to prevent jeopardy. Alternatively, the federal agency could attempt to formulate additional up-front safeguards to control the manner in which the state implements the program so as to ensure no jeopardy. For example, a federal agency may rely on section 7(a)(1) to fashion permit criteria for a program, in consultation with the Service, that would ensure that the permitted activity would not harm existing or future listed species.

There are some drawbacks to both of these approaches. For the former, requiring the state to submit each proposal to the federal agency for review and possible consultation could add unacceptable delay and complexity to the state's administration of the program. There seems to be little reason to force the federal action agency to be an intermediary when the real players are the state implementing agency and the Service, absent an intractable disagreement between the two. For the latter, adding general criteria to control state implementation may not necessarily solve the issue of insufficient information, particularly given possible critical site-specific factors. Furthermore, an arguable disadvantage of both of these approaches is that it is a greater stretch to interpret section 7(a)(1) as enabling an agency to expand its authority derived from a programmatic statute than to read it to enable the agency to delegate the duty to consult under section 7(a)(2).

action authorized, funded, or carried out by such agency” is not likely to result in jeopardy. Because it does not say that action agencies shall consult with the Secretary in ensuring no jeopardy, the language of the provision does not conclusively rule out delegating the duty to consult.

Some legislative history, however, suggests that Congress intended that the duty to consult stay with the federal agency, and apparently the Service has reached the same conclusion. The 1982 Conference Report indicates that the conferees rejected language that would have allowed a nonfederal project applicant to consult directly with the Service. The conference committee reasoned that restricting the actual consultation to the Secretary and the Federal action agencies involved is appropriate in light of the fact that it is the Federal agency which issues the permit and which, under the provision of section 7(a)(2) of the Act, must ensure that the issuance of the permit does not jeopardize the continued existence of an endangered or threatened species or adversely modify its critical habitat.

The Service seems to take a similar position. The preamble to the joint regulations flatly states that “[f]ederal agencies cannot delegate their role in initiating formal consultation, a conference, or early consultation.”

Despite this authority, section 7(a)(2)’s language and its legislative history may be ambiguous enough to allow the Service and other agencies to view section 7(a)(2) as permitting delegation of the duty to consult. The Service may have to abandon its preamble statement in a carefully explained rulemaking, but this may not be difficult because the joint regulations already reflect a flexible position. Under section 402.08 of the joint regulations, a federal agency may allow a nonfederal applicant to represent it during informal consultation and in preparing a biological assessment, provided that the agency notifies the Service of the designation. Although the agency must supervise

404. Id. The ESA does not distinguish between a private party “applicant” and a state government “applicant.” See 16 U.S.C. § 1532(13); 50 C.F.R. § 402.02. Thus, it would be difficult to argue that this language applies only to private but not state applicants.
405. Preamble to Final Rule, supra note 5, at 19,933, 19,939; see also Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters, 56 Fed. Reg., 23,108, 23,137 (1991) (noting the Department of Interior’s comments that the ESA and joint regulations require FERC, rather than a license applicant, to consult with the Service).
408. 50 C.F.R. § 402.08; see Preamble to Final Rule, supra note 5, at 19,939.
the biological assessment process and independently ratify the assessment’s conclusions,\(^4^0^9\) this rule indicates that the Service does not interpret section 7(a)(2) as an absolute bar to the delegation of consultation obligations.\(^4^1^0\) In addition, the joint regulations authorize action agencies to adopt particularized consultation procedures through informal rulemaking so long as the new procedures “retain the overall degree of protection afforded by the [ESA] and [the joint] regulations.”\(^4^1^1\)

Indeed, pursuant to this authority, one action agency has promulgated regulations requiring a state agency to consult with the Service after delegation of a federal permitting program. The OSM has adopted rules requiring a coal mine operator, under SMCRA,\(^4^1^2\) to notify the state regulatory authority whenever a listed species is discovered in the permit area.\(^4^1^3\) Upon such notification, the state regulatory authority must consult with FWS to determine the conditions under which mining may continue.\(^4^1^4\) Apparently, OSM has nothing to do with this consultation, yet any biological opinion that might result is as “binding” on the state agency as it would have been if OSM retained primacy.\(^4^1^5\)

Nevertheless, there is no denying that at least the drafters of the 1982 Conference Report believed that section 7(a)(2) does not allow a federal agency to delegate the duty to consult. The root of this belief appears to be the notion that the duties to consult and to insure are joined at the hip—that because section 7(a)(2) places the duty to insure firmly on the federal agency, the duty to consult must follow. But section 7(a)(2)’s plain language does not clearly mandate this union and, as demonstrated below, the delegation agreement may be drafted so that the federal agency can insure no jeopardy, even though a state

\(^4^0^9\)  50 C.F.R. § 402.08. The regulations do not indicate whether the agency must also supervise informal consultation.

\(^4^1^0\)  See supra notes 37-46 and accompanying text.

\(^4^1^1\)  Preamble to Final Rule, supra note 5, at 19,937.


\(^4^1^3\)  30 C.F.R. §§ 816.97(b), 817.97(b) (1993); see also id. § 700.5.

\(^4^1^4\)  See id. §§ 773.15(c)(10), 815.15(a). Some commentators think that OSM views the delegation of the SMCRA permitting program as the last federal action subject to section 7(a)(2) before the state assumes primacy and can issue permits to mine. See Macleod et al., supra note 37, at 711. They claim that OSM imposed the duty to consult on the states at the delegation stage “to ensure that this ‘delegation’ action would not result in ESA section 7(a)(2) violations in the future.” Id. The consultation procedure in the SMCRA regulations seems to support this theory. See sources cited supra note 413. After delegation, however, OSM retains general oversight authority over state administration of the program. It may, for example, withdraw approval of the state program if the state fails to adhere to any of the pertinent federal regulations. 30 C.F.R. § 745.15(b). OSM apparently does not view this oversight authority as sufficient to require it to exercise its power for section 7(a)(2) purposes; this is arguably erroneous given the failure of the “inaction” exception. See supra part II.C.3.

\(^4^1^5\)  See supra note 80 and accompanying text.
agency exercises the duty to consult. Arguably, the inclusion of proper safeguards in the delegation agreement would satisfy the 1982 conference committee’s real concern—that the duty to insure is effective only when exercised with the full benefits of consultation.

c. Protecting the Duty To Insure

How does the federal agency fulfill its duty to insure if it has delegated away the duty to consult? One possible solution is for the federal oversight agency to retain sufficient authority to veto a state-proposed action whenever the responsible state agency and the Service disagree. The process would take place as follows. After the duty to consult is delegated, the implementing state agency makes the initial section 7(a)(2) assessment for each activity it undertakes pursuant to the program, just as if it were a federal agency. If the state determines that the proposed action is a “major construction activity,” it would initiate the biological assessment process; otherwise, the state would determine whether the activity “may affect” listed species or critical habitat.416 Once section 7(a)(2) scrutiny is triggered, the state agency consults directly with the Service and must obtain either the Service’s concurrence that the action is not likely to have an adverse effect or a no-jeopardy opinion before committing resources that would violate section 7(d).417

Pursuant to its section 7(a)(2) duty to insure, however, the federal oversight agency would retain sufficient authority to veto any state-proposed action to which the Service has formally objected (i.e., either by not concurring in a “no adverse effect” finding or by issuing a jeopardy opinion). Because section 7(a)(2) applies of its own force to any federal action,418 this authority would be in addition to whatever authority the oversight agency has under the applicable programmatic statute. If the state agency does not agree with a formal Service determination, and negotiation proves fruitless, it may take the issue to the federal oversight agency. The federal agency ultimately must make an independent determination, pursuant to its duty to insure,419 and either veto the proposed state action or allow it to proceed. Any subsequent, substantive legal challenge would be to the federal agency’s determination. Yet as long as the state agency agrees with the Service’s position, the federal oversight agency does not need to be involved, and its section 7(a)(2) duty to insure should be deemed satisfied.

416. See supra notes 37-49 and accompanying text.
417. See supra notes 46-60 and accompanying text.
418. See supra part II.A-B.
419. See supra note 401 and accompanying text.
Some may object to the "fiction" of saying that the federal oversight agency has satisfied its duty to insure when that agency has not reviewed the proposed action for section 7(a)(2) compliance. Requiring the federal oversight agency to review state-proposed actions that have been endorsed by the Service, however, seems impractical and overly formalistic. The Service probably would be more objective and ultimately more capable of insuring that the ESA's policies are carried out than the federal oversight agency would be.

Another criticism of this scheme is that neither the federal oversight agency nor the Service is involved in the initial section 7(a)(2) assessments. The state agency could determine that the proposed action is not a "major construction activity" or that it will have no effect on listed species, and undertake the activity without any federal scrutiny. In such a situation, critics could charge that the federal oversight agency is abdicating its duty to insure even though the state agency is ostensibly complying with its duty to consult. This criticism, however, may be misplaced. There appears to be little or no evidence that a state agency would be any more likely than a federal action agency to abuse its discretion in making the threshold determinations under section 7(a)(2), even though the latter technically is laboring under the duty to insure. More importantly, enforcement mechanisms could be fashioned by regulation or in the delegation agreement to provide state agencies with incentives similar to federal agencies' incentives to make section 7(a)(2) threshold determinations lawfully. If necessary, the delegation agreement could be drafted to ensure that the receiving state accepts some effective enforcement mechanism.

3. Summary: Advantages of Delegating the Duty To Consult

Under the framework outlined above, delegating the duty to consult may be a more useful alternative for federal agencies faced with a delegation decision than attempting to use incremental consultation.

420. If a nonfederal entity prepares a biological assessment, the joint regulations require the federal action agency to ratify independently the conclusions in the assessment even though the Service must concur in the assessment's findings before the action can proceed. See 50 C.F.R. §§ 402.08, 402.12(j)-(k), 402.14(b); see also supra notes 40-43 and accompanying text. The preamble states that this requirement satisfies the action agency's section 7 obligations. Preamble to Final Rule, supra note 5, at 19,939.

421. See supra notes 67-80 and accompanying text.

422. If necessary, however, a concern over the lack of federal scrutiny could be addressed through some kind of informal concurrence procedure. The state agency's threshold determinations could be informally reviewed by the Service or the federal oversight agency. This proposal is analogous to the procedure established in the regulations for action agency review and approval of a federal applicant's determination of "no likelihood of adverse effect" in a biological assessment. See 50 C.F.R. § 402.08; see also supra text accompanying notes 408-10. Certainly, if the latter procedure satisfies the federal agency's duty to insure, the former should as well. See supra note 420.
Delegating the duty to consult avoids the predicament caused when the ultimate environmental effects of delegating the program are unknown or the agency would lose some authority to act for section 7(a)(2) purposes upon delegation. It also insures that the federal action agency will meet its burden to insure no jeopardy, and it may eliminate the possibility that section 7(d) would bar the delegation because the Service could issue a definitive, rather than a "best-guess," no-jeopardy opinion. Incremental consultation would not necessarily address these problems, even if Conner and its progeny could somehow be overcome.

Delegating the duty to consult is also superior from a pragmatic vantage. For many delegable federal programs, state consultation would reduce bureaucratic complexity and personnel and transaction costs. If the federal oversight agency retains responsibility for consultation, assuming that the program could be delegated, three governmental actors will be involved in the consultation process: the state, which will initially approve the proposed action, the federal oversight agency, which will review the state’s proposed action and determine whether to consult, and the Service, which will consult with the federal oversight agency. Because it is highly likely that the federal oversight agency will adopt the Service’s conclusions, there seems to be little reason for the federal oversight agency to have a role unless the state objects to those conclusions and the disagreement is unresolvable. Direct consultation between the state and the Service should save time and money, decrease the chance of miscommunication and other errors that result from bureaucratic complexity, and result in the same level of listed species protection.423

From a policy standpoint, delegating the duty to consult lacks some of the weaknesses that are inherent in incremental consultation as laid out in the joint regulations. Incremental consultation’s main flaw is that it essentially allows segmentation of an action, thus defeating the goal of identifying the broadest possible range of alternatives to minimize all-or-nothing project-species conflicts.424 Although delegating the duty to consult may allow the agencies involved to postpone considering some project-specific factors, consultation for the entire program will still take place at the delegation stage. The Service will review the program as a whole and recommend programmatic changes that might be foreclosed if consultation only looked at

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423. See generally Stewart, supra note 17, at 1209 (noting that Congress is wary of burdensome and ineffective control measures). If the programmatic statute requires the federal oversight agency to approve every state action proposed under the program, however, state consultation may have only marginal benefits because the federal oversight agency and the state already expend resources in that review.

424. See supra notes 74-75 and accompanying text.
the delegation "action" itself. Yet the Service is virtually certain to issue a no-jeopardy opinion, allowing the state to assume the program.

Giving the consultation obligation to the state also is more consistent with the cooperative federalism ideal than requiring the federal oversight agency to review and consult for each state-proposed action. Some programmatic statutes may require the federal oversight agency to review state program administration only periodically, rather than requiring review of each state-proposed action. For these programs, allowing the state to consult would eliminate the need for the federal oversight agency, pursuant to its duty to insure, to assume greater review authority than Congress envisioned in enacting the programmatic statute.\(^{425}\) Even where the programmatic statute grants the federal oversight agency review authority over individual state-proposed actions, delegating the duty to consult better serves the cooperative federalism ideal. Although, under the scheme proposed here, the state would not be a "full" partner because the federal oversight agency would be the final arbitrator in the case of a state-Service dispute, the state would be able to negotiate directly with the Service and, thereby, exercise more control over the program's administration.

The most obvious weaknesses in delegating the duty to consult are its lack of clear legal authority and its potential conflict with the ESA's existing statutory scheme. Nevertheless, in contrast to using the Service's version of incremental consultation, congressional action may not be necessary to implement the delegation scheme introduced here. Section 7(a)(1) and other provisions of the ESA may provide adequate authority to delegate the duty to consult,\(^{426}\) and section

\(^{425}\) This apparently is OSM's reasoning in requiring states requesting control of the SMCRA permitting program also to assume the duty to consult. See supra notes 412-15 and accompanying text. For those delegable federal programs manifesting a very strong cooperative federalism policy by providing for federal oversight only in very limited circumstances, perhaps the duty to insure also should be delegated, although this probably would require congressional action.

\(^{426}\) See supra notes 377-400 and accompanying text. The ESA authorizes the Service and states to enter into administrative agreements, and this authority may be used to support the scheme laid out in the text. Section 4(c) of the ESA authorizes the Service, "[t]o enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of listed species." 16 U.S.C. § 1535(c) (1988). In general, an "adequate and active" program is one in which the state agency charged with the program has the proper authority to carry it out and provision is made for public participation. See id. Section 4(c) appears to contemplate a cooperative agreement in which the state assumes all responsibility for applying the ESA on the ground, and at least one state has done this by essentially enacting a state version of the ESA. See, e.g., Little Blue Natural Resources Dist. v. Lower Platt N. Natural Resources Dist., 317 N.W.2d 726 (Neb. 1982). However, nothing in the provision indicates that a cooperative agreement cannot be made (or an existing agreement amended) in which a specific state agency assumes the duty to consult in conjunction with its obligations under a delegated federal program.
7(a)(2) probably can be interpreted to allow states to assume the consultation obligation. The Service may have to modify its current position, and both the Service and action agencies probably should undertake rulemaking, but these steps are not nearly as onerous or risky as persuading Congress to tinker with section 7.

The foregoing should suggest that delegating the duty to consult may be a viable method of complying with section 7(a)(2) in the delegation and oversight of federal programs, and that such an approach is worthy of serious consideration. Of course, there are myriad policy and practical implications that would need to be worked out. However, if the major theses of this article are correct—that section 7(a)(2) applies to the delegable federal programs and that its application could hinder the delegation of some programs—both federal and state agencies may wish to begin developing this mechanism.

CONCLUSION

Section 7(a)(2)'s plain language, the Supreme Court's interpretation of it in TVA, and Congress' subsequent endorsement of TVA's reading compel the conclusion that the duties to insure and consult apply to the delegation and oversight of delegable federal programs. Moreover, the balance of authority and sound policy suggest that these obligations attach if the federal action agency has any discretion under its programmatic statute to prevent the delegation or subsequent state activity under the program, even if that discretion cannot be exercised for environmental reasons. Although the case law and secondary authorities suggest a number of theories that could operate to exempt certain delegable federal programs from section 7(a)(2)'s sweep, none undermine the strength of this conclusion.

Section 7(a)(2), once triggered, could have a tremendous impact on some delegable federal programs, especially those where the programmatic statute calls for the federal action agency to relinquish authority in making the delegation. The more authority that is relinquished and the less that is known about the program's ultimate environmental effects, the greater the impetus for the Service to issue a jeopardy opinion. Incremental consultation may provide a way out of this bind, but the Ninth Circuit has significantly constrained the procedure's usefulness, and from a policy perspective, this limitation seems warranted. Another possible solution is to allow the federal action agency to delegate the duty to consult to the implementing state, while

427. See supra notes 406-07 and accompanying text.
retaining sufficient authority to comply with its duty to insure and to intervene in the minority of cases where there is a state-service dispute. Although significant hurdles to this proposal exist, none appear fatal, and the mechanism has appeal from both a pragmatic and policy point of view.

One may argue, however, that the more fundamental issue is whether the increased bureaucratic burden and expense that would be associated with applying section 7(a)(2) to all delegable programs is really worth the potential benefits. The answer depends, in large part, on the environmental impact of each particular program and the degree to which imposing a new layer of federally required obligations will reduce the benefits of each program. Although this type of cost-benefit analysis may, for some programs, call into question the wisdom of applying section 7(a)(2), this is no reason categorically to deny section 7(a)(2)'s application to delegable federal programs.

Congress mandated that the Federal Government do everything possible to prevent the permanent elimination of other species. With respect to delegable federal programs, this dedication to preserve other species is pitted against cooperative federalism, a political ideal that is rarely given meaningful substantive effect. If the two conflict, it seems obvious which should give; but this article hopefully has demonstrated that the two may be able to coexist with little or no disruption of existing statutory law.