

DOES THE ENDANGERED SPECIES ACT UNDULY BURDEN DEVELOPMENT PROJECTS?

“Many people fear that Endangered Species Act listings will curtail development in Alaska, but there is no evidence that this ever has been or will be the case. Keep in mind that there have been federally listed species (and some with designated critical habitat) in Alaska for years -- from bowhead whales to spectacled and Steller's eiders -- and yet oil and gas exploration and other developmental activities have continued and expanded.”¹

-- Geoffrey Haskett, U.S. Fish & Wildlife Service, Alaska Regional Director

Background: It's a common misperception that an Endangered Species Act (ESA) listing unreasonably hinders development projects. Yet in reality, the ESA consultation process has a minimal impact on development projects, and the vast majority of projects move forward with only an informal consultation.

How the ESA Works: The ESA requires each federal agency to consult with the Fish & Wildlife Service or the National Marine Fisheries Service (Services) to ensure that agency actions do not jeopardize any endangered or threatened species.² Two consultation options are available. In an informal consultation, the agency undertaking the action makes a determination that the action is not likely to adversely affect any listed species or critical habitat.³ If the appropriate Service agrees, the consultation process is complete and the action may move forward.

On the other hand, if an agency determines there may be an adverse impact on a species or its habitat, formal consultation is required.⁴ The Services then draft a biological opinion on the action's potential impacts, from which the agency taking the action decides how to proceed or whether to proceed at all. If the biological opinion concludes a listed species will be in jeopardy or there will be an adverse modification of critical habitat, the action agency has several options: (1) adopt the Service's recommended reasonable and prudent alternatives, if any; (2) request an exemption; (3) reinstate the consultation; or (4) choose not to take the action.⁵

Data Show the ESA Does Not Curtail Responsible Development: Despite a lack of data collection during the Bush Administration, information compiled since the enactment of the ESA shows does little to roadblock projects. For example:

¹ Geoffrey Haskett, U.S. Fish & Wildlife, Alaska Regional Director, *Polar bear listing no threat to development*, Anchorage Daily News (Dec. 25, 2009) (available at: www.adn.com/opinion/compass/story/1069771.html)

² See 16 U.S.C. § 1536(a)(2).

³ 50 C.F.R. § 402.13(a) (2005).

⁴ 50 C.F.R. § 402.14.

⁵ See U.S. Dep't of Energy, *Endangered Species Act Information Brief*, Doc. No. DOE/EH-412/0012/0699 (June 1999) available at <http://www.eh.doe.gov/oepa/guidance/esa/esashort.pdf>; 16 U.S.C. § 1535(b)(3)(A).

- In a 1992 response to a House Committee on Science, Space, and Technology request, the U.S. Government Accountability Office (GAO)⁶ reported that for the five fiscal years between 1987 and 1991, eighty-nine percent of all ESA federal agency consultations (16,161 of 18,211) were resolved through the informal process.⁷ Of the ten percent of actions that required formal consultation (2,050), more than ninety-one percent (1,869) concluded that the action would not harm any listed species. Of the remaining projects concluding the action would likely jeopardize a species (181), eighty-seven percent (158) found alternatives that allowed the project to proceed. All told, this left twenty-three of 18,211 (less than 1/10 of 1%) projects that would jeopardize a listed species and had no reasonable alternative.
- Another GAO report reviewed 3,200 consultations, finding a listed species only impacted sixty-eight projects, none of which had to be terminated.⁸ Between 1987 and 1995, only an estimated 600 jeopardy or adverse modification findings were made in consultations on 186,000 projects (i.e. less than one-half a percent).
- The U.S. Fish & Wildlife Service stated that in fiscal year 1999, 12,000 informal consultations took place.⁹ Of the eighty-three formal consultations conducted in that year, only one resulted in an opinion that a species would be in jeopardy. Furthermore, the U.S. Fish & Wildlife Service reported that from 1998 to 2000, only 420 projects resulted in a “jeopardy” opinion out of more than 300,000 consultations.¹⁰

Conclusion: The vast majority of projects entering the consultation process are resolved informally with a determination that no listed species will be impacted. Even where a formal consultation is required in instances of potential threat, the agencies more often than not conclude that no such threat exists, or work with the action agency to design project alternatives. Only in extremely rare instances are projects terminated because of probable impacts on listed species.

For more information, contact Cook Inletkeeper at 907.235.4068 x22 or keeper@inletkeeper.org.

⁶ At the time of the report, the GAO had yet to change its name from General Accounting Office.

⁷ U.S. Gen. Accounting Office, *Endangered Species Act: Types and Number of Implementing Actions* 30, Doc. No. GAO/CED-92-131BR (May 1992).

⁸ See U.S. Gen. Accounting Office, *Endangered Species: Limited Effect of Consultation Requirements on Western Water Projects*, Doc. No. GAO/RCED-87-78 (Mar. 1987).

⁹ Terry Rabot, *Federal Role in Habitat Protection in ENDANGERED SPECIES BULLETIN* 10, 11 (Michael Bender ed., Nov./Dec. 1999) available at <http://www.fws.gov/endangered/esb/99/11-12/toc.html>.

¹⁰ U.S. Fish & Wildlife Serv., *Consultations with Federal Agencies: Section 7 of the Endangered Species Act* (Dec. 2005) available at <http://www.fws.gov/endangered/consultations/consultations.pdf>.