

NATIONAL MARINE FISHERIES SERVICE PROCEDURAL INSTRUCTION 02-110-20

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Protected Resources Management
Conservation of Threatened and Endangered Species 02-110

“NO EFFECT” DETERMINATIONS

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SUMMARY OF REVISIONS:

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1.0 Introduction. The National Oceanic and Atmospheric Administration’s (NOAA) National Marine Fisheries Service (NOAA Fisheries) reviewed its consultative responsibilities under section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, and associated regulations at 50 C.F.R. part 402. Based on this review NOAA Fisheries will not provide formal written responses to requests for concurrence with a federal action agency’s determination that its actions will not affect any ESA-listed species or designated critical habitat (“no effect” determination).

Under section 7 of the ESA, if a federal action agency determines that its action “may affect” ESA-listed species or designated critical habitat within NOAA Fisheries jurisdiction, the federal action agency must consult with NOAA Fisheries to ensure that its action is not likely to jeopardize the continued existence of those species or result in the destruction or adverse modification of such critical habitat. The term “may affect” is not defined in the ESA or by NOAA Fisheries/United States (U.S.) Fish and Wildlife Service’s joint regulations governing section 7 consultation at 50 CFR, Chapter IV. However, the NOAA Fisheries/US Fish and Wildlife Service’s *Final ESA Section 7 Consultation Handbook, March 1998*, (found in PD 02-110-09, hereinafter “*ESA Section 7 Handbook*”) defines the term “may affect” as: “the appropriate conclusion when a proposed action may pose **any** effects on ESA-listed species or designated critical habitat.” If the federal action agency determines that its activities “may affect” an ESA-listed marine or anadromous species or its designated critical habitat, it must

engage in consultation.

If, on the other hand, the federal action agency determines that its action will not affect any ESA-listed species or designated critical habitat within NOAA Fisheries' jurisdiction (i.e., it makes a "no effect" determination), there is no need to consult with NOAA Fisheries. As with "may affect," the term "no effect" is not defined in the joint regulations governing section 7 consultation, but it is defined in the Services' *ESA Section 7 Handbook* as: "the appropriate conclusion when the federal action agency determines its proposed action will not affect a listed species or designated critical habitat." Neither the ESA nor the NOAA Fisheries/U.S. Fish and Wildlife Service's joint consultation regulations mandate consultation when federal action agencies determine their proposed actions have "no effect" on any ESA-listed species or designated critical habitat.

Although not required to do so, action agencies sometimes request that NOAA Fisheries provide written concurrence with the agency's "no effect" determination per the guidance provided in the *ESA Section 7 Handbook*, (page 3-12). NOAA Fisheries has previously (though infrequently) provided such written concurrence with federal action agency "no effect" determinations. However, as directed herein, it shall be NOAA Fisheries' procedure not to provide a written response.

2.0 Objective. The purpose of this procedure is to promote effective, efficient, and consistent implementation of section 7 of the ESA by NOAA Fisheries personnel.

3.0 Authorities and Responsibilities. This directive establishes the following authorities and responsibilities:

Guidelines and Procedures: "No effect" determinations under section 7 of the ESA are the province of action agencies, which may make such findings without seeking the agreement of NOAA Fisheries. A U.S. District Court decision addressed this very issue and issued an opinion that wholly validates NOAA Fisheries' procedure.

The case in question, *Sierra Forest Legacy v. United States U.S. Forest Service*, 598 F. Supp. 2d 1058 (N.D. Cal. 2009), concerned the U.S. Forest Service's determination that an amendment to a "management indicator species" list would have "no effect" on any ESA-listed species and NOAA Fisheries and the U.S. Fish and Wildlife Service's concurrence with that determination. Plaintiffs, environmental groups, filed suit against the Forest Service, NOAA Fisheries, and the U.S. Fish and Wildlife Service arguing, among other things, that the Services violated the ESA in issuing the concurrences. In dismissing the case against the Services, the court declined to address the substantive correctness or incorrectness of the written concurrences. As the court explained, because the U.S. Forest Service never initiated formal consultation, there was no requirement [to issue concurrences] imposed on NOAA Fisheries and the U.S. Fish and Wildlife Service. Thus, the court found that the plaintiff could not challenge the concurrences. *See also id at 1067-69*. The court made clear that it would have reached the same conclusion even if NOAA Fisheries and the U.S. Fish and Wildlife Service had instead disagreed with the U.S. Forest Service's "no effect" finding and issued non-concurrences. *Id.* at 1067 ("Until an action agency requests consultation, [the Services] have no obligation to consult, and in fact cannot

engage in consultation, even if they believe the ‘no effect’ determination was erroneous.”).

Furthermore, neither the ESA nor the joint regulations governing section 7 consultation contain any direction or process for NOAA Fisheries to provide its concurrence with such determinations. Although the *ESA Section 7 Handbook* indicates that a federal action agency may choose to request concurrence with its no effect determination, the handbook does not obligate NOAA Fisheries to acknowledge the request or to respond.¹ It is therefore NOAA Fisheries’ procedure that it will not provide any written concurrence with a federal action agency’s determination that its action will have “no effect” on any ESA-listed species or designated critical habitat.²

¹ If requested, NOAA Fisheries staff may provide technical information and assistance to the federal action agency as it decides whether to make a “no effect” determination. However, as provided herein, NOAA Fisheries shall decline to concur with any such final determination. In cases where NOAA Fisheries disagrees with the federal action agency’s “no effect” determination, NOAA Fisheries may offer to provide the above-referenced technical assistance and may urge the federal action agency to engage in ESA section 7 consultation.

² This procedure is not intended to address, and is not applicable, when the federal action agency determines that its action “may affect” certain species and/or habitat but will have “no effect” on others (sometimes referred to as “mixed determinations”).