A Dual Track for Individual Takings: Reexamining Sections 7 and 10 of the Endangered Species Act

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A DUAL TRACK FOR INCIDENTAL TAKINGS: REEXAMINING SECTIONS 7 AND 10 OF THE ENDANGERED SPECIES ACT

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I. INTRODUCTION

Congress enacted the Endangered Species Act¹ in 1973 in response to concerns that human beings and their technology were rapidly destroying the United States' natural ecosystems.² The Act's stated purpose is to conserve the ecosystems upon which endangered and threatened species depend, and further to establish a program for the conservation of those species.³ To this end, the Act proscribes activities that could harm or kill species listed as endangered pursuant to the Act, or destroy these species' habitat.⁴ The Act, however, provides an exception to this prohibition against "takings"—activities destructive of listed species or their habitat—if such takings occur incidentally to otherwise lawful activities.⁵

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⁴ See id. § 1538(a)(1). The Act sets forth procedures for identifying those species that are endangered or threatened and adding those species to the list of species entitled to protection under the Act. Id. § 1533(a)–(c). Endangered species are those species that are threatened with extinction through all or a significant portion of their range. Id. § 1532(6); see also H.R. REP. No. 1625, 95th Cong., 2d Sess. 5 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9455. Threatened species are those that are likely to become endangered within the foreseeable future. 16 U.S.C. § 1532(20) (1988); see also H.R. REP. No. 1625, 95th Cong., 2d Sess. 5 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9455. Hereinafter, this Comment will refer to endangered species and threatened species generally as "listed species," except where it refers to specific provisions of the Act that treat endangered species and threatened species differently. See infra note 24.
⁵ 16 U.S.C. § 1536(b)(4) (1988) (incidental take authorization for federal agencies, also known as § 7); id. § 1539(a) (incidental take authorization for state or private parties, also known as § 10(a)); see infra notes 85–99, 156–201 and accompanying text.
Congress has recognized that the Act, to work effectively, must balance its mandate to protect species against the modern necessity of allowing development activities that could result in the taking of those species.\(^6\) To achieve this balance, Congress has amended the Act several times since 1973 to clarify the process by which parties may obtain authorization for the incidental taking of listed species.\(^7\) Specifically, two sections of the Act, generally known as section 7 and section 10(a), now address authorized takings of listed species.\(^8\)

Section 7 provides a means for federal parties to obtain incidental taking authorization.\(^9\) Under section 7, federal agencies must consult with either the Secretary of the Interior, as represented by the Fish and Wildlife Service (FWS), or the Secretary of Commerce, as represented by the National Marine Fisheries Service (NMFS),\(^10\) to ensure that any action that they authorize, carry out, or fund will not jeopardize the continued existence of a listed species.\(^11\) If a proposed agency action will result in the taking of a listed species, the agency must obtain authorization for that taking. The Secretary may authorize the action only after first determining that it will not likely jeopardize the continued existence of the listed species.\(^12\)

Similarly, section 10(a) of the Act sets forth an authorization process for incidental takings, but it applies to state or private activities that do not require federal authorization or funding.\(^13\) Under section 10(a), a state or private party may obtain a permit for any action that could result in the taking of a listed species.\(^14\) Before receiving

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\(^8\) See supra note 5.


\(^10\) 50 C.F.R. § 402.01(b) (1989). The Secretary of the Interior, through the Fish and Wildlife Service (FWS), and the Secretary of Commerce, through the National Marine Fisheries Service (NMFS), share responsibility for conducting § 7 consultations. \(I_d.; \) see generally Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,926 (1986). Marine animals fall under the jurisdiction of the Secretary of Commerce, through the NMFS, while all other species of animals are under the jurisdiction of the Secretary of the Interior, through the FWS. 50 C.F.R. § 402.01(b) (1989). Hereinafter, discussion of the Act’s regulations will refer generally to “the Secretary,” except where the FWS or the NMFS are specifically involved.


\(^12\) Id. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1) (1989).


an incidental take permit, however, the party must demonstrate that the taking will not reduce appreciably the likelihood of the species’ survival and recovery.\footnote{16 U.S.C. § 1539(a)(2)(B)(iv) (1988).}

Since 1985, when the Secretary promulgated regulations implementing section 10(a)’s incidental taking permitting process, state or private parties have completed only four conservation plans.\footnote{Telephone interview with Ronald Swan, attorney, Department of the Interior Office of the Regional Solicitor, Pacific Northwest Region, Portland, Or. (Jan. 21, 1991). The conservation plans concerned projects on San Bruno Mountain in San Mateo County, Redwood City, Cal.; Coachella Valley in Riverside, Cal.; North Key Largo, Fla.; and Clark County, Nev. Id.; see also Fish and Wildlife Service Region 1, Draft Conservation and Planning Guidelines 2 (1990) [hereinafter FWS Conservation Guidelines].} By contrast, hundreds of section 7 consultations occur each year between the Secretary and federal parties seeking incidental taking authorization.\footnote{See H.R. Rep. No. 567, 97th Cong., 2d Sess. 13 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2813; see also telephone interview with Paul Seltzer, attorney, Palm Springs, Cal. (Oct. 26, 1990). In September 1990, for example, the Bureau of Land Management (BLM) was engaged in approximately forty-five § 7 consultations for development activities in California alone. Telephone interview with Edward Lorentzen, attorney, Bureau of Land Management, Sacramento, Cal. (Oct. 9, 1990).} There are two major reasons for this disparity. Section 10(a) and its conservation planning requirement, in comparison with section 7, represent a far more costly and time-consuming process for obtaining incidental taking authorization. Moreover, state or private parties seeking to avoid section 10(a) can establish, with relative ease, a federal nexus for their activities that will provide them access to the section 7 consultation process.\footnote{Telephone interview, James Bartell, Fish and Wildlife Service Region 1, Sacramento, Cal. (Sept. 20, 1990).}

This Comment examines the contrasting procedural burdens imposed by the section 7 and section 10(a) incidental taking authorization processes. Although the sections purport to provide an identical level of protection for listed species, this Comment concludes that section 10(a) in theory offers the best potential for accomplishing the Act’s purpose of both protecting and conserving listed species. Because parties have succeeded in circumventing section 10(a), however, the protection that listed species otherwise would enjoy under the Act has been diminished.

Section II of this Comment discusses the significant amendments to the section 7 consultation process, and section III examines the development of the section 10(a) incidental take permitting procedure. While Congress has simplified the section 7 process, it has not similarly streamlined the section 10(a) conservation planning
scheme. Section IV of this Comment assesses whether section 10(a)'s more burdensome procedural requirements, which in practice may afford greater long-term protections for endangered species than section 7, provide an incentive for parties to seek incidental take authorization through section 7 consultations. Finally, section V explores how Congress could promote the preparation of conservation plans by facilitating the section 10(a) incidental take authorization process. Further, section V examines methods of modifying section 7 to channel more incidental taking applicants through section 10(a) and thus ensure that incidental takings are authorized under section 7 only after federal agencies have provided the maximum possible protection for listed species.

II. SECTION 7: INCIDENTAL TAKING AUTHORIZATION FOR FEDERAL ACTIONS

In the preamble to the Act, Congress articulated a broad goal of promoting conservation measures that will bring endangered or threatened species to the point of recovery at which they no longer require the Act’s protection.\(^\text{19}\) Despite the preamble’s broad policy in favor of conservation, however, a federal agency’s legal obligation under section 7 is not to promote the recovery of listed species, but to avoid taking actions that could jeopardize those species.\(^\text{20}\) Although the Secretary may propose conservation measures during section 7 consultations, such proposals are merely non-binding recommendations that are wholly separate from the jeopardy requirement.\(^\text{21}\)

To enforce section 7's legal prohibition against jeopardizing listed species, the Act contains both substantive and procedural requirements.\(^\text{22}\) Substantively, the Act proscribes the taking\(^\text{23}\) of endangered species or the destruction of those species' habitat.\(^\text{24}\) Further, section 7 prohibits any federal agency from permitting, funding, or

\(^\text{19}\) 16 U.S.C. §§ 1531(b), 1532(3) (1988); see supra note 4 and accompanying text.


\(^\text{21}\) See id.

\(^\text{22}\) See Sierra Club v. Marsh, 816 F.2d 1376, 1386, 1389 (9th Cir. 1987); Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985); see infra notes 94–99.

\(^\text{23}\) The Act defines the term “take” to mean to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19) (1988).

\(^\text{24}\) The Act forbids any person in the United States or on the high seas to take of any species of fish or wildlife listed as endangered under § 4 of the Act. Id. § 1538(a)(1)(B), (C).
carrying out any action that could jeopardize a listed species or its habitat. Parties violating this "jeopardy standard" are subject to criminal and civil penalties. Procedurally, section 7 prescribes a consultation process that ensures a federal agency's compliance with the Act's substantive protections. Careful adherence to the Act's procedural demands is necessary for the substantive protections to work effectively. Congress therefore has substantially modified the section 7 consultation process so that parties may more easily meet the Act's substantive requirements. The following section assesses these modifications and the analyses the Secretary performs during consultations to determine whether proposed federal actions would violate the Act's jeopardy standard.

A. The Interagency Consultation Process Prior to 1978

As it originally appeared in the 1973 Act, section 7 was a one-paragraph statement mandating that federal agencies consult with the Secretary to ensure that any actions they permitted, funded, or carried out would not jeopardize the continued existence of listed species or destroy or modify those species' critical habitat. To "jeopardize the continued existence" of a listed species means to engage in an action that reasonably would be expected to appreciably reduce both the survival and the recovery of a listed species.

In January 1978, the Secretary for the first time implemented procedures for the consultation process mandated under the 1973 Act. Under these procedures, which were designed to assist federal agencies in ensuring that their activities complied with the section 7 jeopardy standard, and which also formed the basis for later
amendments to section 7, a federal agency typically initiated consultations after discovering that a proposed action might affect a listed species.\textsuperscript{34} The agency then would contact the Secretary to request assistance in determining whether pursuing the action potentially would violate the section 7 jeopardy standard.\textsuperscript{35}

Prior to 1978, parties had challenged the section 7 jeopardy standard only twice.\textsuperscript{36} When, in 1978, the United States Supreme Court decided \textit{Tennessee Valley Authority v. Hill},\textsuperscript{37} Congress received notice of the need to improve section 7 to avoid potential conflicts between economic concerns and the protection of listed species.\textsuperscript{38} In \textit{Hill}, the Tennessee Valley Authority (TVA) had invested more than $100 million in constructing the Tellico Dam on the Little Tennessee River when, in 1973, biologists discovered that an endangered species of minnow, the snail darter, inhabited a portion of the river that would be flooded by the dam.\textsuperscript{39} The Supreme Court affirmed a decision by the United States Court of Appeals for the Sixth Circuit to enjoin the TVA from completing the dam.\textsuperscript{40} The Court held that

\textsuperscript{34} See id.

\textsuperscript{35} See id.

\textsuperscript{36} See \textit{Sierra Club v. Froehlke}, 534 F.2d 1289, 1305 (8th Cir. 1976) (claim that Army Corps of Engineers' construction of dam would jeopardize endangered Indiana bat was dismissed when plaintiff failed to prove dam's adverse effects on bat); National Wildlife Fed'n v. Coleman, 529 F.2d 359, 374–75 (5th Cir.) (Department of Transportation enjoined from constructing highway interchange on lands inhabited by Mississippi sandhill crane until Department could show that interchange would not jeopardize crane or its habitat), \textit{reh. denied}, 532 F.2d 1375 (5th Cir.), \textit{cert. denied}, 429 U.S. 979 (1976). While these cases emphasize that a proposed activity's economic importance should not factor into the Secretary's determination of whether the activity would violate § 7, they also illustrate the flexibility in § 7 to allow a taking to occur when the taking will not jeopardize a species. See \textit{H.R. REP. No. 1625, 95th Cong., 2d Sess. 11} (1978), \textit{reprinted in 1978 U.S.C.C.A.N. 9453, 9461}.\textsuperscript{38} The 1978 amendments formalized the process for issuing a biological opinion; required that federal agencies prepare biological assessments; and required that, where the Secretary determines that a proposed action would jeopardize the continued existence of a listed species, the Secretary suggest "reasonable and prudent alternatives" in its biological opinions. See \textit{id}. at 19–22, \textit{reprinted in 1978 U.S.C.C.A.N. at 9469–72}. The 1978 amendments also prohibited federal agencies or permit applicants from making, after the initiation of consultation, any irreversible commitment of resources that would foreclose the adoption of reasonable or prudent alternatives. See \textit{id}. at 21, \textit{reprinted in 1978 U.S.C.C.A.N. at 9471}.

\textsuperscript{37} 437 U.S. 153 (1978).

\textsuperscript{38} See \textit{H.R. REP. No. 1625, 95th Cong., 2d Sess. 10} (1978), \textit{reprinted in 1978 U.S.C.C.A.N. 9453, 9640}. The 1978 amendments formalized the process for issuing a biological opinion; required that federal agencies prepare biological assessments; and required that, where the Secretary determines that a proposed action would jeopardize the continued existence of a listed species, the Secretary suggest "reasonable and prudent alternatives" in its biological opinions. See \textit{id}. at 19–22, \textit{reprinted in 1978 U.S.C.C.A.N. at 9469–72}. The 1978 amendments also prohibited federal agencies or permit applicants from making, after the initiation of consultation, any irreversible commitment of resources that would foreclose the adoption of reasonable or prudent alternatives. See \textit{id}. at 21, \textit{reprinted in 1978 U.S.C.C.A.N. at 9471}.

\textsuperscript{39} 437 U.S. at 158–59, 172.

\textsuperscript{40} \textit{Id}. at 195.
the Act’s legislative history revealed an explicit congressional mandate to make endangered species protection a national priority that could not be subordinated to economic concerns.41

The Hill case not only illustrated the original Act’s potential inflexibility towards accommodating activities that would jeopardize listed species; it also focused congressional attention on the need to clarify the section 7 consultation process in order to avoid future situations in which a federal agency unknowingly created an irresolvable conflict between completing an activity and complying with the Act’s jeopardy standard.42

B. The 1978 and 1979 Amendments to Section 7

Congress recognized that good faith consultation between a federal agency and the Secretary could resolve many potential conflicts between endangered species protection and developmental and economic interests.43 Thus, through the 1978 amendments, Congress formalized the procedures by which a federal agency may consult with the Secretary to determine whether actions by that agency, or by an applicant44 for a federal permit or license, would likely violate the section 7 jeopardy standard.45 The amendments expanded section 7 to establish a formal system for collecting information and conducting environmental reviews.46

Section 7 requires that federal agencies request information from the Secretary about whether a listed species is present in the area affected by a proposed agency action.47 If the Secretary advises the federal agency that a listed species might inhabit a proposed project area, the federal agency must prepare a “biological assessment” identifying listed species in the proposed project area, their critical

41 Id. at 185.
46 See infra notes 47–58 and accompanying text.
habitat, and the potential impacts that the project could have on the species.

Federal agencies must prepare biological assessments for federal actions that qualify as "major construction activities" under the National Environmental Policy Act (NEPA). Major construction activities are projects, such as the construction of dams, buildings, roads, and water resource projects, that significantly modify the physical environment.

Using information provided in the biological assessment, the Secretary issues a "biological opinion" regarding whether the proposed project will jeopardize a listed species or its critical habitat. A negative biological opinion reflects the Secretary's decision that a federal agency could not proceed with the proposed activity without jeopardizing a listed species. Under the 1978 amendments, if the Secretary determined that a project would jeopardize a listed species, the Secretary was authorized to recommend those "reasonable and prudent alternatives" that the federal agency or applicant could take in order not to jeopardize the species or harm its habitat. A reasonable and prudent alternative is one that a federal agency or an applicant may implement to avoid jeopardizing the species without altering the intended purpose of the proposed action. The Act defines the term "critical habitat" as that land within the geographic area occupied by the listed species that is essential to the conservation of the species, as well as that land outside the inhabited area that is essential for the conservation of the species. The Act also defines "critical habitat" as air, land, or water areas that, if destroyed, would appreciably decrease likelihood of endangered species' survival.

Through the 1978 amendments, Congress adopted a restrictive definition of "critical habitat" that covered only the area needed to enable a listed species to survive at its present level, rather than that area where a species lives. The Act also specifies that the Secretary must consider economic and technical feasibility when developing such alternatives. Congress also amended § 7 to prevent federal agencies and permit or license applicants from making, after the initiation of consultations, any "irreversible or irretrievable commitment of resources" that could foreclose the adoption of "reasonable and prudent alternatives" to the
does not require a federal agency to adopt any of the recommended alternatives.\textsuperscript{57} An agency that proceeds with a proposed activity without adopting the Secretary's recommendations and later jeopardizes a listed species, however, is subject to liability under the Act.\textsuperscript{58}

In the 1978 amendments, Congress did not alter a federal agency's substantive obligation under the Act to avoid jeopardizing listed species. As a result of the 1978 amendments, however, the Act more clearly identified the required steps of a formal consultation. In doing so, the Act provided federal agencies with greater assistance in complying with the jeopardy standard.

When Congress amended the Act again in 1979,\textsuperscript{59} it modified a federal agency's obligation under section 7 from ensuring that the agency's action would not jeopardize a listed species, to ensuring that its action would not likely jeopardize a listed species or its habitat.\textsuperscript{60} While Congress noted that it did not intend the amendment to lessen an agency's substantive obligation under section 7,\textsuperscript{61} the section's protection of listed species is now less absolute. In addition, the 1979 amendment eliminated section 7's prior mandate that the Secretary issue negative biological opinions whenever an agency failed to guarantee that its actions would not jeopardize a listed species or its habitat.\textsuperscript{62} The amendment authorized the Secretary to issue a "no-jeopardy" biological opinion based not on a guarantee


\textsuperscript{62} Id.
that a proposed action would not jeopardize a listed species, but on the best evidence available or evidence that the agency could develop during consultation.\textsuperscript{63}

C. The 1982 Amendments to Section 7

Responding to criticism from industrial and economic interests that the section 7 consultation process was too complicated and time-consuming, Congress, through the 1982 amendments to the Act,\textsuperscript{64} sought to expedite the section 7 consultation process.\textsuperscript{65} In addition, it established provisions to excuse parties receiving incidental take authorization under section 7 from the Act's prohibition against the taking of endangered species.\textsuperscript{66} Congress did so by requiring that the Secretary supplement any no-jeopardy biological opinion with a statement explicitly authorizing the incidental taking of listed species.\textsuperscript{67}

1. Expedited Consultation Process

Critics of section 7 had charged that the consultation process was too complicated, and that the Secretary frequently extended reviews beyond the ninety-day completion period originally set forth in regulations implementing the 1973 Act.\textsuperscript{68} The 1982 amendments set firm limits on the allowable time period for section 7 consultations.\textsuperscript{69} The Secretary and a federal agency now must conclude a section 7 consultation within ninety days of the date that the federal agency initiates consultation.\textsuperscript{70}

\textsuperscript{63} Information relied upon during a § 7 consultation must represent the "best scientific and commercial data available or which can be obtained during the consultation." 50 C.F.R. § 402.14(d) (1989).
If the proposed action involves a permit applicant, the Secretary and the federal agency may not extend the consultation for more than ninety days from the date when the agency initiated the consultation without providing the applicant with a written explanation regarding why a longer consultation is necessary.\textsuperscript{71} In addition, the Secretary must provide the applicant with both an outline of the information needed to complete the consultation and the consultation's estimated completion date.\textsuperscript{72} Finally, the Secretary and the federal agency cannot extend the consultation for more than sixty days without first obtaining the applicant's consent.\textsuperscript{73}

In addition to limiting the duration of formal consultations, the 1982 amendments authorized the Secretary to conduct early consultations under section 7.\textsuperscript{74} Early consultation allows a party, prior to applying for a federal permit, to request that the Secretary consult with the permitting federal agency to determine the potential impact that a proposed project could have on a listed species or its habitat.\textsuperscript{75} By allowing a permit applicant to identify a project's likely impact on listed species early in the project's initial stages, early consultations provide an additional mechanism for reducing the likelihood of conflicts between those species and the proposed project.\textsuperscript{76}

A preliminary biological opinion issued at the conclusion of an early consultation does not represent final authorization to take a listed species.\textsuperscript{77} Nonetheless, the Secretary has established a mechanism for parties to confirm a preliminary biological opinion.\textsuperscript{78} If the Secretary finds that no significant change in either the project or in the information reviewed during early consultation has occurred, the Secretary may confirm the preliminary biological opinion as a final biological opinion, thereby eliminating the need for a formal consultation.\textsuperscript{79}

The Secretary also has established an informal consultation process to exempt certain projects from formal section 7 consultations.\textsuperscript{80} During informal consultations, a federal agency relies on discussions,
correspondence, and other informal contacts with the Secretary to evaluate whether a proposed action might jeopardize a listed species. If the federal agency determines that the proposed action will not jeopardize the species, and the Secretary concurs with this decision, the consultation process ends, and no further action is required by the applicant or federal agency. If a federal agency determines, however, that a proposed action may affect a listed species, the federal agency must go forward with formal consultation under section 7. During informal consultation, the Secretary also may suggest actions that the agency or applicant could take to avoid jeopardizing a listed species or its habitat.

2. Incidental Take Statements: Reconciling Section 9 and Section 7

In addition to facilitating the consultation process, the 1982 amendments eliminated potential conflicts between the section 7 incidental take authorization process and section 9's taking prohibition. Prior to the 1982 amendments, a federal agency or permit applicant that had completed a section 7 consultation and received a no-jeopardy biological opinion from the Secretary got no assurance that the incidental takings authorized during the consultation would not result in liability under section 9. Although a no-jeopardy decision issued following a consultation reflected the Secretary's position regarding a proposed activity's effect on an endangered species, it did not bar private actions brought under section 9.

Section 7 now requires that the Secretary issue an "incidental take statement" upon reaching a no-jeopardy biological opinion. This statement explicitly exempts federal agencies or permit applicants from the Act's taking prohibitions. The statement must specify the

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81 Id.
82 Id.
84 50 C.F.R. § 402.13(b) (1989).
86 Id.
incidental taking's anticipated impact on a listed species, list reasonable and prudent measures\(^{90}\) that the Secretary considers necessary to minimize that impact, and establish the terms and conditions—including reporting requirements—with which the federal agency or applicant must comply.\(^{91}\)

As long as the applicant or federal agency complies with the terms of the incidental take statement, it is exempt from the Act's taking prohibition.\(^{92}\) The federal agency must reinitiate consultations, however, if during the course of the action the terms of the statement are violated.\(^{93}\) In *Sierra Club v. Marsh*,\(^ {94}\) for example, the FWS had approved the Army Corps of Engineers' proposed construction of a highway and flood control channel under the precondition that the Corps acquire 188 acres of marshland to mitigate the project's effects on the California least tern and the light-footed clapper rail, both endangered species.\(^ {95}\) The United States Court of Appeals for the Ninth Circuit held that the Corps had violated section 7's procedural requirements by failing to reinitiate consultation with the FWS after the Corps's acquisition of the land had been delayed.\(^ {96}\) The court enjoined further construction of a portion of the highway until the Corps acquired the marshland, and directed the Corps to reinitiate formal consultation with the FWS.\(^ {97}\)

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\(^{90}\) 50 C.F.R. § 402.14(i)(1)(ii) (1989). The Secretary has interpreted the phrase “reasonable and prudent measures” to mean those steps necessary to minimize the level of incidental taking. Id. § 402.02. Although the Secretary has authorization to suggest mitigation measures, those measures may represent only minor changes that do not alter the basic design, location, duration, or timing of the proposed action. Id. § 402.14(i)(2).


\(^{93}\) 50 C.F.R. § 402.14(i)(4) (1989). Commentators on the 1982 amendments argued that this reinitiation procedure could enable the Secretary to authorize activities that would exceed the “jeopardy ceiling”—the level at which the taking would likely jeopardize the endangered species. Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,954 (1986). The Secretary responded that the level of taking authorized in the incidental take statement would not be set at the threshold of likely jeopardy, and that the Secretary would not issue an incidental take statement if the proposed action would result in an incidental take level approaching the jeopardy ceiling. Id.

\(^{94}\) 816 F.2d 1376 (9th Cir. 1987).

\(^{95}\) Id. at 1379.

\(^{96}\) Id. at 1389. The court held that the Corps had violated § 7's substantive protections by allowing the destruction of a species' habitat without first acquiring the mitigation lands. Id. at 1386.

\(^{97}\) Id. at 1389.
While the 1982 amendments facilitated the section 7 consultation process, they did not affect the substance of the Supreme Court's decision in *Hill*. The Act continues to reflect Congress's view, as enunciated in *Hill*, that any balance between the economic hardships inherent in complying with the Act and the public interest in protecting endangered species tips heavily in favor of preserving endangered species.

**D. Effects Analysis**

While, in many respects, a formal consultation represents a coordinated effort between a federal agency and the Secretary, the ultimate decision as to whether a proposed activity is likely to jeopardize a listed species is the Secretary's alone. In reaching a decision, the Secretary evaluates the effects of the action that is the subject of the consultation, as well as the cumulative effects of other unrelated activities that are reasonably certain to occur in the "action area" of the proposed activity.

1. Effects of the Action Analysis

When analyzing the effects of a proposed action, the Secretary considers the action's direct or immediate impacts on an endangered species, as well as those indirect impacts that are reasonably certain to occur. The Secretary regards an action to be reasonably certain to occur if there is more than a mere possibility that the action will proceed, bearing in mind economic, administrative, or legal hurdles confronting the project. When considering whether the effects of a proposed action will jeopardize a listed species, the Secretary uses

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98 *Id.* at 1383 n.10.
99 *Id.* at 1383. In its final rule promulgating the 1982 amendments, the Secretary noted that revisions to § 7 were intended to streamline the consultation process while maintaining the protections afforded to species under the Act. Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,927 (1986).
101 *Id.* § 402.14(g)(3).
102 *Id.* The Secretary performs this analysis using information provided by the federal agency. *Id.* § 402.14(g)(1).
103 Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,933 (1986). The "reasonably certain to occur" standard, however, does not require a proposed action to be guaranteed to occur before it will be included in an effects of the action analysis. *Id.*
the status of the species and its habitat as the basis for the analysis.\textsuperscript{104}

2. Cumulative Effects Analysis

Cumulative effects, by comparison, are those state or private activities that are reasonably certain to occur, but are not related to the action that is the subject of consultation.\textsuperscript{105} Although a federal agency need not consider cumulative effects in a biological assessment under section 7,\textsuperscript{106} the Secretary must evaluate cumulative effects before issuing a biological opinion.\textsuperscript{107} Thus, an analysis of the cumulative effects of unrelated activities is part of the formal consultation.\textsuperscript{108}

Furthermore, federal agencies must complete a cumulative effects analysis in order to comply with NEPA.\textsuperscript{109} NEPA requires an Environmental Impact Statement (EIS) assessing the cumulative effects of any proposed legislation or other major federal actions significantly affecting the quality of the environment.\textsuperscript{110} A federal

\textsuperscript{104} Id. at 19,932. The Secretary's failure to evaluate fully the potential effects of a proposed action will render its biological opinion incomplete. National Wildlife Fed'n v. Coleman, 529 F.2d 359, 373 (5th Cir.), reh. denied, 532 F.2d 1375 (5th Cir.), cert. denied, 429 U.S. 979 (1976). In Coleman, the United States Court of Appeals for the Fifth Circuit enjoined completion of a federal highway construction project, because the FWS and the United States Department of Transportation had failed to assess the project's indirect effects on lands inhabited by the Mississippi sandhill crane. Id. The project's potential indirect effects included commercial and residential development in the project area. Id. The effects of the action analysis also must include interrelated and interdependent actions. Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,932 (1986). Interrelated actions are part of and dependent upon a larger activity, while interdependent actions are those that would not occur but for the larger action. Id.

\textsuperscript{105} Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,932-33 (1986). Cumulative effects analyses do not consider other federal actions, which require separate § 7 consultations. Id. at 19,933.

\textsuperscript{106} Id. at 19,932.

\textsuperscript{107} Id. at 19,932.

\textsuperscript{108} Id. at 19,932.

\textsuperscript{109} Id. at 19,932.

\textsuperscript{109} 50 C.F.R. § 402.14(g)(4) (1989).

\textsuperscript{110} 42 U.S.C. § 4332(2)(C) (1988). The goal of NEPA is to ensure that federal agencies are fully aware of the impact of their decisions on the environment. Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 985 (9th Cir. 1985). A federal agency must conduct an environmental assessment for all federal actions that may significantly affect the quality of the human environment. Id. at 986. If an agency determines that the proposed activity would not likely have a significant environmental effect, the federal agency issues a finding of no significant impact (FONSI), which excludes the NEPA review. See Thomas v. Peterson, 753 F.2d 754, 757 (9th Cir. 1985). If, however, the environmental assessment indicates that the proposed action will have a significant effect, the agency must develop an EIS. See id. The EIS details any unavoidable adverse environmental effects associated with the action, any
agency may use as its biological assessment an EIS prepared under NEPA, even though the scope of the EIS analysis is broader than legally required pursuant to the Act.\textsuperscript{111} In such cases, the Secretary, when formulating a biological opinion, applies the Act's, rather than the NEPA, cumulative effects standard.\textsuperscript{112}

The Secretary must consider the cumulative effects of state and private actions that are reasonably certain to occur in the action area of a proposed project.\textsuperscript{113} The Act's "reasonably certain to occur" standard does not cover all proposed actions.\textsuperscript{114} The Secretary has determined that extending the cumulative effects analysis to include all proposed actions, as opposed to only those that are reasonably certain to occur, would allow speculative activities to disrupt federal actions that pose minimal adverse impacts.\textsuperscript{115}

When it issued regulations under the Act pursuant to the 1982 amendments, the Secretary explicitly rejected a recommendation that the section 7 cumulative effects analysis include all reasonably foreseeable future federal, state, and private actions.\textsuperscript{116} A broad standard would require the Secretary to issue a jeopardy opinion for a federal action that, at the time of the opinion, would not endanger a listed species, but that was proposed for an area where future, speculative actions could, on a cumulative basis, jeopardize a listed species.\textsuperscript{117} The Secretary noted that Congress

alternatives to the action, and any irreversible commitment of resources necessary to implement the action. 42 U.S.C. § 4332(2)(C) (1988).

\textsuperscript{111} Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,932 (1986); see also Peterson, 753 F.2d at 763 (§ 7 biological assessment may be part of an EIS). The procedural requirements of a § 7 consultation are analogous to those under NEPA. Peterson, 753 F.2d at 764. Thus, a failure to prepare a biological assessment is comparable to a failure to prepare an EIS. Id.


\textsuperscript{113} 50 C.F.R. § 402.14(g)(4) (1989). The term "action area" is defined as an area affected directly or indirectly by the federal action. Id. § 402.02.


\textsuperscript{115} Id.; see Sierra Club v. Marsh, 816 F.2d 1376, 1387 (9th Cir. 1987). In Marsh, the United States Court of Appeals for the Ninth Circuit rejected a claim that the Corps should reinitiate consultation with the FWS over a highway and flood control project after the state of California approved a private development on land near the Corps project. 816 F.2d at 1387. The private development, which was unrelated to the Corps project, had not received approval when the Corps consulted with the FWS. Id. The private development therefore had not been included in the FWS cumulative effects analysis. Id. If consultation were reinitiated, however, the FWS and the Corps would have to consider the private development as a cumulative effect. Id.


\textsuperscript{117} Id.
did not intend the Act to permit speculative future actions to bar federal projects.118

The standard for cumulative effects analyses under NEPA is broader. The Council on Environmental Quality (CEQ), which is charged with enforcing NEPA regulations, requires that federal agencies consider “connected actions” and cumulative effects together in a single EIS.119 Cumulative actions under NEPA are those actions that, when viewed with other proposed actions, have significant impacts.120 CEQ regulations require that cumulative impact analyses consider impacts of past, present, and reasonably foreseeable future actions that are related or unrelated to the proposed project.121 Thus, while the Act requires that the Secretary consider only those actions that are reasonably certain to occur, NEPA requires an assessment of not only proposed, but also reasonably foreseeable future actions.122

The Secretary justifies using the narrower section 7 effects analysis on the grounds that the Act contains a substantive, jeopardy standard, while NEPA contains only procedural requirements.123 NEPA demands that federal agencies evaluate how their actions will affect the environment.124 The Act, by comparison, requires both a systematic determination of the effects a federal project will have on listed species and a showing that the projects will not likely jeopardize listed species.125

E. Section 7 Consultation: One Example

The FWS and the Federal Highway Administration (FHWA) recently completed a formal consultation to evaluate the potential

118 Id.
119 40 C.F.R. § 1508.25(a)(1) (1990). “Connected actions” are those actions that may have consequences requiring an EIS, that cannot proceed unless other actions are taken previously or simultaneously, and that are interdependent parts of a larger action and depend upon the larger action for their justification. Id.
120 Id. § 1508.25(a)(2); see also Thomas v. Peterson, 753 F.2d 754, 759 (9th Cir. 1985) (Forest Service required under NEPA to prepare EIS that considered immediate effects of constructing timber road through national forest, as well as effects of future timber sales that would occur as result of road).
123 Id. at 19,933; see Peterson, 753 F.2d at 764.
124 Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 985 (9th Cir. 1985); see also supra note 110 and accompanying text.
125 Peterson, 753 F.2d at 763.
environmental impacts of a proposed project to upgrade a 2.1-mile section of highway in Bakersfield, California.\textsuperscript{126} On July 24, 1990, the FHWA requested a formal consultation under section 7 to determine the project's potential effects on three endangered species: the San Joaquin kit fox, the Tipton kangaroo rat, and the blunt-nosed leopard lizard.\textsuperscript{127} The section of highway crossed state lands, as well as approximately one mile of private lands owned by Oceanic Communities, Inc.\textsuperscript{128} The City of Bakersfield required Oceanic, which proposed to develop a portion of the lands into residential housing, to contribute to the Stockdale Highway project.\textsuperscript{129} The FHWA acted as the lead agency in the section 7 consultation, because it contributed federal funds to the highway project.\textsuperscript{130}

On August 8, 1990, the FWS issued a biological opinion on the potential impact that the highway renovation plan and the Oceanic housing project would have on the three endangered species.\textsuperscript{131} The FWS determined that construction activities during both the Stockdale Highway and Oceanic projects could result in the incidental taking of kit foxes, blunt-nosed leopard lizards, and kangaroo rats.\textsuperscript{132} Further, while the FWS concluded that habitat losses from the highway project would be minimal, it found that all habitat on Oceanic's 130.7-acre project area would be destroyed.\textsuperscript{133} The FWS concluded, however, that neither project was likely to jeopardize the continued existence of those species.\textsuperscript{134}

As required under the Act, the FWS also assessed the cumulative effects of future state and private activities, such as urban devel-

\textsuperscript{126} See Wayne S. White, Biological Opinion on Formal Section 7 Consultation Concerning Proposed Widening and Realignment of Stockdale Highway Within the City of Bakersfield, Kern County, Cal. 1 (Aug. 8, 1990) (Correspondence No. 1-1-90-F-40, on file with the Fish and Wildlife Service) [hereinafter White Biological Opinion].

\textsuperscript{127} Bruce E. Cannon, Letter to the FWS Requesting Formal Consultation on the Effects of Improvements to Stockdale Highway Within City of Bakersfield, Cal. (July 24, 1990) (File No. M-F248(4)(6), on file with the Federal Highway Administration) [hereinafter Cannon Letter]; see White Biological Opinion, supra note 126, at 1.

\textsuperscript{128} Id. at 2. During the first phase of its project, which would encompass about 130.7 acres of land, Oceanic planned to install public utilities and public service facilities. Id. Oceanic later proposed to sell the land to builders for the construction of single-family homes. Id.

\textsuperscript{129} Id. at 1.

\textsuperscript{130} Id. at 2. The FHWA had submitted to the FWS a request for formal consultation on July 24, 1990. Cannon Letter, supra note 127, at 1. In the request, the FHWA noted that Oceanic and the FWS had already concluded informal consultations, during which Oceanic had provided the FWS with a biological assessment of the proposed project. Id. at 2. The FHWA's request described both the proposed action and the habitat and species that it would affect. Id. at 1.

\textsuperscript{131} White Biological Opinion, supra note 126, at 6.

\textsuperscript{132} Id. at 4.

\textsuperscript{133} Id. at 1.
opment, flood control, and reservoir construction projects, on the three endangered species.\textsuperscript{135} Although the FWS determined that the cumulative effects of these projects posed a significant threat to the eventual recovery of the three species, it nonetheless concluded that the highway and housing project, considered together with future possible housing, flood control, and reservoir construction projects, would not likely jeopardize the species’ survival.\textsuperscript{136}

As part of its biological opinion, the FWS also issued an incidental take statement exempting Oceanic and the City of Bakersfield from the Act’s taking prohibition.\textsuperscript{137} The statement authorized a specified level of taking for each species, provided that Oceanic and Bakersfield implemented mitigation measures the FWS deemed reasonable and prudent for reducing the taking level.\textsuperscript{138} The mitigation measures included pre-construction surveys of the projects’ sites, to identify any new evidence of activity by the endangered species in the highway and housing project construction areas; clear delineation of construction sites to prevent inadvertent destruction of species habitat; and preemptive measures, such as covering trenches and pipes, to reduce the possibility of entrapping or killing species at the sites.\textsuperscript{139}

\textbf{F. Federal Nexus for Section 7 Projects}

The Act provides that only those projects authorized, funded, or approved by federal agencies may proceed through the section 7 incidental take authorization process.\textsuperscript{140} Neither the Act’s language, nor its legislative history, nor the regulations implementing the Act’s amendments, however, specify the type or substance of the federal nexus necessary to bring a state or private activity within section 7.\textsuperscript{141} Attorneys working with the Act, however, have stated that the Secretary applies a “but for” test when determining whether a pro-

\textsuperscript{135} Id. at 6.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 7–8. In its incidental take statement, the FWS anticipated that one kit fox would be harmed or killed during highway construction, while twenty-two foxes and two lizards would be harmed, killed, or displaced during the Oceanic project. Id. at 7. Because no reliable estimates were available on the number of kangaroo rats living in the Oceanic project area, the FWS did not specify limits on the number of rats that could be taken during the project. Id. Rather, the FWS authorized the incidental take of rats in specific sites within the project area. Id.
\textsuperscript{139} Id. at 9.
\textsuperscript{140} 50 C.F.R. § 402.01 (1989); see 16 U.S.C. § 1536(a)(2) (1988); see also supra note 20 and accompanying text.
\textsuperscript{141} Telephone interview with William Bunch, attorney, Austin, Tex. (Sept. 26, 1990).
posed private or state activity properly falls within section 7: if the activity could not proceed but for federal permitting or funding, then the activity proceeds through a section 7 consultation. 142

A recent test of the section 7 federal nexus requirement arose in December 1989, when the Sierra Club Legal Defense Fund (SCLDF) challenged the validity of a section 7 consultation between the FWS and Clark County, Nevada. 143 In October 1989, the FWS had issued a biological opinion authorizing the incidental take of 416 desert tortoises in connection with Kerr-McGee Corporation’s construction of an ammonium perchlorate facility in Clark County. 144 The lands on which Kerr-McGee Corporation planned to develop its project had been transferred from federal ownership, 145 and at the time of the section 7 consultation were under the exclusive land use jurisdiction of Clark County and the state of Nevada. 146

In its biological opinion, the FWS explained that its signing an agreement for mitigation measures at the Kerr-McGee site represented a federal action bringing the project within section 7. 147 The SCLDF charged that the taking would not occur incidentally to an action by a federal agency or a party acting under the supervision of a federal agency. 148 The taking, the SCLDF claimed, would occur incidentally to a private construction project, by a private corporation acting under land use authorization from Clark County. 149 The SCLDF argued that the taking was not incidental to a federal action and therefore was excluded from the section 7 consultation process. 150 According to the SCLDF, the FWS only could authorize the incidental take pursuant to a conservation plan prepared under section 10(a). 151

The section of the Act through which the taking authorization process proceeds is critical, the SCLDF claimed, because section

142 Id. But see Coggins & Russell, supra note 30, at 1465 ("Virtually any federal participation in the decision to carry out an activity will trigger section 7").

143 Letter from Laurens H. Silver, attorney for the Sierra Club Legal Defense Fund, Inc. (SCLDF), to the Honorable Manuel Lujan, Jr., Secretary, Department of the Interior (Dec. 22, 1989) (on file with the SCLDF) (discussing the SCLDF Notice of Intent to Sue) [hereinafter Silver Letter].


145 Silver Letter, supra note 143, at 1.

146 Id.

147 Navarre Letter, supra note 144, at 2.

148 Silver Letter, supra note 143, at 1.

149 Id.

150 Id.

151 Id.
10(a) ensures that no taking will occur prior to the completion of an approved conservation plan and an opportunity for public comment to discuss possible alternatives to the taking.152 The SCLDF argued that allowing the project to proceed under section 7 would result in a less thorough consideration of the incidental taking than if the taking were authorized under section 10(a).153 After delivering its Notice of Intent to Sue, the SCLDF reached a settlement with the FWS over the Kerr-McGee project.154 As a result, the merits of the SCLDF’s nexus claim were not litigated.155

III. SECTION 10(A): INCIDENTAL TAKING AUTHORIZATION FOR STATE OR PRIVATE ACTIVITIES

Before Congress developed the section 10(a) incidental take permitting procedure when it amended the Act in 1982, parties who did not require federal funding or authorization for a proposed activity had no access to the section 7 consultation process and thus could not obtain authorization for the incidental taking of endangered species.156 This exclusion occurred because section 10(a), as it originally appeared in the 1973 Act, authorized the Secretary to grant exceptions to the Act’s taking prohibition only to allow actions taken for scientific purposes or to enhance the propagation or survival of listed species.157 In 1982, however, Congress created a mechanism for authorizing otherwise lawful state or private actions that would result in the incidental taking of listed species.158

Under section 10(a), a state or private party seeking to carry out an activity that could result in the taking of a listed species first must obtain a permit from the Secretary.159 The Secretary may

152 See id. at 2–3.
153 See id. at 2.
154 See Settlement Agreement between Sierra Club Legal Defense Fund, Inc. (SCLDF), Kerr-McGee Chemical Corp., the United States through the FWS, and the Nature Conservancy (Feb. 8, 1990) (on file with the SCLDF). Under the settlement, Kerr-McGee agreed to contribute $145,000 to the FWS for a tortoise management study, $52,000 to the Nature Conservancy, and $180,000 to acquire and enhance tortoise habitats in California and Nevada. Id. at 2–3.
an incidental take permitting procedure that would allow for the development of conservation plans for diverse situations.178

2. The Section 10(a) Conservation Planning Process

A party preparing a conservation plan under section 10(a) must satisfy three general analytical requirements.179 First, the party must specify in the plan the impacts that would likely result from the anticipated taking.180 The Secretary has acknowledged that this step is potentially the most perplexing and difficult task confronting section 10(a) permit applicants.181

To determine the probable impacts of the proposed taking, the applicant must delineate the boundaries of the conservation plan area.182 Typically, the geographic boundaries of the conservation plan should encompass all areas that could be affected by activities causing the incidental take.183 When a local agency seeks an incidental take permit for the proposed development of local lands by private parties, the Secretary has recommended that the plan area not be limited to those sites involved with one or a few private proposals up for immediate consideration.184 Rather, the conservation plan area should encompass all habitat of listed species in the proposed development area.185 The San Bruno Mountain plan, for example, included the entire range of the Mission Blue butterfly.186

Conservation plans covering large areas promote more comprehensive and coordinated planning efforts and thus increase the options available for both conserving and enhancing listed species habitat.187 The Secretary has cautioned, however, that state or local


181 FWS CONSERVATION PLANNING GUIDELINES, supra note 16, at 7. In fact, FWS officials have recommended that private parties requiring incidental take authorization evaluate whether a proposed project contains a federal nexus that could carry the project into § 7. Telephone interview with William Lehman, attorney, Fish and Wildlife Service Region 1, Sacramento, Cal. (Sept. 27, 1990).

182 FWS CONSERVATION GUIDELINES, supra note 16, at 7.

183 Id.

184 Id.

185 Id.

186 Id.

187 Id. at 8.
applicants should avoid developing conservation plans that encompass too large an area, and that involve potentially unmanageable numbers of participants.\footnote{188} Such plans could necessitate satisfying many land use and development concerns at once, and thus could pose serious administrative difficulties, as well as prevent the applicants from securing agreements among the participants regarding the required action in the plan area.\footnote{189}

The section 10(a) permitting process provides incentive for applicants to consider both listed and unlisted species in their conservation plans.\footnote{190} For example, if a conservation plan contains protections for an unlisted species, no further mitigation requirements would be imposed on the applicant if the Secretary later added the species to the endangered species list.\footnote{191} An applicant failing to consider unlisted species in a conservation plan, however, risks having to halt a project and amend the conservation plan if that species is subsequently listed.\footnote{192}

The second step in the conservation planning process is the identification of the steps that the permit applicant will take to monitor, minimize, and mitigate the proposed project’s impacts on endangered species.\footnote{193} Mitigation measures include preserving species habitat by acquiring new land or restoring degraded land, establishing buffer zones around the species’ habitat, or altering local zoning laws to reduce or eliminate future adverse impacts on the species.\footnote{194} The applicant must specify in the conservation plan the funding available to implement the proposed mitigation measures over the life of the requested incidental take permit.\footnote{195}

\footnote{188} Id.
\footnote{189} Id.
\footnote{194} FWS CONSERVATION GUIDELINES, \textit{supra} note 16, at 12. Although the Secretary requires that the applicant mitigate the potential adverse effects of the proposed activities to the maximum extent possible, the Secretary will require only those mitigation measures that are reasonable in light of the anticipated level of incidental taking. Telephone interview with Ronald Swan, attorney, Department of the Interior Office of the Regional Solicitor, Pacific Northwest Region, Portland, Or. (Jan. 23, 1991).
To fulfill the third and final requirement, the applicant must demonstrate that alternative actions that would not have involved a taking were at least considered, and explain why the applicant chose not to adopt those alternatives.\textsuperscript{196} The Secretary may not require that the applicant adopt one of those alternatives, nor may the Secretary recommend alternatives.\textsuperscript{197} An applicant, however, may have to implement other measures that the Secretary deems necessary or appropriate for the proposed conservation plan to succeed.\textsuperscript{198} Moreover, if a conservation plan would not adequately mitigate a proposed action's harmful effects on a listed species or its habitat, the Secretary must deny the permit application.\textsuperscript{199} One such measure that is often required is a formal, or implementing, agreement among all parties who sign the conservation plan.\textsuperscript{200} Such an agreement establishes an operating program for the conservation, protection, enhancement, and monitoring of endangered species in the action area.\textsuperscript{201}

\textbf{B. Public Comment Period}

Another difference between the process for granting an incidental take authorization under section 7 and the corollary process under section 10(a) is that the Secretary may not issue a section 10(a) incidental take permit without first providing an opportunity for public comment.\textsuperscript{202} The Secretary must publish a notice in the Federal Register inviting public comment on each application for an incidental take permit.\textsuperscript{203} Parties have thirty days from the date of the notice's publication to respond to the proposed taking.\textsuperscript{204} If the Secretary decides to issue an incidental take permit over a party's objection, the objecting party must be notified of the Secretary's decision.\textsuperscript{205}

\begin{itemize}
  \item \textsuperscript{199} See id.
  \item \textsuperscript{200} FWS CONSERVATION GUIDELINES, supra note 16, at 14; see also supra note 170 and accompanying text.
  \item \textsuperscript{201} FWS CONSERVATION GUIDELINES, supra note 16, at 14.
  \item \textsuperscript{202} 16 U.S.C. § 1539(a)(2)(B) (1988); see 50 C.F.R. § 17.22(c) (1989).
  \item \textsuperscript{203} 16 U.S.C. § 1539(c) (1988).
  \item \textsuperscript{204} Id.
  \item \textsuperscript{205} 50 C.F.R. § 17.22(c)(3) (1989).
\end{itemize}
C. The Interaction of Section 10(a) and NEPA

The Act does not expressly require a section 10(a) permit applicant to comply with NEPA. The Secretary, however, implicates NEPA merely by approving a conservation plan, even without funding or developing the plan. By sanctioning the plan, the Secretary allows other parties to take actions that could significantly affect the quality of the environment. The Secretary, therefore, must conduct an EIS pursuant to NEPA to determine the effects of any incidental take permit and conservation plan.

IV. COMPARING THE TWO INCIDENTAL TAKE AUTHORIZATION PROCESSES

A. Section 10: A More Difficult Road For Incidental Take Authorization

Although Congress developed section 10(a) as a separate incidental take permitting process for private or state parties that cannot obtain access to section 7, the two sections are nonetheless interrelated. Most significantly, the two sections purportedly set forth an identical standard of protection for endangered species. Under section 10(a), the Secretary will not issue an incidental take permit unless it determines that a taking will not appreciably reduce the likelihood of a listed species' survival and recovery. Congress intended this standard to be identical to the section 7 no-jeopardy standard.

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206 Endangered and Threatened Wildlife and Plants; Prohibitions and Permits, 50 Fed. Reg. 39,681, 39,684 (1985). Section 10(a), however, does not preclude a party from coordinating the review under the Act with an EIS under NEPA. Id.
207 FWS CONSERVATION GUIDELINES, supra note 16, at 25.
208 Id.
Notwithstanding this purported similarity in the substantive protection extended to listed species under section 7 and section 10(a), the two sections present enormously different procedural demands. Amendments to section 7 reflect a continued congressional effort to make consultations a less time-consuming and more flexible procedure for obtaining incidental take authorization. The 1978 and 1982 amendments, in particular, simplified the section 7 consultation process by outlining in careful detail the steps that a federal agency must follow in order to obtain authorization for an incidental take. Further, through the amendments, Congress created opportunities for early and informal consultations so that federal agencies might, where appropriate, avoid formal consultation entirely.

By contrast, Congress has not made similar improvements to section 10(a) since the Secretary promulgated incidental take permitting procedures under the 1982 amendments. In their current form, section 10(a) regulations impose relatively heavy burdens on parties seeking to obtain incidental take permits. For example, whereas a section 7 consultation occurs almost exclusively between the Secretary and a federal agency, under section 10(a) a state or private applicant assumes sole responsibility for preparing a conservation plan that meets the Secretary's approval. An applicant under section 10(a) assumes the cost of collecting biological data on listed species potentially affected by a proposed project, determining the appropriate scope of the conservation plan, and making funds available to implement required mitigation measures. Even after an applicant has completed a conservation plan, the Secretary may only accept or reject the plan; the Secretary is not authorized, as under section 7, to recommend reasonable or prudent alternatives that the applicant could take to avoid jeopardizing a listed species.

H.R. REP. No. 567, 97th Cong., 2d Sess. 15 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2815. Congress has noted that a more flexible Act could benefit endangered species protection. H.R. REP. No. 1625, 95th Cong., 2d Sess. 13 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9463. For example, if by listing a species the FWS would immediately create numerous conflicts between economic interests and the Act, the FWS might be reluctant to recognize additional endangered or threatened species. Id.

See supra notes 43–58, 64–125 and accompanying text.

See supra notes 74–84 and accompanying text.

See, e.g., FWS CONSERVATION GUIDELINES, supra note 16, at 7.


See supra notes 163–201 and accompanying text.

See supra notes 197–99 and accompanying text.
Furthermore, prior to issuing a section 10(a) permit, the Secretary must accept and respond to public comment on applications for incidental take permits.\footnote{16 U.S.C. § 1539(c) (1988); see supra notes 202–05 and accompanying text.} Nothing in section 7, however, authorizes or requires the Secretary to provide for public comment before issuing an incidental take statement.\footnote{Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,928 (1986). In the Final Rule promulgating the 1982 amendments to § 7, the Secretary explicitly rejected recommendations that § 7 include increased public participation in the consultation process through public notice of consultation requests and results. \textit{Id.} The Secretary noted that statutory time constraints on § 7 consultations rendered detailed public participation measures impracticable. \textit{Id.} In addition, although federal agencies are generally required under NEPA to hold a public comment period prior to proceeding with any action that could have a significant environmental impact, the CEQ has established a categorical exclusion to the NEPA public comment period requirement for § 7 consultations. Telephone interview with Ronald Swan, attorney, Department of the Interior Office of the Regional Solicitor, Pacific Northwest Region, Portland, Or. (Jan. 23, 1991).} Thus, parties proceeding through section 10(a) cannot avoid the time delays and risks associated with subjecting a proposed project to public scrutiny.\footnote{Telephone interview with Ronald Swan, attorney, Department of the Interior Office of the Regional Solicitor, Pacific Northwest Region, Portland, Or. (Jan. 23, 1991).}

Finally, the Act does not establish time limitations for the review of incidental take permit applications submitted under section 10(a). Thus, while the Secretary and a federal agency must complete section 7 consultations within ninety days, and have limited opportunities for obtaining extensions,\footnote{Telephone interview with Michael Bean, attorney, Environmental Defense Fund, Washington, D.C. (Oct. 8, 1990).} the FWS has estimated that completing the section 10(a) conservation planning process requires an average of two years.\footnote{Telephone interview with Ronald Swan, attorney, Department of the Interior Office of the Regional Solicitor, Pacific Northwest Region, Portland, Or. (Jan. 23, 1991).}

\textbf{B. Circumventing Section 10(a)}

When Congress amended the Act in 1982, it contemplated the establishment of two separate incidental take tracks: one for federally authorized, permitted, or funded projects; and a second for those projects that do not have a federal nexus.\footnote{See supra notes 126–39 and accompanying text.} As demonstrated by the Oceanic project,\footnote{See supra notes 128–30 and accompanying text.} however, even a slight degree of federal involvement—such as the contribution of federal funds—may remove a project from the habitat conservation planning process under section 10(a) and place it within the realm of section 7.\footnote{See supra notes 128–30 and accompanying text.}

Commentators have argued that parties are obtaining incidental take authorization under section 7 for projects that have only an
attenuated federal nexus, and therefore should proceed through section 10(a). The disparity between the large number of incidental takings that the Secretary has authorized under section 7 and the dearth of conservation plans completed since 1985 is evidence that parties requiring incidental take authorization are seeking a federal nexus that will enable them to proceed under section 7.

One privately initiated activity that avoided the section 10(a) conservation planning process involved an expansion project that the 3M Corporation proposed for its manufacturing facility in Austin, Texas. The first phase of a proposed four-phase project that began in 1988 involved the construction and operation of an electrical cogeneration plant. The plant was constructed on approximately thirty-five acres of a 215-acre tract of land held by 3M. In order to operate the facility, 3M obtained from the United States Environmental Protection Agency (EPA) an air quality permit under the Clean Air Act (CAA). In addition, 3M sought authorization under section 10(a) for the incidental take of the golden-cheek warbler, an endangered species of bird. The warbler, which was listed as an endangered species in 1990, inhabited land that 3M intended to use in its expansion project.

After it began operating the cogeneration facility, 3M determined that it could not comply with the emission standards specified in the CAA permit. The company sought a modified permit from the EPA. On the basis of these negotiations with the EPA, 3M claimed that the project, including the facility expansion, was a federally authorized project under section 7 of the Act. Thereafter, 3M terminated its planning under section 10(a) and initiated a section 7 consultation.

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<td>230</td>
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<td>Id. In the Oceanic case, Oceanic had originally prepared a conservation plan as part of a § 10(a) incidental take permit application. See White Biological Opinion, supra note 126, at 5. With the initiation of § 7 consultations as a result of the FHWA’s involvement, Oceanic’s original § 10(a) conservation plan served as the equivalent of a mitigation plan under § 7. Id. The FWS noted that the Stockdale Highway project and the Oceanic project were both part</td>
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As they now stand, section 7 and section 10(a) present two very different methods for obtaining incidental take authorization. While ostensibly providing an identical level of protection to listed species,241 the sections set forth very different procedural demands. Section 7 consultations are a coordinated, carefully monitored exchange between the Secretary and federal agencies; the section 10(a) conservation planning process represents a largely independent and relatively unstructured endeavor by private or state applicants.242 Thus, although Congress intended section 10(a) to be an incidental take permitting track for non-federal projects,243 the ease with which parties may establish a federal nexus has resulted in the development of few conservation plans and a continued reliance on the section 7 authorization process.

V. MORE PROTECTION FOR LISTED SPECIES

A. Section 10(a): More Protective of Listed Species Than Section 7

In theory, the substantive protections in section 7 and section 10 are almost identical—each requires a determination that a proposed action will not jeopardize a listed species or destroy its critical habitat.244 In practice, however, section 10(a) may provide more protection for listed species, thereby more effectively furthering Congress's intent that the Act both protect and restore species whose numbers have depleted to the point where they are threatened with extinction.245

Although each section requires the Secretary to evaluate proposed projects under the equivalent of a no-jeopardy standard,246 section
10(a)’s conservation planning process may result in greater benefits for listed species. Under section 7, the Secretary may specify in an incidental take statement those reasonable and prudent measures that are necessary to mitigate a proposed action’s impact on listed species. The Secretary’s ability to propose far-reaching conservation measures, however, is restricted, because the Secretary cannot mandate mitigation measures that would alter the basic scope of a proposed activity. In contrast, under section 10(a), the Secretary may recommend mitigation measures that are reasonable in light of the anticipated level of incidental taking. Neither the Act nor the implementing regulations contain language explicitly restricting the scope of recommended mitigation or minimization measures.

In addition, while the Secretary under section 7 must analyze the cumulative, direct, and indirect effects of a proposed activity, the Secretary’s analysis focuses on the activity’s action area and the takings and habitat destruction that would likely occur there. The Secretary need not consider the effects of proposed activities or other activities that are not reasonably certain to occur. Further, even though federal agencies must prepare, under NEPA, an EIS assessing the cumulative effects of any proposed activity likely to have a significant environmental impact, the Secretary applies the Act’s narrower cumulative effects standard when reaching a biological opinion.

Through this somewhat restricted environmental review under section 7, the Secretary is unlikely to find that the taking of listed species resulting from the proposed activity and other activities that are reasonably certain to occur will jeopardize the continued existence of any listed species in the action area. The proposed activity, however, while not jeopardizing the listed species, would certainly not enhance the species’ recovery. The Act’s stated goal is to recover listed species, but a federal agency’s legal obligation under section 7 is simply to avoid actions that could jeopardize those species. In the final rule promulgating the 1982 amendments to section 7, the Secretary rejected a recommendation that it add a statement to

248 See supra note 91 and accompanying text.
249 See supra note 198 and accompanying text.
250 See supra notes 100–25 and accompanying text.
251 See supra notes 114–15 and accompanying text.
252 See supra note 112 and accompanying text.
254 See supra notes 19–20 and accompanying text.
section 7 requiring that federal agencies address recovery measures during consultations. The Secretary stated that it lacked the authority to address the way in which federal agencies should address their obligation to conserve listed species.

By contrast, section 10(a) conservation planning is broader in scope, and it reflects a greater emphasis on the long-term recovery of listed species. The boundaries of a conservation plan should encompass all areas likely to be affected by activities that are the subject of consultation. Further, mitigation measures that the Secretary might require as part of a section 10(a) permit include establishing a fund for the study of a listed species, or setting aside large tracts of land as a refuge area for the species. Thus, while a section 7 consultation generally focuses on the action area of a proposed project, the scope of the section 10(a) conservation planning process might extend much further.

By the time a species is listed under the Act as threatened or endangered, its continued existence is in doubt. While the jeopardy standard may prevent a change in the status quo with regard to the current well-being of a species, more drastic efforts on behalf of the species are needed to improve their condition. The section 10(a) conservation plans, which may be more regional in scope, represent a more drastic solution to listed species protection than the project-by-project measures taken as part of section 7 incidental take authorizations.

Finally, because section 7 does not require a public comment period, the Secretary conceivably could issue an incidental take statement without being fully informed of the potential effects that the anticipated taking could have on a listed species’ survival. Under section 10(a), however, the Secretary cannot issue an incidental take

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256 Id.; see Coggins & Russell, supra note 30, at 1468 (§ 7 requires conservation of listed species, but does not specify nature or extent of that duty); William R. Murray, The Act Will Work—If They Let It, 7 ENVTL. FOR. 31, 32 (1990) (Act requires Secretary to “develop for each listed species a recovery plan that sets out elements for conservation and survival, but specifies no criteria to accomplish these goals”).
257 See supra notes 183–92 and accompanying text.
258 Id.
259 See supra notes 198, 200–01 and accompanying text.
261 See supra note 4.
263 See supra note 183 and accompanying text.
264 See supra note 222 and accompanying text.
permit without subjecting the proposed taking to full public inspection. Thus, the public comment requirement is a procedural device that can translate into more substantive protections for listed species.

B. Promoting Greater Use of Section 10(a)

Congress drafted the section 7 and section 10(a) incidental take authorization processes to protect listed species while providing the Secretary with the flexibility to address modern realities such as development and habitat loss. Apart from this underlying premise, contrasting procedures for obtaining incidental take authorization have evolved under each section. As a result of this disparity in their procedural requirements, the two sections achieve different results: convenience and administrative ease under section 7, and potentially greater protections for listed species under section 10(a). Congress could enhance the Act’s two incidental take authorization procedures by identifying those elements of each section that effectively balance species protection with modern realities and incorporating those elements into both sections.

Although section 10(a) provides potentially greater protection for listed species, this protection will not be realized while state and private parties have a strong incentive to avoid the section altogether and take advantage of a currently accessible section 7 consultation process. Congress could improve section 10(a) by promoting the section’s use. For example, it could streamline and clarify the conservation planning process, as it has section 7’s consultation procedure.

Although Congress determined that regulations setting forth cookbook specifications for conservation plans were inappropriate, state or private parties would benefit by knowing in advance the extent of their obligations under section 10(a). For example, the Secretary could establish a definite time limitation for the section 10(a) permitting process. Further, the Secretary could establish a formal mechanism whereby section 10(a) permit applicants could work in conjunction with the Secretary to develop conservation plans. Such a mechanism would alleviate the information gathering

265 See supra notes 202–05 and accompanying text.
266 See supra notes 2, 43, 161 and accompanying text.
267 See supra note 177 and accompanying text.
Another method of improving section 10(a) would be to authorize the development of mini-conservation plans for projects involving only a small percentage of a listed species' known habitat. For such projects, the Secretary would not require conservation plans that mandated measures to protect a listed species throughout its territory. Instead, the Secretary would encourage applicants to focus their conservation, minimization, and mitigation efforts on the action area of the proposed projects. Further, Congress could amend the Act to restrict or eliminate the opportunity for public comment on these smaller projects, thereby expediting the section 10(a) permitting process and reducing the risk that the proposed projects would be delayed.

In addition, Congress could increase the use of section 10(a) by reducing the opportunity for section 7 consultations regarding fundamentally state or private projects that have only an attenuated federal nexus. To achieve this result, Congress would have to amend section 7, which currently does not delineate a minimum nexus. As written, section 7 simply states in broad terms that formal consultations are limited to projects authorized, funded, or carried out by federal agencies. One possibility would be to amend section 7 so that only those activities funded or carried out by federal agencies qualify for formal consultation; projects only permitted by a federal agency would have to proceed through section 10(a). Such a proposal likely would meet with criticism from federal agencies, which would argue that requiring conservation plans for all federally permitted projects would pose an administrative impossibility. Congress or the Secretary, however, could tailor the conservation planning requirement to apply only to those activities likely to affect a large number of listed species or a substantial amount of their critical habitat.

Congress also could increase the use of the section 10(a) conservation planning process by requiring that incidental take statements authorize only those takings that are directly incidental to federal projects. For example, if the FHWA were acting as the lead agency in a section 7 consultation, because it had authorized the use of

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268 See supra notes 179–201 and accompanying text.
269 See supra note 141 and accompanying text.
federal funds for a road improvement project, but a private party sought authorization to take a listed species during the construction of a housing development serviced by the road, the incidental take statement would cover only those takings that occurred as a direct result of the road widening. Takings that occurred as a direct result of the housing development could receive incidental take authorization only through section 10(a). Under this policy, incidental take authorization for the Oceanic project would have extended only to takings that occurred as a direct result of the highway construction project. The Oceanic project would have been responsible for obtaining an incidental take permit under section 10(a) for any takings that occurred as a result of the housing construction.

The underlying theme of the Act, as enunciated by Congress and the courts, is to provide the highest possible protection for listed species. Thus, improvements to the Act’s incidental take authorization process also should address whether the amended section 7 sufficiently promotes the conservation and recovery of listed species. One improvement would be to provide for greater public involvement during the section 7 authorization process, which currently is a closed exchange proceeding exclusively between two federal agencies. Although increased public involvement could prolong the section 7 consultations, Congress and the Secretary should seek to balance this consequence with increasing listed species protection through public participation. For example, greater public involvement would be especially desirable prior to the authorization of projects that could result in a high level of incidental takings or affect a large portion of a listed species’ habitat.

VI. CONCLUSION

Section 7 and section 10(a) of the Endangered Species Act currently achieve an uneven balance between species conservation and procedural convenience. Congress has improved section 7 through a series of amendments that, while not altering the jeopardy standard, have made formal consultations a less burdensome process. Section 7, however, may provide fewer long-term protections for listed species than section 10(a). While not jeopardizing listed species, parties acting under section 7 fail to contribute to the long-term survival and recovery of those species.

271 See supra notes 126–39 and accompanying text.
272 Id.
273 See supra notes 3, 98–99 and accompanying text.
Under section 10(a), the Secretary has developed a conservation planning process that can produce long-term benefits for listed species. Conservation plans typically consider not only jeopardy, but also species recovery and conservation. Despite its broader protections, however, section 10(a) will benefit listed species only in theory, and not in practice, as long as state and private parties may proceed easily under the section 7 formal consultation process. Removing the incentive to avoid section 10(a) could result in the preparation of more conservation plans.

The incidental take authorization process would benefit by the incorporation of section 7's procedural innovations into section 10(a), and by the imposition of limitations on the use of section 7 to authorize incidental takings on non-federal lands by private or state activities. These improvements would help strike a better balance between substantive protections for listed species and the procedural flexibility necessary to ensure that these substantive requirements are met.