

COMMON FLAWS IN DEVELOPING AN EFFECT DETERMINATION

Federal agencies may, through informal consultation, utilize the expertise of the Service to evaluate the agencies assessment of potential effects. The Service may provide written concurrence that the project is “not likely to adversely affect” listed species or critical habitat if the federal agency’s assessment identifies only beneficial, insignificant, or discountable effects and formal consultation is not required. Service concurrence is contingent upon the biological analysis providing an adequate justification for the effect determination. Quite often, the Service must decide whether to concur with an effect determination without adequate supporting information. The determination may be correct, but the Service cannot make the “leap of faith” to accept it without supporting evidence and rationale. This is an important point that often delays the informal consultation process.

Quite frequently, effect determinations aren’t necessarily wrong, they simply aren’t justified in the federal action agency’s analysis. The analysis should lead the reviewer through a discussion of effects to a logical, well-supported conclusion. For example, certain arguments might justify a “may affect, not likely to adversely affect” determination, but do not support a “no effect” determination. It is important to remember that “no effect” means literally no effect, not a small effect or an effect that is unlikely to occur. If effects are insignificant (in size) or discountable (extremely unlikely), a “may affect, not likely to adversely affect” determination is probably appropriate. Examples of inappropriate arguments commonly used to justify effect determinations follow.

The “Displacement” Approach: This relates to the argument that removal of habitat or disturbance of individuals results in a “not likely to adversely affect” or a “no effect” determination because individuals can simply go elsewhere. Except possibly for wide-ranging species, this argument is usually unacceptable. Generally other suitable habitats will already be occupied by other individuals of that species who would then also be affected, probably adversely so, by the proposed action. When the argument is properly used, some rationale must be provided to indicate there are adequate refugia available and the impact will not occur during denning or nesting periods. In any case, a “no effect” call in these situations is usually not appropriate. The species will be affected but, depending on the situation, perhaps not adversely.

The “Not Known To Occur Here” Approach: The operative word here is known. Unless adequate surveys have been conducted or adequate information sources have been referenced, this statement is difficult to interpret. It begs the questions “Have you looked?” and “How have you looked?” Always reference your information sources. Have you queried the North Carolina Wildlife Resources Commission and/or the North Carolina Natural Heritage Program database? Species occurrence information that is generated through one day/year surveys or “wildlife observation records” (which more closely reflect the location of people, for example) are usually inadequate to justify species absence. For some species, nest sites are surveyed yearly. In situations

where wide-ranging species are difficult to census, however, it may be advisable to assume species presence if the habitat is present. The timing of surveys is also important. Consider the life history of the species when scheduling surveys. For example, many plants are only identifiable while flowering.

The "We'll Deal With It Later" Approach: This approach may be used when consultation needs to be completed quickly (e.g., to secure federal funds) before adequate surveys are conducted or biological analyses are completed. This approach may be used to justify a "no effect" or a "may affect, not likely to adversely affect" determination. Basically, the approach is that if the Service will concur with a "no effect" or a "not likely to adversely affect" determination now, the federal agency will promise to coordinate if listed species are located and do whatever the Service wants to protect them. This approach offers little to no assurance that the species will not be affected by the project prior to being "discovered," is not consistent with consultation procedures, and Service concurrence is seldom given. Although we try to review projects in a timely manner, generally each Service biologist is reviewing a number of projects from a variety of federal agencies at any one time. Federal agencies need to front load project planning to include adequate time to conduct/require surveys, gather information, complete analyses, and conduct interagency consultation. Federal agencies that have coordinated project review through informal consultation to identify conservation measures and to avoid or reduce adverse effects generally receive more timely Service concurrence and, if necessary, biological opinions.

The "Leap of Faith" Approach: This refers to the assumption that the Service reviewer is familiar with the project and/or its location, and there is no need to fully explain the impact the project may have on listed species. Usually, there is little or no connection or rationale provided to lead the reader from the project description to the effect determination. We cannot assume conditions that are not presented in the analysis. Doing so would leave both the project proponent and the Service at risk of challenge by third parties that do not necessarily share in or trust our good working relationship. Analyses must logically lead the reviewer from current conditions, through potential effects of project implementation on listed species/critical habitat, to an effect determination.