

March 2004

# ENDANGERED SPECIES

## More Federal Management Attention Is Needed to Improve the Consultation Process



G A O

Accountability \* Integrity \* Reliability

Highlights of [GAO-04-93](#), a report to congressional requesters

## Why GAO Did This Study

To protect species that are at risk for extinction, the Endangered Species Act requires that federal agencies consult with the Fish and Wildlife Service or the National Marine Fisheries Service (the Services) to ensure that activities they authorize, fund, or conduct will not jeopardize endangered species or adversely modify their critical habitat. While federal agencies recognize that consultations benefit species, some are concerned about the time and resources consumed. In this report, GAO (1) assesses the federal data on consultations, (2) identifies steps by federal agencies to improve the process, and (3) discusses lingering concerns of federal and nonfederal parties about the process. GAO limited this study to consultations with the Forest Service, the U.S. Army Corps of Engineers, and the Bureaus of Land Management and Reclamation in Idaho, Montana, Oregon, and Washington.

## What GAO Recommends

Because many concerns about the consultation process center on its timeliness, GAO recommends that the Services improve the data about the time and effort to complete the process. GAO further recommends that the Services and other federal agencies work together to clarify the process and evaluate improvement efforts. In commenting on a draft of this report, the agencies generally concurred with our findings and recommendations.

[www.gao.gov/cgi-bin/getrpt?GAO-04-93](http://www.gao.gov/cgi-bin/getrpt?GAO-04-93).

To view the full product, including the scope and methodology, click on the link above. For more information, contact Barry Hill at (202) 512-3841 or [hillbt@gao.gov](mailto:hillbt@gao.gov).

## ENDANGERED SPECIES

# More Federal Management Attention Is Needed to Improve the Consultation Process

## What GAO Found

The data available on consultations and their timeliness varied between the Services, but neither agency's databases captured all the elements needed to reliably determine the length of the process. Data from the National Marine Fisheries Service and the Fish and Wildlife Service's Portland field office (the Service's other five offices did not have comparably reliable data) show that about 40 and 30 percent of their nearly 1,220 and 330 consultations, respectively, exceeded established time frames (for consultations completed during fiscal years 2001 through 2003). However, these data do not include the significant time and effort sometimes spent discussing a project before consultation officially began. As a result, the Services cannot discern the level of effort devoted to Endangered Species Act consultations.

Federal agencies have taken several steps to make the consultation process smoother and more efficient. Specifically, agencies took steps to facilitate collaboration, reduce workload, and improve the consistency and transparency of the process. While many officials praised these efforts, it is unclear whether the efforts are achieving their intended performance improvements, for they have not been comprehensively evaluated.

Despite the improvement efforts, federal officials and nonfederal parties still have concerns about the consultation process. Workload has been a persistent concern for the Services and other agencies despite staff increases in recent years. Another major concern is that the Services and agencies sometimes disagree about the extent to which consultation is necessary. Some agency officials believe that the Services require more than is necessary under the Endangered Species Act, while officials at the Services contend that they are simply fulfilling their responsibilities. Nonfederal parties also have concerns. Parties seeking to conduct activities that are authorized by a federal agency are concerned about the time and resources expended to comply with the process. Environmental advocates are concerned that the process may not effectively protect species.

### Agencies Must Balance the Use of Natural Resources with the Protection of Species



Sources: GAO, Nova Development Corporation, U.S. Army Corps of Engineers.

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**Abbreviations**

BLM	Bureau of Land Management
FWS	U.S. Fish and Wildlife Service
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration

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United States General Accounting Office  
Washington, D.C. 20548

March 19, 2004

The Honorable Michael Crapo  
Chairman, Subcommittee on Fisheries, Wildlife, and Water  
Committee on Environment and Public Works  
United States Senate

The Honorable Max Baucus  
United States Senate

More than 80 species listed as threatened or endangered under the Endangered Species Act make their home in the vast waterways and millions of acres of federally managed lands in the northwestern United States. Federal agencies are directed by the act to utilize their authorities to conserve such species. In addition, species and habitat must be protected against adverse effects of federal activities, such as operating hydroelectric dams, thinning vegetation to prevent wildfires, grazing livestock, dredging waterways, and constructing or maintaining docks and piers. Deciding how best to protect threatened and endangered species, and assessing the extent to which federal activities should be altered or restricted, has taken time and energy to work through and has generated considerable controversy and frustration.

Before authorizing, funding, or carrying out activities, federal agencies must determine whether these activities might affect a listed species or habitat identified as critical to its survival. If effects are likely, the agencies must consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service—collectively referred to as the Services—to ensure that the activities will not jeopardize a species' continued existence or adversely modify its designated critical habitat. To initiate the consultation process, an agency submits a biological assessment or similar document to the Services that describes the proposed activity and its likely effects on listed species and their habitat. Consultation usually ends with the Services issuing their own assessments of the likely effects, including any recommendations or requirements to mitigate these effects. Although there are set time frames for completing consultations, federal agencies and the Services often discuss proposed activities' designs, effects, mitigation, documentation, or other matters in "preconsultation" sessions that occur before these time frames begin. In this report, when we say the "entire consultation process," we include preconsultation.

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From 1997 through 2000, 25 species were listed for protection under the Endangered Species Act in the northwestern United States, and frustration levels with the entire consultation process increased. These newly listed species included bull trout, several species of salmon, and other animals that inhabit large geographic ranges. With the new species listings, the consultation workload expanded beyond what the Services could handle in a timely manner. As a result, many proposed activities were delayed—some for months, others for years—because of the requirement to consult. The Services were criticized for these delays. Officials with the Services acknowledged these delays and attributed them to a lack of resources to address the expanded workload and the learning curve associated with dealing with newly listed species; however, the officials noted that the process is essential in protecting species.

As requested, in this report we (1) assess the federal data available on consultations and determine the number completed and their timeliness for fiscal years 1998 through 2003; (2) identify steps taken by the Services and other federal agencies to improve the consultation process; and (3) discuss concerns of federal officials and nonfederal parties about the process. As you requested, we limited our review to the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), the U.S. Army Corps of Engineers, the Bureau of Land Management, the Bureau of Reclamation, and the Forest Service (the latter four agencies are often referred to as “action agencies”) and to consultations conducted in Idaho, Montana, Oregon, and Washington. We obtained electronic data on consultations from the Services and tested the reliability of the data. We also administered—via telephone or in person—a comprehensive survey to a nonprobability sample<sup>1</sup> of 66 officials in the Services and action agencies in the four states, and we conducted open-ended interviews with 143 officials. Our survey and interviews elicited officials’ perceptions about consultations based on their experiences since the late 1990s. We also interviewed 44 nonfederal parties, including applicants—parties seeking federal authorization or funds to conduct an activity subject to consultation—and representatives of environmental advocacy and industry groups. We conducted our work in accordance with generally accepted government auditing standards. (See app. I for details on the scope and methodology of our review.)

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<sup>1</sup>Results from nonprobability samples cannot be used to make inferences about a population because, in a nonprobability sample, some elements of the population being studied have no chance or an unknown chance of being selected as part of the sample.

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## Results in Brief

The data available on consultations completed and their timeliness for fiscal years 1998 through 2003 varied between the Services, but neither agency's databases captured all the elements of the entire consultation process needed to reliably determine the timeliness of consultations that occurred in the four states we reviewed during this period. NMFS implemented a regional electronic database in January 2001 that tracks key elements of the consultation process for all of its field offices that conduct consultations in the four states. We obtained data from this system from January 2001 through fiscal year 2003. Before this time, NMFS did not maintain electronic data that included dates necessary for determining timeliness. FWS implemented an electronic database only recently—in March 2003—for Idaho, Oregon, and Washington, but not Montana. Before then, most FWS field offices either did not track consultations data electronically or did not include key elements in their databases such as the date on which a consultation was initiated. Consequently, we were able to obtain sufficiently reliable electronic data comparable to that from NMFS from only one FWS field office—Portland, Oregon—for fiscal years 2001 through 2003. (Of the six FWS field offices in the four states we reviewed, Portland accounted for approximately 20 percent of all consultations completed in fiscal year 2002.) Based on data from NMFS' regional system and FWS' Portland field office, the Services conducted almost 1,550 consultations during fiscal years 2001 through 2003 with the four action agencies in Idaho, Montana, Oregon, and Washington. While most of these 1,550 consultations were completed within established time frames, about 40 percent of the consultations exceeded established time frames, in some cases by more than a year. However, these time frames do not capture the sometimes significant amount of preconsultation time spent discussing a project before the consultation is considered to have officially begun. Some officials with the Services and action agencies said that time spent in preconsultation can be valuable by resulting in projects that have fewer effects on species and habitat. The Services have just begun to capture data on actions taken during preconsultation but the Services do not identify the level of resources expended or routinely assess how much time is spent in preconsultation. Without complete and reliable data on the entire consultation process, federal managers and congressional decision makers cannot have an accurate picture of how long the process takes to complete, how much it costs, and whether resources are adequate to meet workload demands. In addition, the Services cannot confirm or deny complaints about the lengthiness of the entire consultation process or know where the most significant problems arise.

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The Services and action agencies have taken steps, in three general categories, to make the consultation process smoother and more efficient, although the effectiveness of these efforts is unclear. First, the Services and action agencies have taken steps to facilitate collaboration between staff at the Services and action agencies so that disagreements can be resolved before they slow down the consultation process. Second, the Services and action agencies have developed approaches to reduce the consultation workload, such as including multiple related activities in a single consultation. And third, the Services and action agencies have taken steps to increase the consistency and transparency of the consultation process, such as providing interagency training courses and posting guidance and information on agency Web sites. Although many officials praised these various efforts for helping to reduce workload, promoting better working relationships, and protecting species better, in some cases, it is difficult to ascertain their effectiveness because the Services have not comprehensively evaluated them. While the Services and agencies have conducted some analyses of how the new processes are working and what problems have occurred, the Services and agencies have not assessed whether the processes reduce workload and the time to complete the entire consultation process. Given resource constraints, it is imperative that resources invested in process changes be justified by gains in process efficiency while maintaining or enhancing effectiveness.

Despite efforts to improve the consultation process, officials with the Services and action agencies still have concerns centering on two key issues. First, officials at the Services and action agencies are concerned about workload. While staff levels have increased in recent years, those increases have been outpaced by increases in the number and complexity of consultations. Second, officials at the Services and action agencies sometimes disagree about the extent to which consultation is necessary. Many officials recognized that the consultation process benefits species. However, some action agency officials said they feel pressured by the Services—and by the fear of litigation—to seek consultation, regardless of the likely effects of an activity on listed species, including in situations where they feel consultation is unnecessary. In addition, action agency officials said the Services sometimes require detailed documentation for activities that are unlikely to adversely affect listed species or that will benefit the species in the long term, activities for which these officials believe less detail should suffice. The officials said that detailed documentation of such activities causes the consultation process to take longer than it should. For their part, officials at the Services said that the need to consult and the level of documentation are dictated by the



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Endangered Species Act, its implementing regulations, the Administrative Procedure Act, and the outcomes of court decisions. They believe they are appropriately fulfilling their consultation responsibilities to protect species, including clearly documenting and explaining the logic supporting their decisions. The time and effort required to do so, however, adds to an already heavy consultation workload.

Nonfederal parties' concerns depended on their expectations of the process. Nonfederal parties wanting permits to conduct activities in federally managed areas told us that consultation adds inordinately to the time and cost of the permitting process. Before the additional species listings in the late 1990s, the permitting process for activities such as constructing or modifying private docks on Lake Washington generally took only 2 or 3 months and averaged about 5 percent of construction costs, according to a Lake Washington homeowners' representative. Now that consultation is conducted as a part of the permitting process, this representative said that permitting costs have increased to about 33 percent of construction costs. Furthermore, the average processing time for 19 permits issued for such activities in 2002 was about 2 years. Conversely, environmental advocates expressed concern over the Services' ability to fulfill their legal obligation to effectively protect species because of a lack of resources and a limited understanding of the status of species across their ranges. For example, some advocates said that the Services do not have sufficient information on species' conditions to be able to accurately determine whether federal activities may jeopardize species. Finally, applicants and environmental advocates alike were concerned that the process lacks transparency. Some applicants said they found the process confusing; both applicants and environmental advocates said they were frustrated by not having a voice in decisions made in the process.

We are making recommendations to the Secretary of the Interior and the Under Secretary of Commerce for Oceans and Atmosphere to improve the information used to manage the consultation process. We are also recommending that the Secretaries of the Interior and Defense, the Under Secretary of Commerce for Oceans and Atmosphere, and the Chief of the Forest Service work together to improve the transparency and consistency of the consultation process. These recommendations include reaching agreement on the amount of specificity needed in biological assessments and on the requirements of the process.

The Departments of the Army and the Interior, the National Oceanic and Atmospheric Administration (NOAA), and the Forest Service provided

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comments on a draft of this report and generally concurred with our findings and recommendations. The agencies also provided overall comments and technical clarifications in some areas in this report. We have addressed these comments and clarifications where appropriate. The agencies' comment letters and our responses are presented in appendixes II through V.

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## Background

The purpose of the Endangered Species Act is to conserve threatened and endangered species and the ecosystems upon which they depend. Under the act, the U.S. Fish and Wildlife Service is responsible for protecting terrestrial, or land-dwelling, and freshwater animal and plant species; the National Marine Fisheries Service is responsible for protecting ocean-dwelling species and anadromous species, such as salmon.<sup>2</sup> The act prohibits, without the appropriate exemption, the "taking" of any threatened or endangered species of fish or wildlife and defines "take" as to harass, harm, pursue, shoot, wound, kill, trap, hunt, capture, or collect, or to attempt any such conduct. Federal agencies must comply with prohibitions against taking species that are listed as threatened or endangered and must consult with the Services to ensure that their activities do not jeopardize the continued existence of any listed species or destroy or adversely modify habitat designated as critical for those species. However, "taking" a species that is incidental to the purpose of a federal action and does not cause jeopardy or adverse modification may be permitted and, in practice, often is. Thus, the consultation process allows some activities to take place that may involve the incidental take of listed species, and helps federal agencies avoid adversely affecting listed species and designated critical habitat. Federal agencies are also directed by the Endangered Species Act to utilize their authorities to conserve threatened and endangered species.

When a federal agency determines that an activity it intends to authorize, fund, or carry out may affect a listed species, the agency may initiate either an informal or a formal consultation with FWS or NMFS.<sup>3</sup> Informal consultation occurs when the agency has determined that an activity may

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<sup>2</sup>Anadromous species live part of their lives in freshwater and part in saltwater.

<sup>3</sup>If a federal agency determines that a proposed activity will have no effect on listed species (e.g., if no listed species or critical habitat exist in the area), then consultation is not required.

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affect but is not likely to adversely affect listed species or critical habitat. If the Services agree, typically by issuing a letter of concurrence with the agency's determination, then the agency may proceed with the activity without further consultation. Although there is no regulatory deadline for completing an informal consultation, each Service's policy is to do so within 30 days of receiving a complete biological assessment or similar document. This assessment describes, among other things, the proposed activity and its likely effects on any listed species or habitat that may be present in the area of the proposed activity.

On the other hand, if an action agency initially determines that an activity is likely to adversely affect a species, the action agency is required to initiate formal consultation by submitting a biological assessment or similar document.<sup>4</sup> The Services have up to 135 days (with the option for the Services and action agencies to agree to extensions) to conduct the consultation and document, in a biological opinion, whether the activity is likely to jeopardize the species' continued existence or adversely modify its designated critical habitat and what actions, if any, are required to mitigate that impact.<sup>5,6</sup> (Such "jeopardy opinions" are not common; in fiscal year 2003, for example, the Services issued only one biological opinion that identified proposed activities as potentially jeopardizing threatened and endangered species in the four states included in our review.) The Services may postpone the start of the 135-day time frame until they have sufficient information from the action agency on which to base their opinions. This is also true for the 30-day time frame for informal consultations.

In the northwestern United States, the consultation process is a prominent part of federal land management and federally authorized or funded activities because of the region's combination of large areas of federal land and significant numbers of listed species. Endangered or threatened

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<sup>4</sup>The Services may also request formal consultation if they disagree with an action agency's determination that an activity is not likely to adversely affect listed species.

<sup>5</sup>Required actions are intended to mitigate the activity's impact by minimizing the extent of incidental take.

<sup>6</sup>The 135-day limit results from the combination of two time limits—the Endangered Species Act requires consultations to be completed within 90 days, and the implementing regulations require biological opinions to be delivered within 45 days after consultation has been completed. 16 U.S.C. § 1536(b)(1)(A) and 50 C.F.R. § 402.14(e), respectively. Since, in practice, preparation of the biological opinion is considered part of the consultation process, we will be referring to the 135 days as the time for completing the consultation process.

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species in this region include the northern spotted owl, grizzly bear, Canada lynx, bull trout, and various salmon species, or “runs.” Following are four of the many federal agencies that carry out activities in the Northwest that may require consultation under the Endangered Species Act.<sup>7</sup>

- The *U.S. Army Corps of Engineers* (Corps) supports navigation of the nation’s waterways by maintaining and improving channels. Also, in Idaho, Montana, Oregon, and Washington, the Corps operates about a dozen multipurpose dams and reservoirs that provide flood control, generate hydroelectric power, protect fish and wildlife, and support recreation and other activities. In addition, the Corps issues permits for the discharge of dredge or fill material into U.S. waters; such discharges may occur in connection with dredging or building docks and other structures.
- The *Bureau of Land Management* (BLM) manages about 36 million acres of federal land in Idaho, Montana, Oregon, and Washington. The agency manages and issues permits for activities such as livestock grazing, recreation, mining, and timber harvesting.
- The *Bureau of Reclamation* delivers water and hydroelectric power throughout 17 western states. In the Northwest, it operates and maintains 28 dams and administers 54 reservoirs.
- The *Forest Service* manages about 62 million acres of national forest in Idaho, Montana, Oregon, and Washington. The agency issues permits for and manages activities such as timber harvesting; recreation; livestock grazing; mining; environmental restoration; and rights of way for road construction, ski areas, and access to private land.

Balancing species’ needs with natural resource uses—both of which are among these federal agencies’ missions—can be difficult, as activities can vary widely in their effects on listed species (see fig. 1).<sup>8</sup>

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<sup>7</sup>FWS manages land in national wildlife refuges and, like other land-managing agencies, must consult with its own biologists—and with NMFS biologists, if appropriate—in determining the effect of its management activities on listed species. Similarly, when NMFS’ activities might affect a listed species, NMFS must consult with its own biologists (and with FWS biologists, if appropriate) about the activities’ likely effects.

<sup>8</sup>Many other federal agencies may need to consult on effects to species. The agencies include the Departments of Defense, Energy, and Transportation, and the Environmental Protection Agency and the Federal Energy Regulatory Commission.

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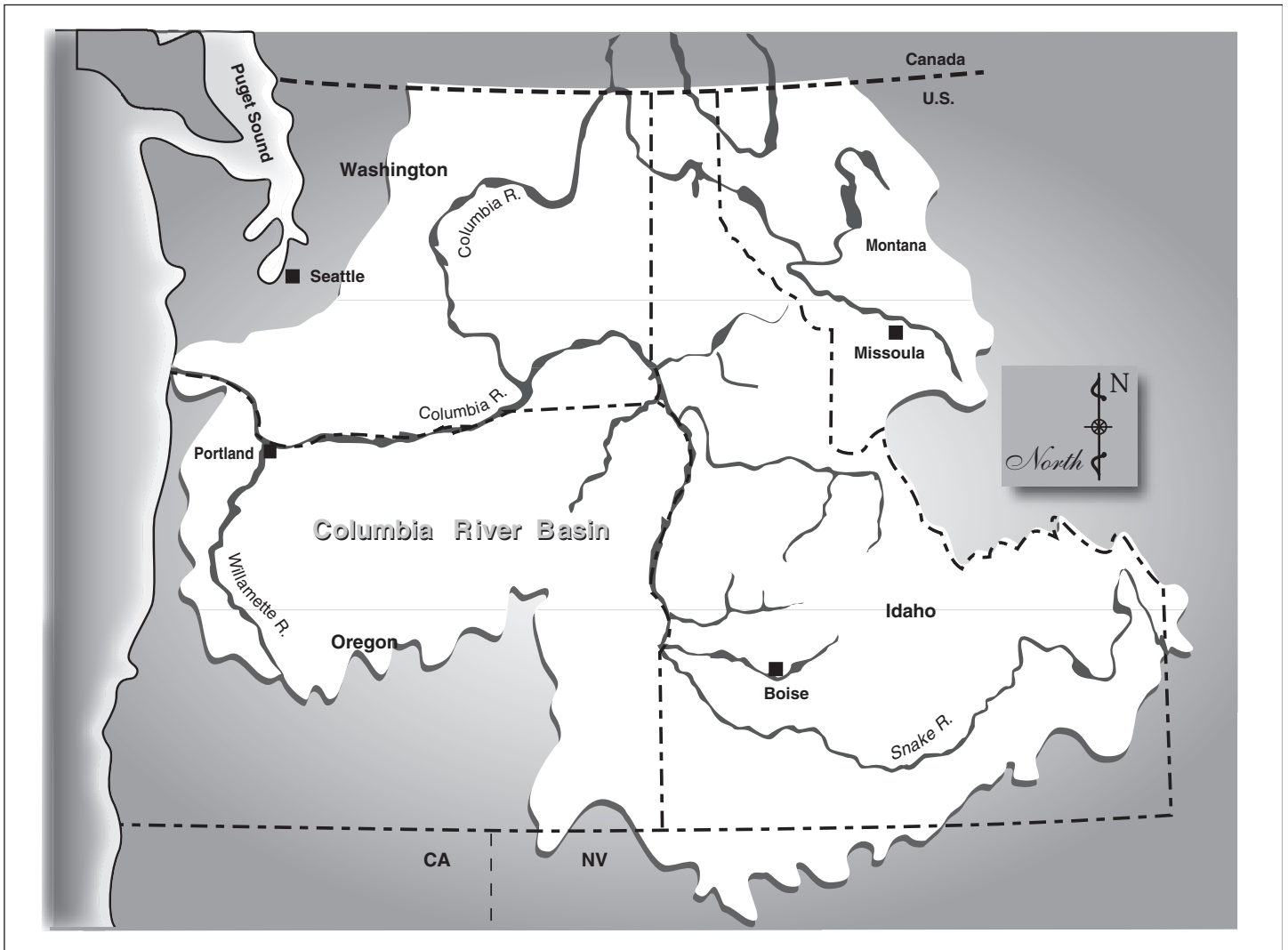
**Figure 1: Agencies Must Balance the Use of Natural Resources with the Protection of Species**



Sources: GAO, Nova Development Corporation, U.S. Army Corps of Engineers.

The consultation workload for these agencies in the northwestern United States has increased dramatically since the late 1990s, largely as a result of the many species added to the list of species protected under the Endangered Species Act. The number of protected species increased more than 60 percent in Idaho, Montana, Oregon, and Washington. Several of these species have habitats that cover large areas of the Northwest. For example, in 1998 the Fish and Wildlife Service listed the bull trout, which occurs in major river basins across the four states, including the Columbia and Klamath basins, as well as in coastal areas such as Puget Sound in Washington. In 1999, the National Marine Fisheries Service listed nine subspecies of salmon and steelhead that occur primarily in these river basins in Oregon and Washington. Figure 2 shows the far reach of just the Columbia River Basin.

**Figure 2: Columbia River Basin**



Source: U.S. Army Corps of Engineers.

Any activity occurring in or near these waterways and their smaller tributaries may require consultation. Consequently, federal agencies are consulting on many more activities than were subject to consultation before the 1998 and 1999 fish listings in order to protect listed species and their designated critical habitats.

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Although actions taken by nonfederal parties may be subject to the consultation process, their direct involvement in the process varies from none to substantial. For some parties, such as individuals who apply for permits to graze livestock on federal lands, the consultation process may be invisible because the federal agency goes through consultation before it issues the permit. For other parties, such as individuals who apply for permits to construct private boat docks or corporations that apply for permits to harvest timber, the process is not only visible, but often requires their participation. In these cases, the individual or corporate permit applicant generally takes on the responsibility of preparing the biological assessment needed to initiate consultation.

Activities can vary widely in their effects on listed species, although relatively few are found to potentially jeopardize a species' continued existence. For example, U.S. Army Corps of Engineers projects that may require consultation range from issuing permits for construction or modification of private docks to dredging operations in harbors and rivers. Similarly, Forest Service projects can range from trail maintenance to timber harvesting, and "decommissioning" or destruction of roads. Obviously, these projects vary in their complexity and the possible severity of their effects on species and their habitats. However, identifying the type and extent of effects on species often remains a difficult task for many of these activities because, as we reported in an August 2003 report, only limited information is frequently available on species' ranges, biologies, and habitat needs.<sup>9</sup>

Mitigative actions that agencies or nonfederal parties may include in their projects in order to minimize impacts to species and their habitats also vary widely. For example, limitations may be placed on the time of year when a project can be conducted. In addition, mitigation may entail altering the methods used for conducting a project, such as leaving buffer zones around known nesting areas undisturbed. Fish ladders and fish barriers are other common mitigation measures employed to protect fish from the harmful effects of dams and other structures (see fig. 3).

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<sup>9</sup>U.S. General Accounting Office, *Endangered Species: Fish and Wildlife Service Uses Best Available Science to Make Listing Decisions, but Additional Guidance Needed for Critical Habitat Designations*, [GAO-03-803](#) (Washington, D.C.: Aug. 29, 2003).

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**Figure 3: Workers Install Electric Fish Barrier Fabric on Canal Diversion Structure**



Source: Bureau of Reclamation.

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### **Completeness of Data Maintained on Consultations Varied between the Services but Did Not Capture the Entire Process**

The data available on consultations completed from fiscal years 1998 through 2003 varied between the Services, but neither of the Services' databases captured the entire consultation process. (Throughout this report, these data should be considered in the context of their associated error rates as explained in app. I.) The most comparable data we were able to obtain for the Services were for fiscal years 2001 through 2003 and included consultations for all NMFS offices in the four states and for FWS' Portland field office. These data showed that the Services completed about 1,550 consultations, about 60 percent of which were completed on time. The remainder exceeded established time frames by intervals ranging from a few days to more than a year. However, our timeliness analysis underestimated the length of time it actually took to complete the entire consultation process because, in part, the Services' data did not include the sometimes significant amount of time that the Services and action agencies spent in preconsultation discussions.



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## Services Differed in the Data They Maintained on Consultations

NMFS and FWS differed in the completeness of data available on consultations. NMFS has a regional database that includes all consultations conducted by NMFS offices in Idaho, Oregon, and Washington;<sup>10</sup> this database contains the two dates needed to calculate the timeliness of consultations (i.e., their compliance with established completion time frames). These two dates are the date the consultation was initiated and the date it was completed. We obtained NMFS electronic data on consultations for most of fiscal years 2001 through 2003.<sup>11</sup> Before 2001, most NMFS field offices did not maintain readily available electronic data or did not consistently capture key dates needed to measure timeliness, such as the date on which a consultation was initiated. FWS implemented a three-state database in March 2003 for Idaho, Oregon, and Washington; before then, only its Portland field office maintained comparably reliable electronic data for fiscal years 2001 through 2003.<sup>12</sup> Therefore, we obtained FWS data for fiscal years 2001 through 2003 for only the Portland field office. Of the six FWS offices in the four states we reviewed, the Portland office accounted for approximately 20 percent of all consultations completed in fiscal year 2002. We reported on similar data management issues in January 2001 about FWS' field office in Carlsbad, California.<sup>13</sup>

Based on NMFS regional data and FWS Portland field office data, the Services completed almost 1,550 formal and informal consultations during fiscal years 2001 through 2003 with the four action agencies in Idaho, Montana, Oregon, and Washington. NMFS data accounted for more than 1,200 of the consultations; about 80 percent were informal, and 70 percent of all the NMFS consultations were conducted with the U.S. Army Corps of Engineers. Similarly, the majority of FWS Portland consultations were informal (more than 65 percent). For the total number of the Portland office's consultations, more than 30 percent were conducted with each of three agencies—the Forest Service, BLM, and the Corps. The Bureau of

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<sup>10</sup>NMFS has no offices in Montana.

<sup>11</sup>Because the NMFS database was implemented in January 2001, we did not obtain data for the first quarter of fiscal year 2001.

<sup>12</sup>FWS' Portland field office has maintained electronic data needed to measure timeliness since 1996.

<sup>13</sup>U.S. General Accounting Office, *Fish And Wildlife Service: Challenges to Managing the Carlsbad, California, Field Office's Endangered Species Workload*, [GAO-01-203](#) (Washington, D.C.: Jan. 31, 2001).

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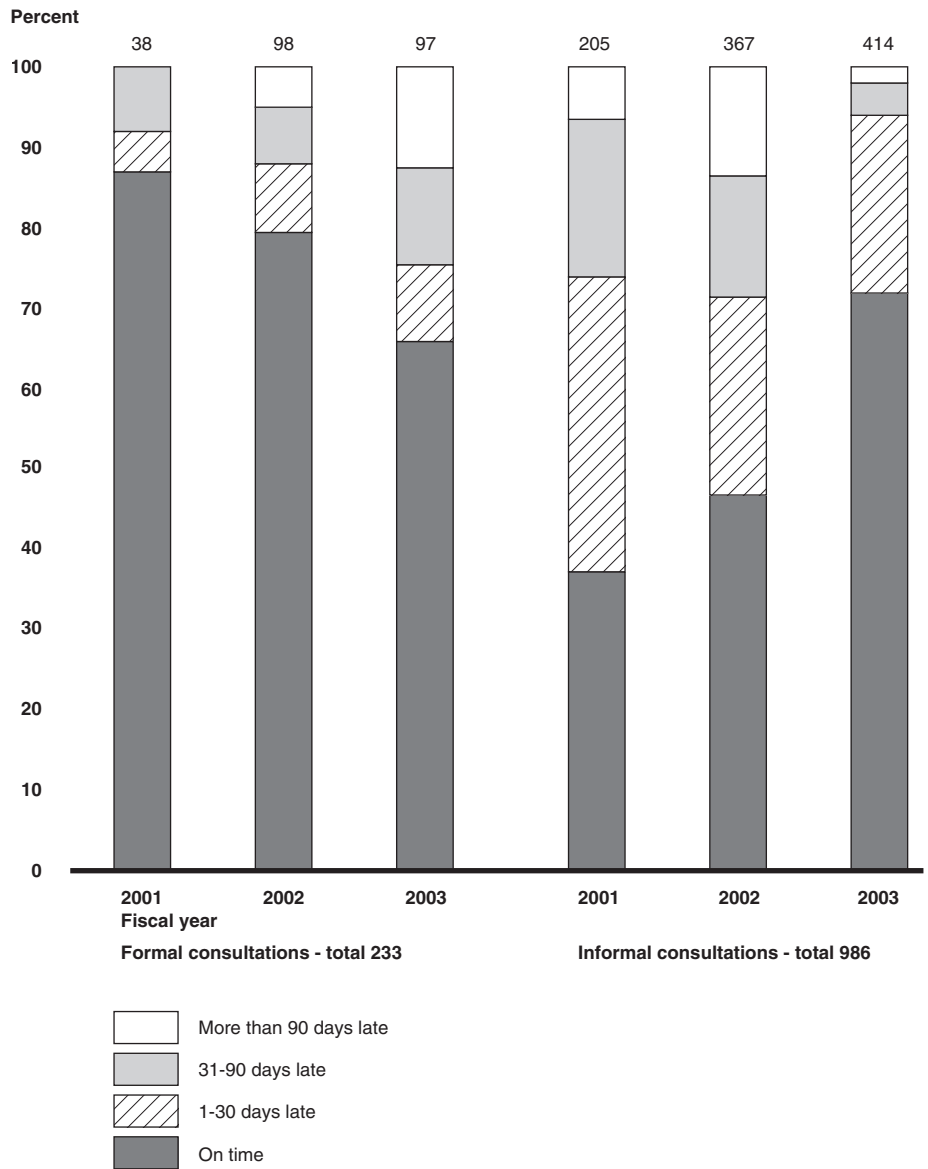
Reclamation accounted for the least number of consultations—23 and 4 with NMFS and FWS, respectively.

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### Nearly Forty Percent of the Consultations Exceeded Time Frames

Our timeliness analysis revealed that nearly 40 percent of the 1,548 consultations completed by the Services exceeded established time frames. For consultations completed during fiscal years 2001 through 2003, NMFS exceeded time frames 41 percent of the time, and FWS Portland exceeded time frames 31 percent of the time. Both Services missed established time frames, most often for informal consultations, which by policy are to be completed within 30 days. Most of the late informal consultations were completed within 60 days, although a small percentage of informal consultations (9 percent for FWS Portland and 16 percent for NMFS) were more than 90 days late. Overall, timeliness was better for formal consultations, which are to be completed within 135 days. NMFS completed 75 percent of its formal consultations on time, while FWS Portland completed 86 percent on time. During this period, both Services improved their timeliness on informal consultations, which account for most of their workloads. On formal consultations, in contrast, NMFS' timeliness worsened over the 3 years, while FWS Portland's improved. We did not find any obvious commonalities among the late consultations—they addressed various kinds of activities including livestock grazing, noxious weed control, and road use. Figures 4 and 5 show NMFS and FWS Portland timeliness data for formal and informal consultations over the 3 years.

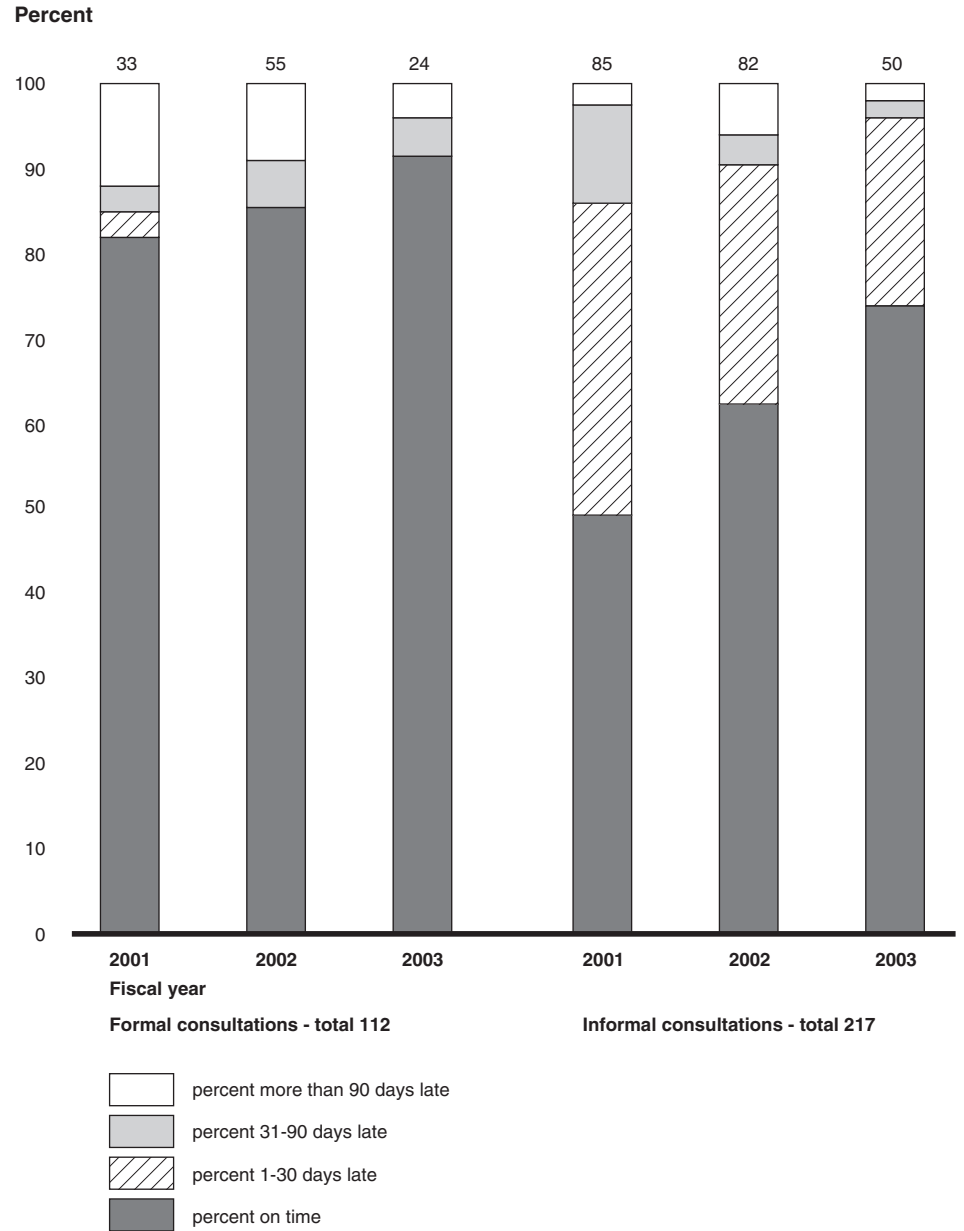
**Figure 4: NMFS Timeliness for Formal and Informal Consultations**



Source: GAO analysis of agency data.

Note: Fiscal year 2001 data are only for the period January 1 through September 30, 2001.

**Figure 5: FWS Portland Office Timeliness for Formal and Informal Consultations**



Source: GAO analysis of agency data.

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According to officials at the Services, some consultations we identified as exceeding deadlines may have had agreed upon extensions that either were not reflected in their data systems or were identifiable in the systems only through review of individual consultation records. For example, the Services and action agencies may agree to extend time frames if a relevant study is nearing completion that would significantly inform the consultation process, or if an action agency decides to wait to consult on an individual project in order to combine it with consultation on future projects. In addition, NMFS officials said that in some cases it is not clear what discretion a federal agency has to make project modifications, for example, and this can result in consultation delays. FWS and Forest Service officials told us that there may be many valid reasons for the Services and action agencies to mutually agree to longer time frames, and that some delays occur at the request of the action agency. The inability to easily identify such extensions, however, does not allow the Services to provide explanations on their timeliness without manually reviewing administrative records for individual consultations. If such information were included and easily identifiable, the Services' data systems would more accurately reflect timeliness. In addition, some officials at the Services and action agencies said that for some proposed projects they expect consultation to take a long time because the projects, and/or determining the status of and potential effects to protected species, are either extremely complex or controversial.

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### Available Data Did Not Capture the Entire Consultation Process

For fiscal years 2001 through 2003, neither of the Services routinely tracked the entire consultation process. Specifically, FWS and NMFS did not routinely track the time spent on or level of effort devoted to preconsultation, which includes actions such as interagency discussions of the content and level of detail to be included in a biological assessment. NMFS officials told us that preconsultation can be very valuable because it may result in modifications to a project to reduce effects to listed species and designated critical habitat so that the action agency may not need to go through formal consultation. According to officials with the Services and action agencies, the time spent in preconsultation may sometimes be considerable because many issues and potential problems may need to be discussed and resolved. In fact, preconsultation may account for the majority of the time spent on the entire consultation process, although some of this time may be spent on complying with environmental requirements other than consultation. As a result, computation of only the time and level of effort spent after the "official" start of a consultation (the point at which the Services are satisfied that the biological assessment is

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complete) may underrepresent the resources devoted to the process. Both Services now track actions taken in preconsultation in their systems and typically identify these actions as technical assistance. However, FWS' system does not electronically link these activities to subsequent consultations easily, and neither of the Services is using these data to determine the level of effort expended on the entire consultation process.

Without information on the time spent in or level of effort devoted to preconsultation, the Services cannot easily determine how long the entire consultation process really takes or respond to complaints that it takes too long, or determine how many resources are expended during preconsultation. Nor can the Services identify trends in timeliness or workload; determine whether delays in preconsultation occur more often in certain locations, with certain types of projects, or with certain agencies; or accurately gauge their resource investment in the entire consultation process. NMFS officials said they use data on the "official" consultation process (i.e., excluding preconsultation) to identify when consultations are exceeding time frames so managers can step in to determine what is needed to resolve the cause of the delay.

Some officials at the Services noted that tracking preconsultation accurately would be challenging. Specifically, they said that simply tracking the time elapsed between an inquiry from an action agency about a proposed activity and the official start of a consultation will not reflect periods of time when neither the Services nor the action agency is actively working on the consultation. For example, some actions that take place during that interval might relate to other activities, other consultations, or other required environmental analyses. In addition, because much of the information generated during this interval may be applicable to processes other than consultation, such as analyses to comply with the National Environmental Policy Act, officials said that it is difficult to apportion a specific amount of time to Endangered Species Act requirements.

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## Improvement Efforts Have Focused on Collaboration, Workload, and Information Sharing, but Their Effectiveness Is Unclear

The Services and action agencies have taken steps in three general categories to make the consultation process smoother and more efficient. These efforts focus on increasing collaboration, reducing workload, and increasing the consistency and transparency of the consultation process. While many officials praised these various efforts, their overall effectiveness is unclear because the Services have not comprehensively evaluated them.

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## Services and Action Agencies Have Worked to Improve Collaboration

The Services and action agencies have taken various steps focused on improving interagency collaboration to make the consultation process smoother and more efficient. The largest such initiative, referred to as “streamlining,” began in 1995 and involves the Services and two action agencies—the Bureau of Land Management and the Forest Service—in the four states we reviewed. This initiative created interagency teams of biologists—known as Level 1 teams—that discuss proposed activities and their likely effects on listed species. One of the purposes of this effort was to encourage the Services and action agencies to work together on biological assessments in order to avoid later disagreements. As such, the Level 1 teams collaborate to identify an activity’s potential effect on listed species, determine what protective measures are needed for species, and reach consensus on what information is needed for a “complete” biological assessment. This consensus is particularly important to the timeliness of consultations, because a consultation officially begins only when the Services have received what they consider to be a complete biological assessment.<sup>14</sup> According to FWS officials, implementation of streamlining generally requires a greater commitment of staff resources than the “traditional” consultation process.

The streamlined process is intended, through Level 1 team communication, to discuss the types of concerns or issues that typically arise during consultation. FWS and Forest Service officials told us that streamlining should result in better projects that incorporate needed species and habitat protections into their designs early, rather than requiring after-the-fact

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<sup>14</sup>As discussed earlier, a complete assessment is one that contains information sufficient to enable the Services to determine how the proposed activity is likely to affect listed species.

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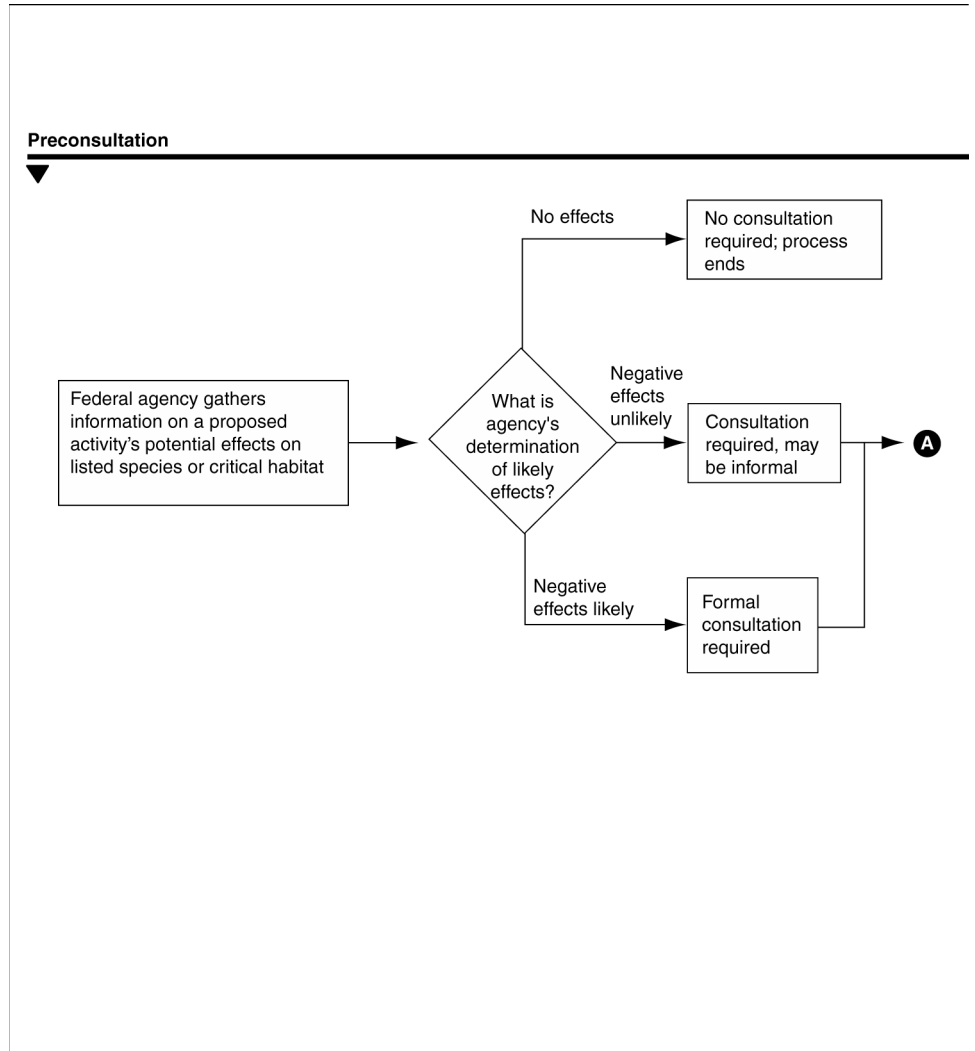
changes that may cause delays in project implementation. Streamlining is also intended to eliminate what action agency officials described as a seemingly endless cycle of information requests. That is, in the traditional (nonstreamlined) consultation process, weeks or months may be spent fulfilling requests from the Services for additional information to resolve incomplete biological assessments (see fig. 6).



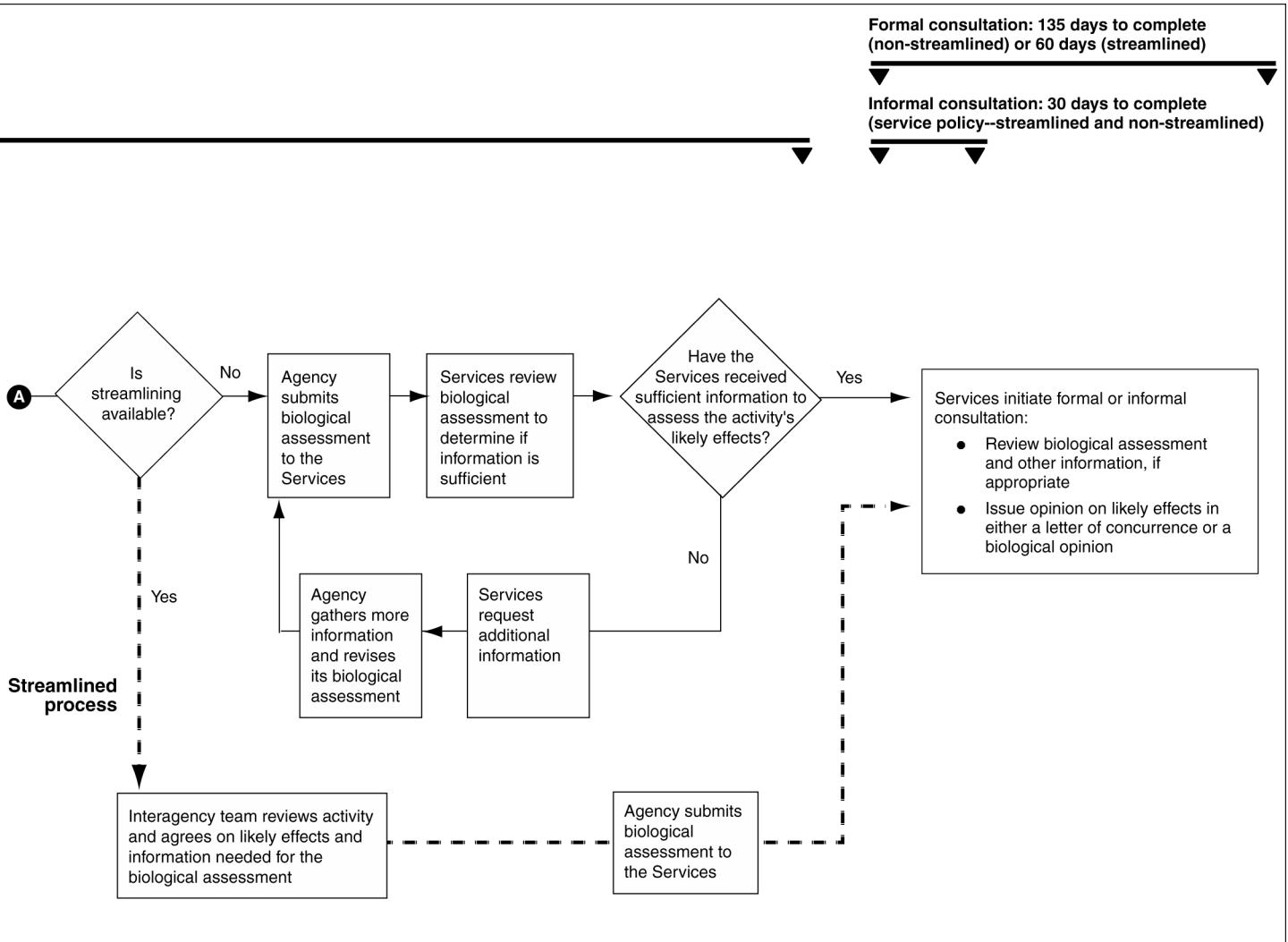
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**Figure 6: Streamlined Consultation Process Seeks to Bypass the Iterative Cycle of Information Requests**



Source: GAO analysis of data from multiple agencies.



Under the streamlined process, in theory, a biological assessment submitted to the Services should never be incomplete, because their biologists have collaborated with action agency biologists on decisions about the assessment's key content. Accordingly, the interagency streamlining agreement specifies shorter time frames for the completion of a formal consultation conducted under the streamlined process—60 days as opposed to 135 days. For streamlined informal consultations, the completion time frame remains the same as for those conducted under the

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traditional process—30 days. In addition to eliminating multiple information requests, the streamlined process should enable the Services to produce a biological opinion (which concludes the consultation process) more quickly than if the agencies did not collaborate up front. If a Level 1 team is unable to resolve disagreements about a proposed activity or its effects, the team is supposed to elevate those disagreements to a Level 2 team, which is composed of field-level managers. Any disagreements unresolved by a Level 2 team can be further elevated.

In Idaho, Oregon, and Washington, the Level 1 streamlining teams meet to discuss specific proposed activities. In Montana, the streamlining process is implemented differently because of staffing limitations, according to officials. Instead of discussing specific activities, Montana team members discuss common problems that could impede consultation, in general, and work on solutions. For example, the Montana team developed a standard format for biological assessments to improve their consistency. The team also developed criteria that can be used to quickly identify (i.e., screen out) proposed activities that will either have no effect on species—and thus do not require consultation—or those that are unlikely to adversely affect species, and can therefore undergo an informal consultation.

Other collaborative initiatives involving other action agencies and nonfederal parties have also emerged. The U.S. Army Corps of Engineers uses a collaborative process in Montana to make the federal and state permitting process simpler and faster. The Corps holds a monthly meeting with officials from agencies involved in approving or issuing permits for work in or near bodies of water. At these meetings, attendees discuss complex or controversial activities that individuals are contemplating or for which permit applications have been submitted. Attendees generally represent the Corps; the Fish and Wildlife Service; the Environmental Protection Agency; the Montana Historical Society; and the Montana Departments of Environmental Quality, Natural Resources and Conservation, and Fish, Wildlife, and Parks; applicants are invited to attend the meetings as well. Not all proposed activities are discussed at the meetings—only those that may be of concern because of their location in a sensitive area, such as the Yellowstone River, or their likelihood of having a negative effect on listed or sensitive species.

In Portland, Oregon, the Services, the U.S. Army Corps of Engineers, and the city of Portland recently launched a collaborative process as well. In Portland, the collaborative process will be used for consultations on the city's capital construction and maintenance activities, such as bridge repair

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and storm water management, that receive federal funding or require permits from federal agencies such as the Corps. According to city officials, monthly meetings held as a part of the collaborative process should result in more efficient consultation because they will enable prompt discussion of projects and early identification of opportunities to consolidate multiple projects into a single consultation.

In a different effort to improve collaboration, the Services opened new field offices closer to the action agency offices with which they routinely consult. Numerous officials at the Services and action agencies told us that the ability to work together in person helps them develop better working relationships that are important to smooth and efficient consultations. Previously, the distance between some Services and action agency locations made consultations difficult. The Fish and Wildlife Service opened suboffices in Chubbock, Idaho; and La Grande, Roseburg, Bend, and Newport, Oregon; in part to handle an increased consultation workload in these areas. NMFS opened offices in Grangeville and Salmon, Idaho; La Grande, Oregon; and Ellensburg, Washington.

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### Services and Action Agencies Have Modified Some Consultations to Reduce Workload

To help reduce the workload associated with consultations while still protecting species, the Services, Bureau of Land Management, Forest Service, and the U.S. Army Corps of Engineers have developed numerous “programmatic” consultations. These programmatic consultations can be lengthy or difficult to develop initially, but are intended to ultimately reduce workload associated with subsequent consultations.

One type of programmatic consultation reduces workload by combining multiple proposed activities into a single consultation rather than consulting on each individual activity. For example, one such programmatic consultation in Oregon covers various permits for grazing on 26 specific allotments on BLM lands. Prior to this programmatic consultation, BLM would have consulted individually on each of the 26 grazing allotments. However, given that the activities occurring on the allotments are similar, as are the effects of those activities, combining them into a single consultation is more efficient.

Another type of programmatic consultation may reduce the work involved in individual consultations by providing specific design criteria that, if followed, will generally ensure a quicker and more predictable approval process. For example, a programmatic consultation being developed by FWS for methane coal bed development activities on public lands in

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Montana prescribes mitigative actions, such as installing devices to deter bald eagles from perching on infrastructure, that proposed projects should include. Similarly, land use plans that must go through consultation—such as multiyear forest plans—may provide clear direction on approvable project designs by identifying design criteria intended to limit effects on species. Presumably, if a proposed activity adheres to the prescribed criteria, consultations will proceed more quickly.

One type of programmatic consultation that officials discussed with us covered categories of routine activities, even though the action agency may not yet have identified specific projects that it planned to conduct. For example, one such programmatic consultation allowed up to 120 culvert replacement and removal projects per year on Forest Service lands in Washington and eastern Oregon. To be covered under this programmatic consultation, proposed activities must have met specific criteria, such as design standards and the time of year of the activity, to ensure that they did not adversely affect protected species or habitat. Qualified projects could proceed without individual consultation, although the action agency might have been required to report annually on the location and size of the completed projects. In contrast, another programmatic consultation of this type—covering 10 categories of routine activities, such as road and trail maintenance on federal lands in northwestern Oregon—did not restrict the number of projects that could be allowed during the consultation’s 5-year life span as long as they met specific design criteria. However, several court decisions have raised questions about the legality of these types of programmatic consultations.<sup>15</sup> As a result, FWS and Forest Service officials informed us that they are recommending that all programmatic consultations include provisions for site-specific (or project-specific) analysis.

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### Services and Action Agencies Have Taken Steps to Increase Consistency and Transparency

The Services and action agencies have taken numerous steps to increase the consistency and transparency of the consultation process. First, the Services and action agencies provide training for those involved in the process. For example, FWS provides weeklong introductory and advanced courses on the consultation process at its National Conservation Training

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<sup>15</sup>See, e.g., *Pacific Coast Fed’n of Fishermen’s Assn’s, Inc. v. National Marine Fisheries Service*, 265 F.3d 1028 (9<sup>th</sup> Cir. 2001), which held that in reaching a “no jeopardy” finding at a regional watershed level, NMFS acted improperly by failing to aggregate the effects of individual projects (at small sites in the watershed) on the entire watershed.

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Center in West Virginia. Anyone involved in the consultation process can take these courses. NMFS provides periodic training at its field offices, and both NMFS and FWS have offered interagency training courses at various action agency locations and are working on additional courses such as a course to assist action agencies in developing biological assessments. The Bureau of Land Management offers Endangered Species Act training two to three times a year, and the Bureau of Reclamation is developing a bureau-wide training program on Endangered Species Act issues, including consultation.

Second, the Services and action agencies have developed a variety of guidance documents on the consultation process. The Services' consultation handbook, for example, was developed to aid Service biologists in implementing the consultation process, but it is also used by action agencies and others. The Bureau of Reclamation has its own draft handbook for complying with Endangered Species Act requirements, including consultations, which is currently being reviewed by the Services. The U.S. Army Corps of Engineers is developing a library of biological assessments to serve as examples for Corps staff going through the process. The Services have also issued numerous policy memos or guidance that address confusing or problematic aspects of consultation. For example, the Services issued guidance on how to assess the direct and indirect effects of right-of-way permits for access to private land. Such assessments have instigated significant disagreements among the Services and action agencies that the guidance hopes to resolve.

Third, the Services and action agencies have taken advantage of the Internet and internal agency Web pages to disseminate information on the consultation process and some specific consultations. The Services, the Bureau of Land Management, and the Forest Service have an interagency Web site that links to the Endangered Species Act, its regulations, and key guidance documents. NMFS has a Web site with links to final biological opinions and its consultation tracking system so that action agencies and others can identify the status of specific consultations; NMFS also has an internal Web site with agency guidance. FWS' regional office in Portland, Oregon, has a similar Web site for consultations conducted in Idaho, Oregon, and Washington. NMFS and FWS are working together to standardize an online template for developing a biological assessment. The U.S. Army Corps of Engineers has a Web site that provides information on the requirements of its permitting program, including permitted activities that must go through the consultation process. Reclamation officials told

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us that they make biological assessments developed by Reclamation staff available to assist other staff in the agency in preparing these assessments.

Last, officials at both the Services and action agencies have used site visits to educate stakeholders about proposed activities and their likely effects on listed species. According to several officials at the Services and action agencies, seeing the site of a proposed activity firsthand is invaluable to understanding the activity and its likely effects on species and habitat (fig. 7).

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**Figure 7: Site Visit to Culvert Replacement Project on Forest Service Land**



Source: GAO.

A Corps official told us that he has taken biologists with the Services out on dredges to increase the biologists' understanding of dredging operations and their likely effect on species. In another example, site visits were important in achieving agreement on a proposed development plan for a ski area in Washington. A Forest Service biologist convened on-site meetings of all the stakeholders in the consultation about the proposed plan. These stakeholders—representatives of the Fish and Wildlife Service, the Forest Service, the ski area, the state, and a local hunting group—walked through the proposed development areas and discussed ways to prevent the



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development from adversely affecting the species involved, including the Canada lynx. This on-site collaboration, according to the Forest Service biologist, not only resulted in stakeholder consensus on revisions to the development plan, but may also have forestalled litigation by the state and the local hunting group, which had previously opposed the proposed development plan.

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## Effectiveness of Improvement Efforts Is Unclear

Owing in part to actions taken to improve the consultation process, many officials from the Services and action agencies who responded to our survey believe that the process has improved since the late 1990s. Of the 56 survey respondents who had been involved in consultations for at least the past 5 years, 33 (nearly 60 percent) said the process had improved. The perception of improvement was strongest in the Services, with 12 of the 14 who responded to this question citing improvements. Slightly more than half of the 40 action agency respondents also indicated that the process had improved. BLM respondents cited the process as improved more often than Forest Service respondents.

More than half of the officials from the Services, BLM, and Forest Service who participated in our survey cited beneficial effects of streamlining, such as increased trust between the Services and action agencies, better communication, and earlier involvement in projects, which many officials emphasized as important for consultations to run efficiently. One Bureau of Land Management official said that the process of having Level 1 teams agree on the draft biological assessment lessens the chance that consultations will be prolonged by one or more requests from the Services for additional information from the action agency. City of Portland officials said that they are seeing similar benefits from their streamlining agreement with the Services, even though the agreement is in the early stages of implementation. These benefits include increased coordination among the city's bureaus and faster approval of Corps permits, which in turn have led to quicker implementation of city projects. As for the addition of new offices, several officials at the Services and action agencies mentioned their importance in enhancing professional working relationships and collaboration.

Some of the officials with the Services and action agencies who responded to our survey also indicated that the use of programmatic consultations has improved the consultation process in the last several years. Numerous other officials at the Services and action agencies we interviewed also noted that programmatic consultations have increased the efficiency of the

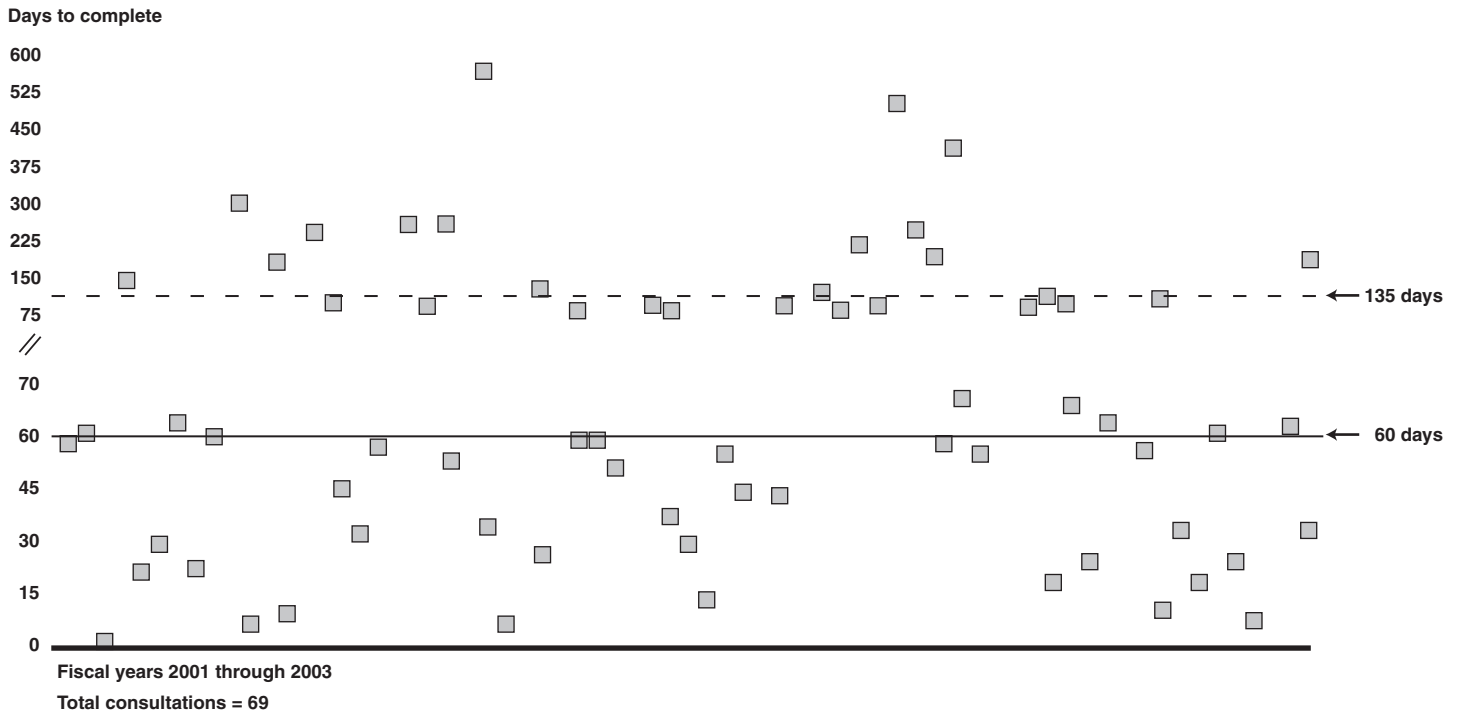
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consultation process. For example, the Corps cited several benefits of a programmatic consultation for dock construction and repair; it has reduced the number of individual consultations required and provided more certainty to applicants and Corps officials as to which designs the Services would accept without formal consultation. Permit reviewers at the Corps have encouraged applicants to use such designs in order to speed their applications.

Perceived improvements in the consultation process, however, cannot be attributed solely to the efforts of the Services and action agencies, as survey respondents identified several other factors that make the consultation process work well. These included effective teamwork between the Services and action agencies—particularly in instances where officials at the Services and action agencies had worked together long enough to develop trust—good interpersonal skills of staff involved in the consultation process, and increased experience with and knowledge of the consultation process in general, and with species such as the bull trout in particular. Our survey and interviews indicate that some officials believe that the consultation process is now less contentious because people have been working together longer and more frequently.

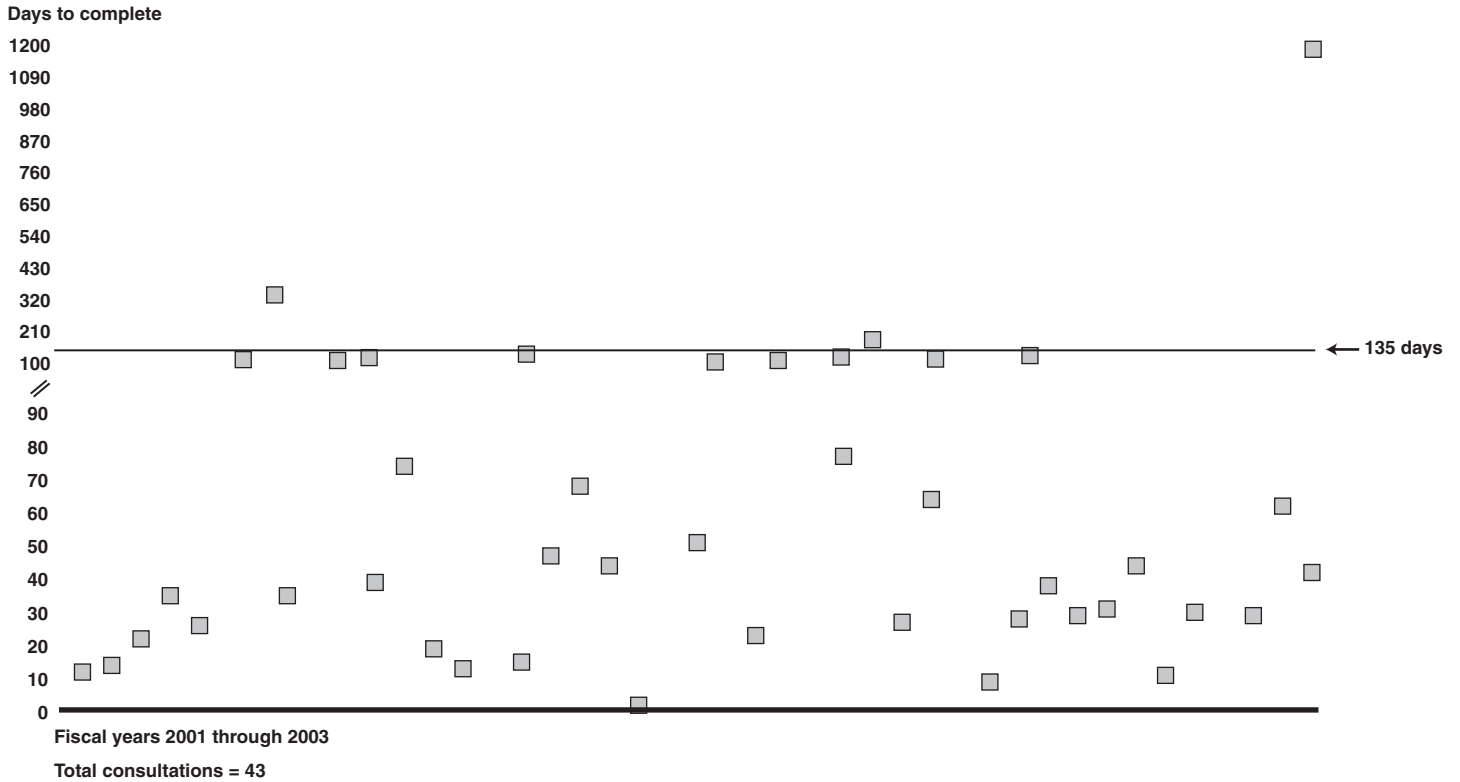
Although the Services and action agencies have done limited evaluations of some of the improvement efforts, they have not assessed whether the efforts aimed at reducing workload and speeding up consultations are achieving their original goals. The Forest Service and an interagency team have evaluated problems with streamlining such as causes for delays. The interagency team, which is composed of officials from the Services, BLM, and the Forest Service, conducts reviews periodically throughout the year, evaluating issues such as procedures, management plans, and selected biological opinions. However, none of the evaluations has analyzed whether the strategy of investing resources in preconsultation actually reduces the work and time spent on consultations while maintaining necessary protection for species and habitat. Our timeliness analysis indicates that this strategy has not always resulted in streamlined formal consultations' meeting the expected shortened time frame of 60 days. Although many streamlined consultations are completed within established time frames—with some completed in very little time—we found that the Services did not conclude streamlined formal consultations within the 60-day time frame for about 46 percent and 62 percent of FWS and NMFS streamlined formal consultations, respectively. Figures 8 through 15 show our timeliness analyses for all the consultations we reviewed.

**Figure 8: FWS Portland Office Streamlined Formal Consultations**



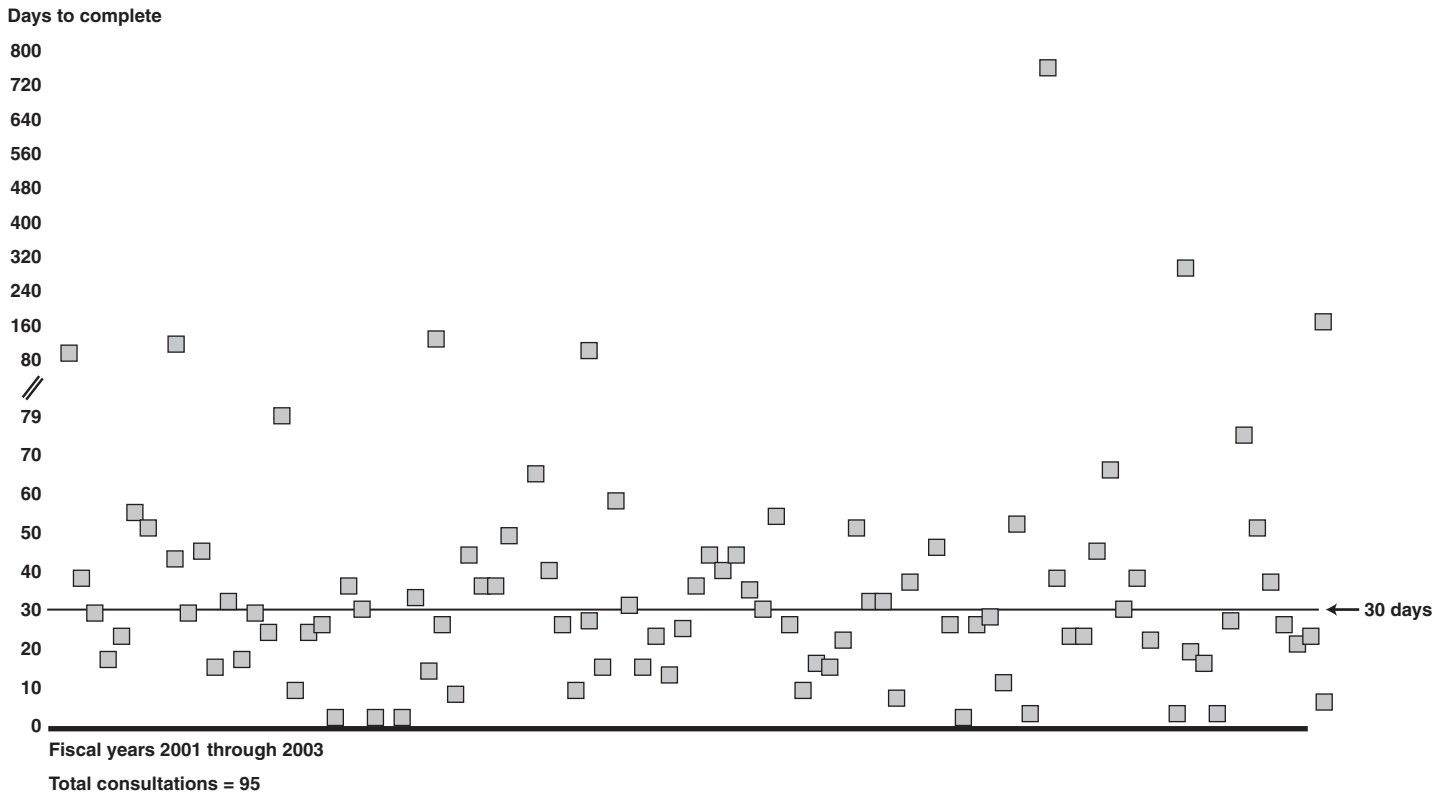
Source: GAO analysis of agency data.

**Figure 9: FWS Portland Office Nonstreamlined Formal Consultations**



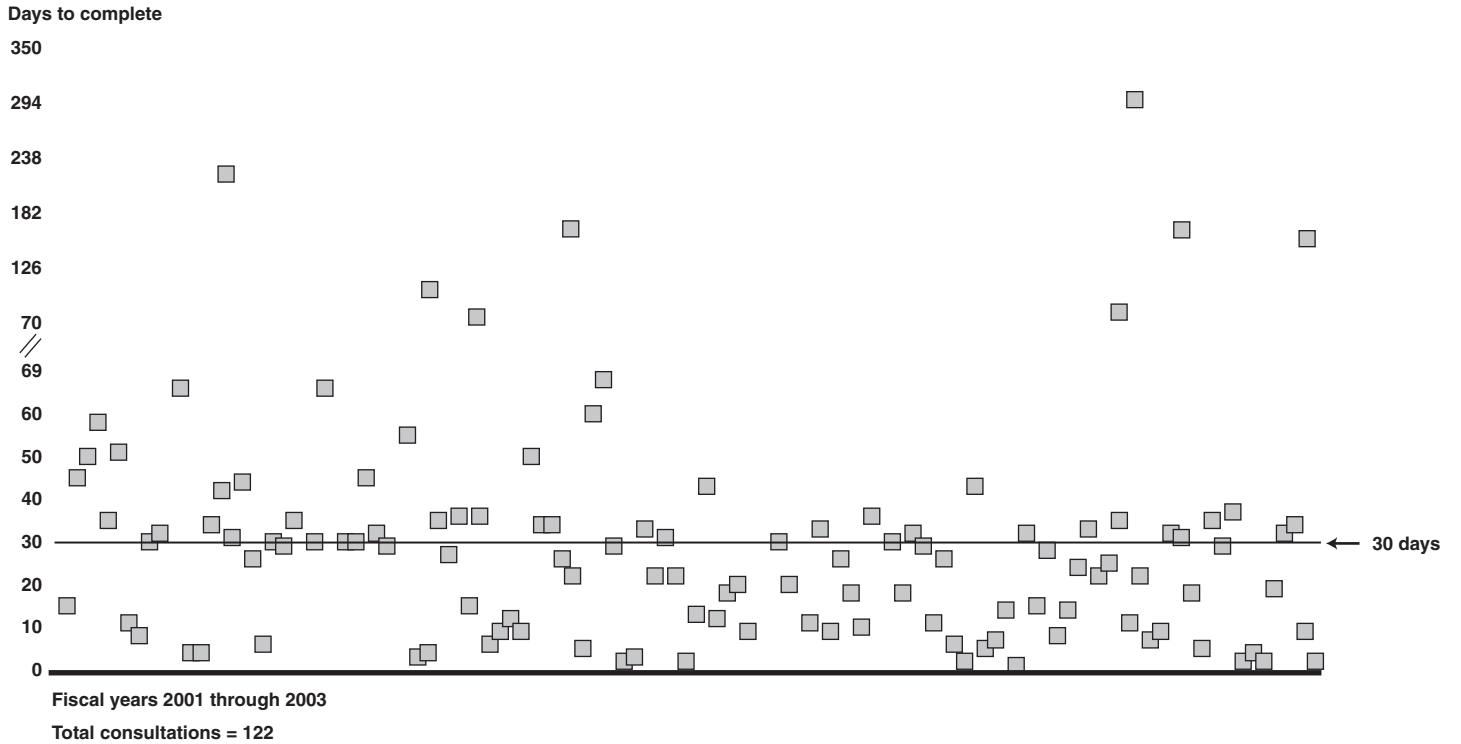
Source: GAO analysis of agency data.

**Figure 10: FWS Portland Office Streamlined Informal Consultations**



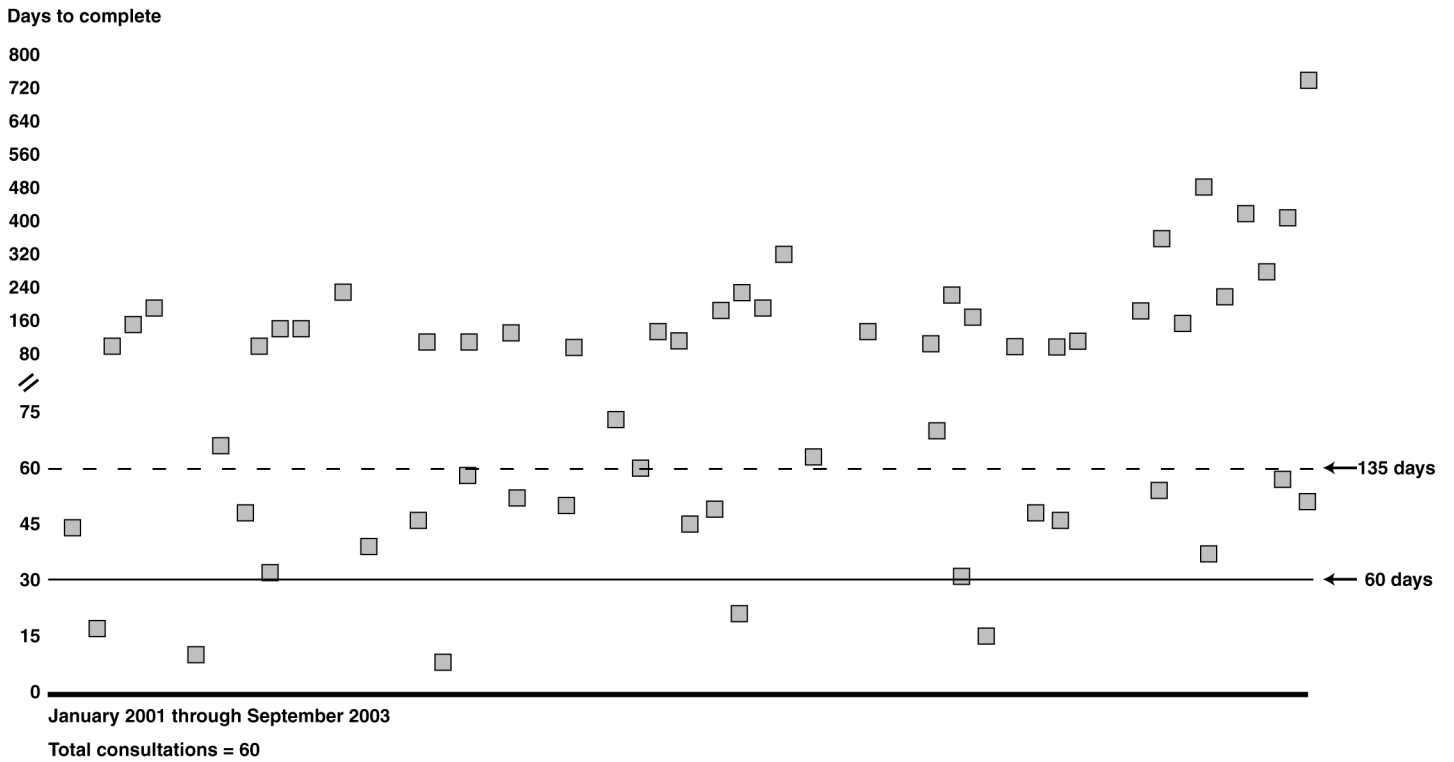
Source: GAO analysis of agency data.

**Figure 11: FWS Portland Office Nonstreamlined Informal Consultations**



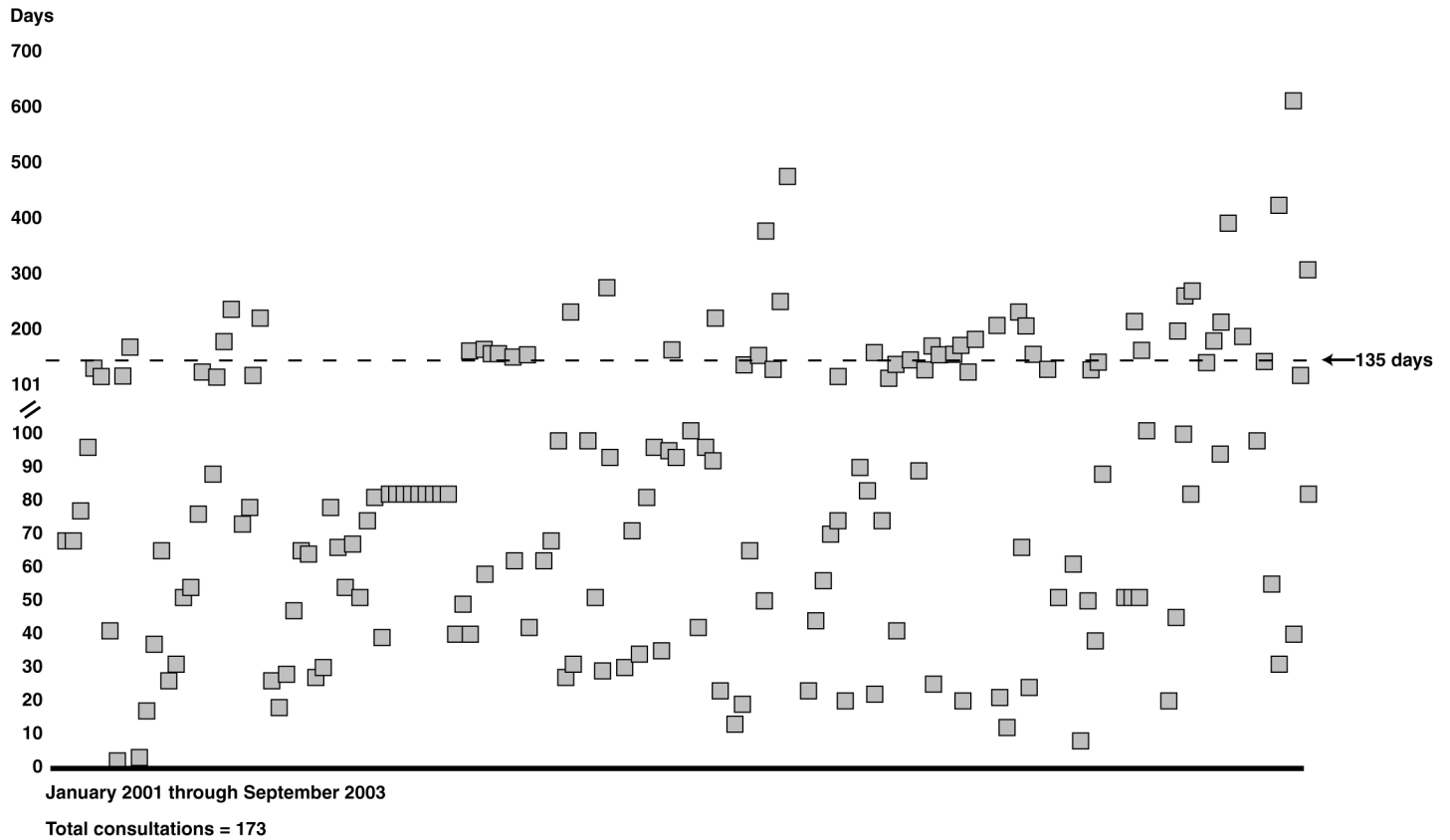
Source: GAO analysis of agency data.

**Figure 12: NMFS Streamlined Formal Consultations**



Source: GAO analysis of agency data.

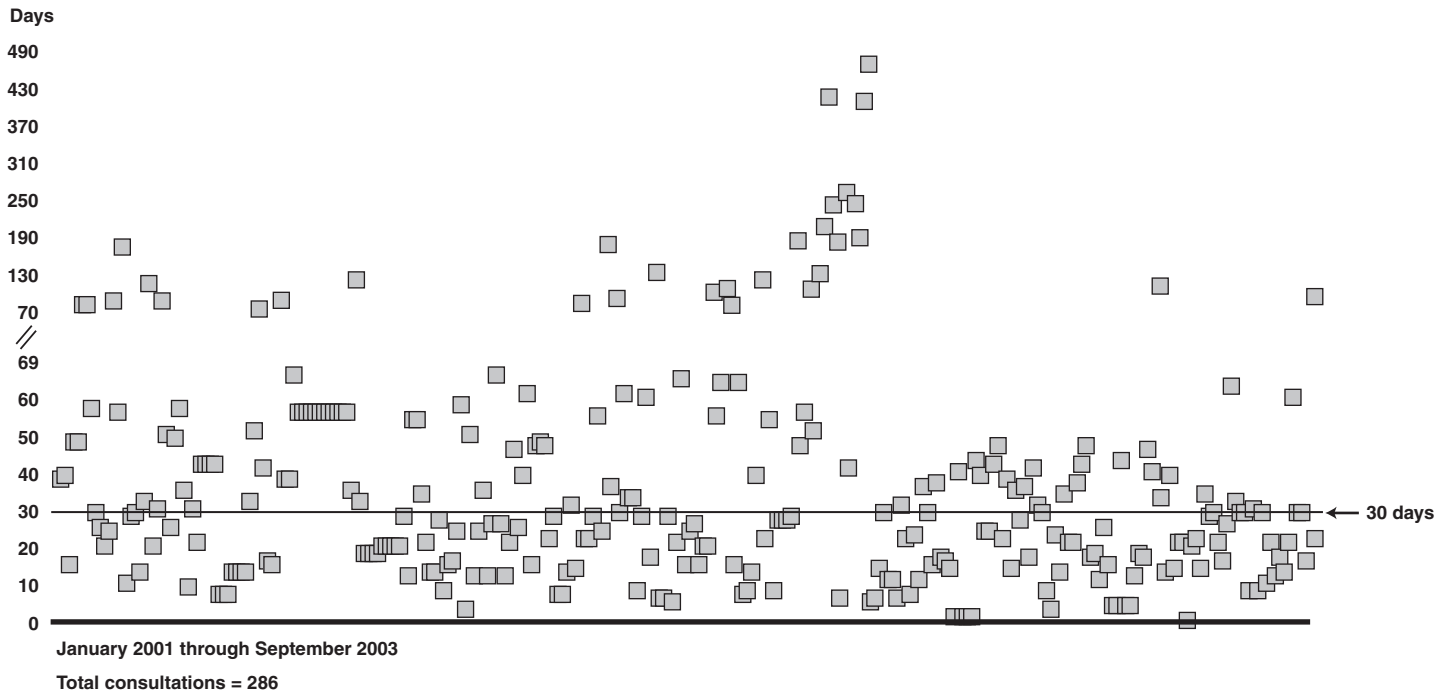
**Figure 13: NMFS Nonstreamlined Formal Consultations**



Source: GAO analysis of agency data.

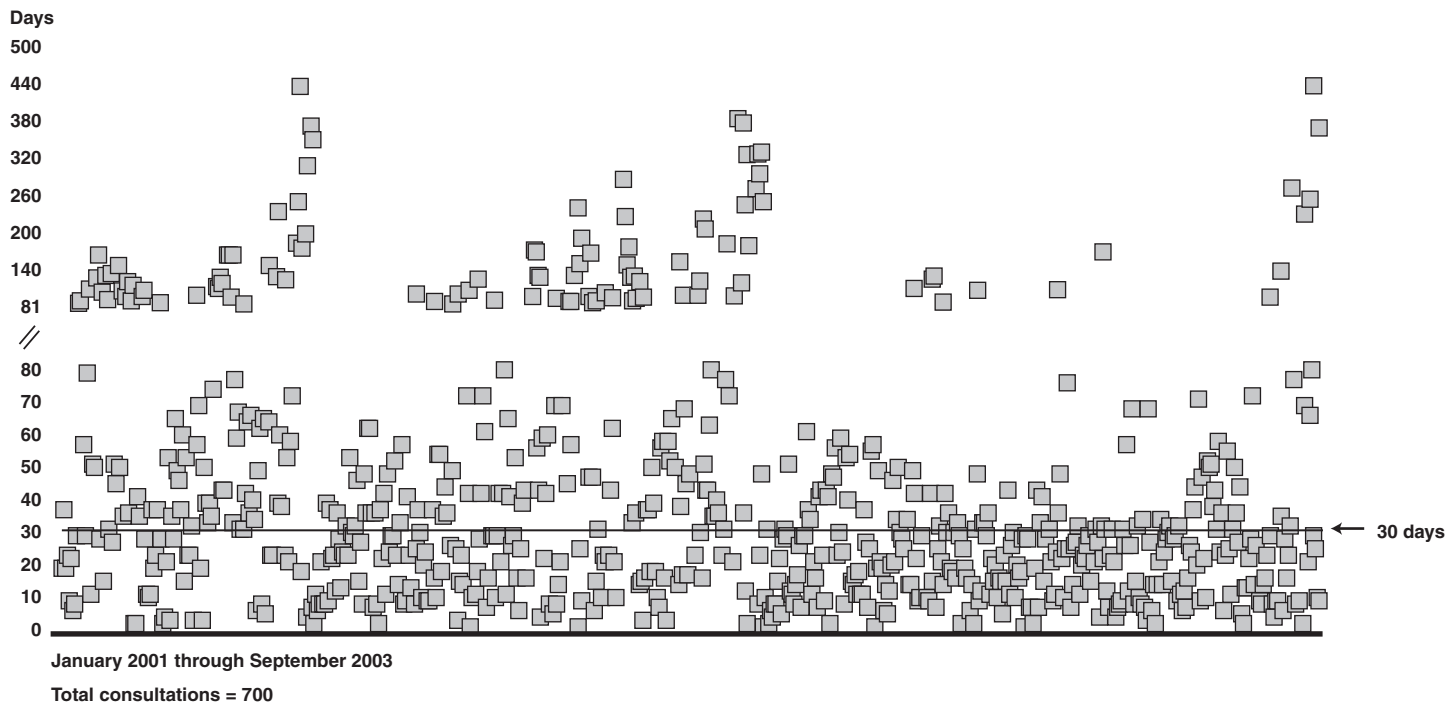


**Figure 14: NMFS Streamlined Informal Consultations**



Source: GAO analysis of agency data.

**Figure 15: NMFS Nonstreamlined Informal Consultations**



Source: GAO analysis of agency data.

Many of the “streamlined” formal consultations that exceeded the shortened 60-day time frame, also exceeded the 135-day time frame for nonstreamlined formal consultations (as figures 8 and 12 show). For NMFS, 18 of the 60 (30 percent) streamlined formal consultations completed during fiscal years 2001 through 2003 exceeded 135 days. Data from the FWS Portland office show that 13 of the 69 (19 percent) streamlined formal consultations completed in that office in fiscal years 2001 through 2003 took longer than 135 days. Furthermore, given that the Services do not know how much time and effort is spent in preconsultation, as discussed previously, the Services cannot know if streamlining is simply shifting time and effort typically spent in consultation to preconsultation, or if they are spending more resources on the entire consultation process under streamlining as compared to nonstreamlined consultations.

We also heard concerns from some officials that the streamlining process can still take a long time to complete, although not everyone thought that

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long time frames were necessarily bad. FWS and Forest Service officials told us that in addition to reducing time frames, streamlining is also intended to help ensure that consultations are completed when the action agencies are ready to implement their actions, even if the streamlined consultation takes as long as it would have under the normal process. One FWS biologist said that streamlining has improved the consultation process because of the improved relationships and mutual understanding of each other's jobs, but that it requires more effort. In this official's opinion, however, the time is well spent because discussions take place before projects are final, so the relationship is less adversarial and the consultation outcome is better, such as fewer effects on species and habitat, or cheaper project modifications. Once a biological assessment is agreed to and is provided to the Services to start the official consultation, she said it is concurred with quickly because of the work and agreements reached on the Level 1 team. FWS officials told us they have committed a lot of resources to implement streamlining but do not know whether the effort has been effective. A FWS official said that if streamlining proves effective, he would like to implement it with other agencies, but he was unsure whether the Service could commit the resources to do so. A NMFS official told us that conducting a comprehensive evaluation of streamlining would take resources that the Service does not have. We also heard concerns about the use of programmatic consultations, particularly on the part of some officials at the Services, because of the legal vulnerabilities discussed earlier. FWS and Forest Service officials informed us that they are recommending that all programmatic consultations include provisions for site-specific (or project-specific) analysis because of this vulnerability.

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## Federal Concerns about the Consultation Process Center on Workload and Process Requirements

Despite efforts to improve the consultation process, officials at the Services and action agencies remain concerned about two primary issues. First, officials at the Services and action agencies are concerned that their workloads remain heavy, even though staff levels have increased in recent years, and it compromises their ability to complete all consultations in a timely manner. Second, officials at the Services and action agencies sometimes disagree about the extent to which consultation is necessary. Officials at the action agencies believe that the Services sometimes recommend consultation when it is not really necessary and that they request similarly unnecessary amounts of scientific analysis and documentation on potential effects. Officials at the Services told us that they believe they are appropriately fulfilling their responsibilities under the act to protect listed species and designated critical habitat.

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## Services and Action Agencies Worry about Continued Resource Constraints

Staffing shortages at the Services were the predominant concern about the consultation process among the 66 survey respondents. It was the most important concern among the Services, Corps, and Bureau of Reclamation respondents, with Forest Service and BLM respondents also identifying it among their top concerns. In addition to the survey respondents, other officials at the Services and action agencies we interviewed also expressed concerns about a lack of resources to deal with the consultation workload at the Services and at the action agencies.

The Services have increased staff levels since the late 1990s to deal with their increasing workloads. NMFS estimates of staff levels for its Northwest region for fiscal years 1999 through 2002 show a nearly 80-percent increase in staffing levels (from 48 full-time equivalents to 86).<sup>16</sup> FWS staffing level estimates for its Portland, Klamath Falls, and Spokane field offices show a 58-percent increase for fiscal years 1998 through 2002 (from 24 to 38).<sup>17</sup> In some cases, these increases are primarily the result of the National Fire Plan that provides funding for biologists at the Services to specifically work on consultations for fire-related activities.

Despite these increases, however, officials at the Services told us that they still do not have enough resources to handle their consultation workloads in a timely fashion. For example, data provided by the FWS Portland field office show that the number of consultations for which each biologist was responsible increased about 90 percent between fiscal years 1998 through 2002, while resources increased about 40 percent. NMFS officials said that they have added staff since the mid-1990s to deal with increasing workload, but that the increase has never been enough. Data we analyzed from NMFS for January 2001 through fiscal year 2003 show that its workload doubled during this period. As a result, officials at both Services told us they often divert resources from other endangered species activities to help complete consultations. This situation is consistent with our findings in a June 2002 report on FWS budgeting for endangered species activities.<sup>18</sup> We found that FWS field office supervisors in all regions reported that a lack of funds and

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<sup>16</sup>This includes the nine NMFS offices in Idaho, Oregon, and Washington that conduct consultations with the agencies we evaluated; NMFS does not have offices in Montana.

<sup>17</sup>Other FWS field offices did not provide estimates.

<sup>18</sup>U.S. General Accounting Office, *Endangered Species Program: Information on How Funds Are Allocated and What Activities Are Emphasized*, [GAO-02-581](#) (Washington, D.C.: June 25, 2002).

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shortage of staff adversely affected their operations, with consultations being the most frequently identified area with insufficient resources. Furthermore, many action agency officials complained of too few experienced staff at the Services to handle the consultation workload. In particular, almost all action agency officials we interviewed in Montana said that FWS resources in the state were woefully inadequate given the service's consultation workload. For example, one Forest Service official in Montana, who had been involved in consultations elsewhere in the Northwest, said she was astounded by the small number of biologists conducting consultations at FWS' office in Montana, given the workload, compared with the other three states included in our review.<sup>19</sup>

Action agencies also expressed concern about a continuing imbalance in their workload and staff levels. For example, according to the U.S. Army Corps of Engineers, the number of consultations that the Corps conducted each year increased almost 300 percent between fiscal years 1999 and 2002, while staff devoted to consultations increased by about 60 percent during this period.<sup>20</sup> Between fiscal years 1998 and 2002, Bureau of Reclamation officials said that they doubled the number of their staff devoted to consultations in the Pacific Northwest Region from a staff level of four full-time equivalents in fiscal year 1998 to eight in fiscal year 2002. Reclamation estimated that its number of consultations increased by almost 85 percent between fiscal years 1998 and 2001, but then declined in fiscal year 2002 to about 20 percent more than its fiscal year 1998 workload. Reclamation officials told us that, while the agency does not conduct many individual consultations, the projects they must consult on are large and very complex, such as those for ongoing water supply and dam operations.

The persistent imbalance between workload and resources is frustrating for staff with the Services and action agencies. Officials from the Services said that they are constantly trying to keep up with their workload and must neglect other duties such as monitoring species or agency actions. Action agency staff are frustrated because biologists at the Services cannot review their proposed projects in a timely fashion. Compounding workload concerns is the belief of many officials at the Services and action agencies we interviewed that their consultation workload will continue to grow as

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<sup>19</sup>Montana is in a different FWS region than Idaho, Oregon, and Washington.

<sup>20</sup>These data are for Corps consultations and staff in Idaho, Oregon, and Washington; the Corps' consultation workload in Montana is negligible.

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projects become more complex, and the Services consult on activities that have not undergone consultation in the past. For example, several officials expect that oil and gas activity on federal lands will expand, and that the associated consultations will likely be complex.

Staffing level problems are exacerbated by high turnover of biologists at the Services. Officials at the Services said they constantly struggle to keep staff. NMFS officials told us that, given its controversial nature, consultation work is very stressful, and sometimes staff experience burn-out. When seasoned biologists leave, they are sometimes replaced by staff that are not knowledgeable about the consultation process or action agency programs and projects. In such situations, the more senior biologists at the Services must not only take time away from their work to train the new biologists, but also take on additional work until the new staff are up to speed. Working with newly hired biologists is frustrating for action agency staff because they too must take time to educate the new biologists at the Services about the agency's programs and activities. Thus, gaining additional staff is somewhat of a double-edged sword, according to officials at the Services and action agencies—additional staff are needed, but it takes time to train them. In the meantime, consultations are postponed or take longer than usual to complete. Officials with the Services also told us that the considerable number of staff positions funded through the National Fire Plan are hard to keep filled, as they are temporary positions and do not provide for job security or promotion. High turnover also affects the success of collaborative efforts, such as streamlining, that many officials said are dependent on good working relationships that take time to develop.

As a result of these staffing problems, some action agencies have arrangements with the Services, such as through reimbursable or interagency personnel agreements, to have biologist positions at the Services to specifically work on, or give priority to, their respective consultations. Agency officials told us that they have resorted to this method to ensure that their proposed projects get through the consultation process in a reasonable amount of time. For example, one BLM office provides funding, through an interagency agreement, for a FWS biologist position in Billings that is devoted to consultations related to BLM field offices' revisions to resource management plans. As mentioned previously, the National Fire Plan also provides resources for biologists at the Services so that consultations related to fire activities can be completed expeditiously.

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## Services and Action Agencies Disagree about the Extent of Consultation Needed

A major concern identified by survey respondents and others we interviewed was that the Services and action agencies sometimes disagree about the extent to which consultation is needed. While action agency officials recognized the benefit of the consultation process to species, many also thought that the process had gotten out of control, that they were consulting on many more activities than was necessary, and that consultations were going beyond what was called for by the Endangered Species Act. For example, although action agencies have the authority under the act to decide whether to consult with the Services about their activities, many action agency officials said they are reluctant not to consult with the Services even if they believe that their activities will not affect listed species. Some action agency officials told us that if they do not get the Services' concurrence on a proposed activity, they feel vulnerable to legal challenge. Similarly, action agency officials complained about the need to consult on activities likely to have only minor effects on species. Some officials felt that it was most important to spend time consulting with the Services on activities that were likely to have major effects on species. They said that they know how to avoid jeopardizing species while carrying out their activities, but that their professional expertise is not recognized.

Officials with the Services said that the purpose of the consultation process is to consider the potential effects of proposed activities regardless of whether they are positive or negative and to avoid jeopardizing species' continued existence and adversely modifying their critical habitat. For example, the consultation handbook states that consultation should be conducted on activities with "insignificant, discountable, or completely beneficial" effects in addition to those with clearly negative effects. Some officials with the Services emphasized that they cannot ignore their responsibility to consult on every action that may affect species or their habitats, and that they must show some level of good faith effort to do so. The Services also pointed out, however, that under the act and its implementing regulations, activities that are not likely to adversely affect species may undergo a less burdensome consultation process (i.e., informal consultation). FWS officials told us that the consultation process provides considerable benefits to species and, in some cases, to action agencies. For example, in some cases, consultation may result in a project that better maintains the integrity of the ecosystem of concern (that would include designated critical habitat) that may provide an agency action more flexibility to carry out future activities in the ecosystem than it otherwise would have had. FWS officials also told us that while they respect the professional expertise of the action agencies, that expertise, the information available, and the perspective of the action agencies are

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typically focused on conservation of species on their respective lands while the Services are responsible for conserving species throughout their ranges.

Some action agency officials believe that the Services spend too much time and effort scrutinizing short-term negative effects of proposed activities that, in the long run, would be benign or beneficial to species or habitat. These officials said that the Services tend to overlook the overall benefits of these activities and instead focus the consultation too heavily on the short-term effects. For example, activities such as replacing or repairing culverts, obliterating roads, or reducing forest fuels can have short-term negative impacts (such as increased sediment in the water or temporarily increased traffic in wildlife habitat) but can also have long-term benefits (such as enhanced fish passage, reduced sediment in fish habitat, and lower likelihood of catastrophic wildfires). Replacement of pier and dock structures provides a good illustration of the conflict between short-term impacts and long-term benefits (see fig. 16).



**Figure 16: Replacement of Creosote-Treated Wood Pilings with Steel Pilings**



Source: Pentec Environmental.

Left to right: Frame of mitigation equipment being deployed around a new steel piling to be installed; steel piling being installed with mitigation equipment operating to replace creosote-treated wood piling.

Note: Replacing creosote-treated wood pilings with steel pilings has many benefits. Not only does the replacement remove toxic creosote from the water, but steel pilings require no maintenance and, hence, no future disturbance to the ecosystem. However, when a vibratory hammer is used to install the steel pilings, the sound waves can harm fish. To minimize the potential harm, NMFS requests the use of a mitigation method, such as this one, which generates a protective curtain of air bubbles around the installation site to minimize the transport of sound waves. In some cases, NMFS also requests that a diver be hired to observe any fish injuries that may result from the installation. Some

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seaport officials find it difficult to justify the cost of such protective measures; they believe the long-term benefits should offset any immediate harm.

Officials at the Services pointed out that consultation is required for activities that have negative short-term effects even if the activities have long-term beneficial effects.<sup>21</sup> Officials at the Services also said that action agencies are sometimes too quick to discount negative effects or to ascribe benefits to their activities without fully understanding the limitations. A NMFS official provided an example of a project to replace a dam used to divert river water for irrigation. The replacement dam was built, in part, to increase habitat for listed salmon species and reduce the possibility of take of listed species during the frequent maintenance activities that the older dam required. Despite the protective barriers included in the new dam, after its completion, officials found dead fish that had accessed the diversion through an alternate channel and were crushed against the inside of the barrier. A further project review revealed the potential for fish caught in the diversion conduit to be sent falling onto exposed rock. FWS and Forest Service officials told us that many projects that have long-term benefits to listed species result in short-term adverse effects including take that can be authorized through the formal consultation process. Another factor that NMFS officials explained could add to the significance of short-term negative effects is that the Services must consider aggregated impacts of numerous activities in an area when they are evaluating the potential effects of a single activity (see fig. 17).

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<sup>21</sup>See *Pacific Coast Fed'n of Fishermen's Assn's, Inc. v. National Marine Fisheries Service*, 265 F.3d 1028, 1037 (9<sup>th</sup> Cir. 2001).

**Figure 17: Numerous Docks and Piers Line the Shoreline of Lake Washington**



Source: U.S. Army Corps of Engineers.

Note: A NMFS official recognized that some people believe that requested mitigation actions seem excessive for a single project; however, he explained that they are required to assess the aggregated effects of projects in an area. In Lake Washington, there are countless docks and piers that individually may not have a significant effect on species, but when taken together, their effects could be considerable.

In addition, some action agency officials said the Services sometimes request that they conduct studies or do monitoring to develop new information about a species or its habitat. Action agency officials pointed out that the consultation process requires agencies to use the best available information, not develop new information. Some officials believe that this is the Services' way of gathering new information on species because they do not have the resources to conduct their own research. For example, Corps officials told us that for one of their proposed activities they were asked to conduct sophisticated hydrologic monitoring because FWS

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speculated that a proposed Corps activity might result in the transport of contaminants in sediment to salmon habitat. However, the Corps asserted that it provided studies showing that the suspected contaminants were not present in the sediment and, therefore, the monitoring was not needed. Under consultation regulations, the Services can ask that additional studies be conducted, but the action agencies can refuse; in that case, the Services should proceed with issuing their biological opinions using the best available information without the requested studies. The consultation handbook suggests that the Services explain to action agencies that gathering more information may ultimately be in their best interests if the information yielded allows the Services to be less conservative in their biological opinion. Specifically, the handbook states that if significant data gaps exist, the Services can either extend the due date for completing the biological opinion until sufficient information is developed or issue their opinion with the available information, giving the benefit of the doubt to the species.

Finally, some action agency officials expressed concern that the Services are taking the consultation process beyond what is actually called for in the Endangered Species Act. Some action agency officials said that they feel they are forced to compromise their project designs too much in order to avoid receiving an opinion from the Services that their proposed activity may jeopardize a species' continued existence or adversely modify its critical habitat (often simply referred to as "jeopardy"). While action agency officials recognized their responsibilities to conserve threatened and endangered species, some officials believe that, in some cases, the Services are requesting project changes or mitigative actions during the consultation process that are intended to help recover species, not just avoid jeopardy (see fig. 18).

**Figure 18: Caving Streambed along a Railway Posed a Safety Hazard**



Source: Chuck Strum, Interstate Engineering, Inc.

Left to right: Caving railbed posed a safety hazard; restoration effort to provide stability to railbed and habitat.

Note: The project restored the integrity of the railbed. However, in the opinion of the railroad company's consultant, FWS requested extensive fish and wildlife habitat restoration beyond what existed in the current condition and beyond what was necessary to shore up the failing riverbank and avoid jeopardizing species or habitat. While not detectable in the photograph, the railroad company installed extensive plantings of willows in the restored riverbank areas to create a riparian area. FWS officials disagreed that this was excessive because, they said, without the plantings of trees and shrubs, the bank stabilization would be only temporary. FWS officials added that project modifications or mitigation that only protect species or habitat in the short-term do not fulfill the action agencies' responsibilities under the consultation requirements of the Endangered Species Act.

Officials with the Services and action agencies told us there is a negative perception about a FWS or NMFS determination that an agency's proposed activity will jeopardize a species. Therefore, action agency officials said they often feel compelled to modify their activities or implement mitigative actions they do not believe are necessary to avoid jeopardy. Action agency officials asserted that this is the reason that the Services issue so few opinions identifying potential jeopardy to a species each year.

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Interior's Assistant Secretary for Water and Science addressed this issue last year at a Bureau of Reclamation conference by asserting that while Reclamation will implement conservation measures for species when practicable, the agency should not include components in its proposed activities that it believes are not necessary for avoiding negative effects to species. Reclamation reiterated this stance in a policy statement recognizing that this new policy may result in the agency receiving jeopardy opinions in some cases. Reclamation officials told us that it would help if the Services were clearer as to which activities were essential to avoiding harm to a species and its habitat and which would be beneficial to broader recovery efforts.

Officials at the Services told us that, because there have been very few jeopardy opinions issued, they believe the consultation process is working. They recognize that there is a negative perception surrounding the issuance of a jeopardy opinion, and that action agencies typically do quite a bit to avoid getting such an opinion. However, they see the process of working through issues in order to avoid a jeopardy opinion or the need for formal consultation as a success, rather than an example of the Services coercing agencies to modify their activities unnecessarily.

Action agency officials thought the documentation needed for the consultation process was similarly getting out of control. Specifically, they said they were being asked to provide the same level of detail and scientific analysis for activities that were unlikely to affect species as for those that were likely to have negative effects. A major point of contention with regard to documentation was the amount of detail requested by the Services in a biological assessment. Typical disagreements about the information needed for a "complete" biological assessment, according to officials at the Services and action agencies, deal with the scope and design of the activity, its likely effects on species, and the baseline against which to assess those effects. For example, Bureau of Reclamation officials told us that the Services request that they assess the effects of dam operation and maintenance activities against a pre-dam environmental baseline (i.e., against conditions that existed before the dam was built). Reclamation officials said that they disagree with this definition of environmental baseline, asserting that it would be appropriate for construction of a new dam, but not for operation and maintenance of an existing one. Consultation regulations and the consultation handbook discuss the environmental baseline as including the past and present impacts of all federal, state, and private actions in the area of a proposed project so that the factors leading to, and possibly still affecting, the current status of a

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protected species can be understood. Reclamation officials told us that they are in the process of working out their differences with the Services on how effects will be analyzed for operations and maintenance at existing facilities.

Overall, action agency officials believe that the Services often request too much information and that, even though activities with minor impacts may be consulted on informally, informal consultations sometimes entail as much documentation and time as do formal consultations on more harmful activities. For example, Forest Service officials told us that disagreements on the information needed to assess effects has been a primary cause of mistrust with the Services, and Bureau of Reclamation officials said that the Services should more clearly explain what information is lacking and why the additional information is necessary for determining the likely effects of an activity.

According to officials at the Services, despite increased guidance, they still receive many biological assessments with insufficient detail to judge a project's effects, and in those cases the Services may make repeated requests for more detailed information until they are satisfied that the assessment adequately addresses the effects of the proposed activity on the species; this may increase the length of time it takes an action agency to complete the entire consultation process. FWS officials said that the Services would likely request the same level of detail and scientific analysis for projects that are not likely to effect listed species or designated critical habitat as they do for projects that are likely to effect them, because they generally need the same type of information to evaluate the potential effects to species; in this regard, FWS officials noted that they are compelled by the Administrative Procedure Act to articulate a satisfactory basis and explanation for their actions. FWS officials also told us that if an action agency is comfortable with its own determination of "no effects" for a project, the agency would not need to request the Services' concurrence, and accordingly, not need to respond to potential information requests. NMFS officials told us that the online template that the Services are developing for biological assessments should eliminate some of the disagreements about the content and adequacy of the assessments.

Because of these disagreements, action agency officials feel that, in practice, they are investing the same amount of resources for activities that are unlikely to harm species as for activities that are highly likely to harm species. That is, the officials feel that all proposed activities receive a similar level of scrutiny, require a similar amount of documentation, and

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consume a similar amount of time and effort in consultation, regardless of their potential effect. According to a Forest Service biologist with 25 years of experience, today's consultation approach means that the Forest Service has to consult on every activity, no matter how inconsequential. In effect, she said, the current process does not allow for any decisions to be based on the action agency biologists' professional judgments. Some action agency officials told us that, given persistent staffing constraints, this did not seem to be the most effective approach. Service officials noted that they must consult on activities that may affect species regardless of the potential severity of the effects. However, a NMFS official said that the streamlining process includes a risk-based approach to the level of effort devoted to consultations, in that streamlining teams will focus on proposed projects with a higher likelihood of adverse effects.

We identified several reasons for disagreements about the extent of consultation. Officials at the Services and action agencies alike cited the fear of litigation among the most significant concerns with the consultation process that often affects their decisions about whether or not to consult on projects and the level of documentation to complete. The Services have been affected by a number of federal court decisions in Idaho, Montana, Oregon, and Washington involving the consultation process. Past court decisions have sometimes required the Services to re-do analyses because their conclusions did not have adequate support, or required consultation on activities that had not gone through the process. Action agency officials said that this has led the Services to apply the same level of scrutiny to all activities, regardless of the level of risk they pose to listed species. Action agency officials believe that the Services attempt to ensure that all biological assessments are "bulletproof" or so comprehensive that they are impervious to legal challenge. Action agency officials told us that they believe such scrutiny and documentation is not always necessary, and that complying with such requests from the Services adds to the time and cost of consultation.

Conversely, officials at the Services asserted that the outcomes of court decisions have established the need to consult on all activities that may affect species, regardless of whether the effects are negative or positive, and to clearly document how they came to their decisions regarding the activities' effects on species and habitat. Some action agency officials recognized that the outcome of litigation similarly causes them to put more details in their biological assessments than they otherwise would. For example, Bureau of Reclamation officials said that increases in Endangered Species Act related litigation have increased the need for



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improved documentation that is more defensible in court, which might include more details about a project, additional graphics, maps, charts, and increased scientific analyses. Litigation has also resulted in more management, editing, and legal review. Forest Service officials also acknowledged the fear of litigation saying that it is pervasive across the Forest Service, and results in the agency including more details in its own analyses and documentation.

Another factor leading to disagreements is that some officials at the Services and action agencies still do not understand each other's programs or the consultation process, despite efforts to provide training, guidance, and other information. More than one-half of the respondents to our survey said they were concerned that new biologists at the Services do not receive sufficient training in the consultation process; respondents were also concerned that new action agency biologists do not receive sufficient training. Officials at the Services and action agencies agreed that biologists at the Services are sometimes unfamiliar with action agency programs and activities, and that the time required for Service biologists to learn about activities and how they may negatively affect species can lengthen the consultation process. High turnover among biologists at the Services is one factor that contributes to this lack of familiarity with action agency activities. Also, a BLM official said that action agency biologists sometimes do not understand the potential complexity of the consultation process and underestimate the length of time it may take. This official said that training on the consultation process is needed for both new and experienced staff.

Personality problems were also identified among the top concerns for the Services and action agencies and an issue that can result in disagreements between the Services and action agencies about the extent of consultation needed. Officials at the Services and action agencies said that sometimes officials take unyielding positions on consultations, either on behalf of the activity or the listed species, and they waste time arguing about philosophical positions rather than rationally working through project effects. In these instances, the process takes much longer to complete than when participants are able to compromise. In other cases, officials told us that some individuals that are key to the consultation process lack the interpersonal or negotiation skills necessary to resolve conflicts that arise in the process. In some areas, staff were able to overcome philosophical differences because they have been working together for several years and have developed trust. In areas where there is high staff turnover or unyielding personalities, trust has been harder to develop.

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## Nonfederal Parties' Concerns Depended on Their Expectations of the Consultation Process

Nonfederal parties' concerns depended largely on their expectations of the consultation process. Nonfederal parties intent on carrying out an activity were concerned primarily about the cost and time required for the process, although in some cases factors other than consultation added to the cost or time. Environmental advocates, in contrast, were concerned mainly about whether the process effectively protects species. In addition, both applicants and environmental advocates were concerned that the process was not sufficiently transparent.

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## Applicants Were Primarily Concerned about Cost and Time

Applicants are individuals, companies, or other organizations that receive federal authorization or funds to conduct certain activities, and the effects of these activities on protected species must be considered to determine if consultation is necessary. We interviewed 40 applicants including individual landowners, companies, and industry groups who had been through the consultation process for activities such as private dock construction or repair, timber harvesting, and oil and gas or mineral development. Most of these 40 applicants expressed concern about the cost that the consultation process added to their activities. For example, more than half of these applicants hired consultants to prepare the biological assessment for consultation on their activity because, in some cases, the action agencies' workload was too great to prepare an assessment in a timely manner for them. Typically, hiring such consultants added thousands of dollars to the applicants' costs. Now that consultation is conducted as a part of the permitting process, permitting costs have increased to about 33 percent of construction costs for a typical dock, according to a homeowner's representative in Washington. In contrast, before the additional species listings in the late 1990s, the permitting process for such activities averaged about 5 percent of construction costs.

Most applicants also incurred costs associated with modifications to their proposed activities during consultation—modifications which they viewed as costly or unnecessary. For example, a timber company representative in Idaho said that a consultation between FWS and the Forest Service for a timber sale resulted in unnecessary costs after a bald eagle's nest (the bald eagle is a threatened species under the ESA) was discovered in the area of the sale while the company was preparing for harvest. FWS and Forest Service determined that the timber contained in a 1-mile buffer zone around the nest should not be harvested in order to protect the eagle. However, according to the company representative, forgoing that zone would have largely devalued the sale because it included nearly all of the

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high-value timber. After learning about the federal agencies' decision, the company paid over \$6,000 to an outside consultant to review it; the consultant prepared a biological assessment that identified deficiencies in the federal agencies' scientific reasoning behind the decision. Ultimately, FWS and the Forest Service excluded a smaller area of timber, causing the company to forgo a much smaller share of the high-value timber—about 22 percent—from the original sale. However, by the time this decision had been reached, the market value of the high-value timber had dropped substantially.

Most applicants were also concerned about the additional time needed to carry out their activities as a result of the consultation process. For example, an applicant for a U.S. Army Corps of Engineers permit to construct a marina in Washington waited more than 180 days for NMFS to issue its biological opinion—about 45 days longer than the 135 allowed once formal consultation is initiated. Beforehand, the applicant had already spent about 125 days in preconsultation, which included multiple requests from NMFS, spaced weeks or months apart, for additional project information that sometimes duplicated information he had already provided or that appeared unnecessary for initiating consultation. According to the applicant, the lengthy consultation risked delaying the construction for a year because of the limited time window for in-water work, which must be planned around fish presence and cannot take place during severe weather. NMFS officials recognized that final reviews of the draft biological opinion both at NMFS and the Corps took longer than usual, in part, because NMFS was working to standardize the quality of its biological opinions issued by various field offices. NMFS officials maintained, however, that all of the information requested was necessary for consultation and speculated that some information may have duplicated what was sent to state or local permitting agencies to which NMFS was not privy.

As another example, the average time for the Corps to process 19 permits issued in 2002 for building private docks or similar activities on Lake Washington (near Seattle) was about 2 years. This time included the consultation time spent by the Services, as well as the time spent by the action agency to help the permit applicant complete a biological assessment for the consultation and meet other Corps requirements for the permit. Officials from both Services noted that the prolonged permitting process was due, in part, to the consultation workload generated after the late 1990s salmon and bull trout listings, as well as FWS' initial unfamiliarity with the effects of activities on the bull trout—the only

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aquatic species FWS manages in Washington. According to a Lake Washington homeowners' representative, before the additional species listings in the late 1990s, the permitting process for such activities generally took only 2 or 3 months.

Concerns about time and expense that an applicant attributed to the consultation process may sometimes stem from other factors about which the applicant may have been unaware. For example, an applicant seeking road access through a national forest to his private timberland, which he planned to partially harvest, waited 3 years for federal approval. According to the landowner, the timber on his land was devalued by as much as one-third while the permitting process ran its course. He attributed this wait and cost to consultation. Though the permitting process included consultation, the Forest Service biologist involved in the permit said that efforts to comply with the National Environmental Policy Act, rather than consultation, protracted the permitting process. Similarly, Forest Service officials said that, in general, the National Environmental Policy Act is often the limiting factor in delayed fire projects.

Some applicants found the consultation process to be confusing or unclear. According to officials at the Services, applicants—particularly, first-time applicants—often apply for permits “late,” when they are ready to proceed with a project that has not taken listed species into account. In some cases, applicants were unaware of consultation requirements or the time frames involved. For example, a representative from a local government in Oregon, overseeing her agency’s first project to restore fish habitat, first learned of the federal permitting and consultation requirements after receiving state approval for the project. She was concerned about the time needed for permitting and consultation because her agency faced pressure to finish the project before the funding expired and the seasonal work period ended. In this case, the project was completed on time because NMFS and the U.S. Army Corps of Engineers worked hard to complete the permitting and consultation within her time constraints.

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### Environmental Advocates Were Concerned about Whether the Process Protects Species

Environmental advocates that we contacted were primarily concerned that the consultation process, as implemented, does not go far enough to protect listed species. According to these advocates, consultations may not adequately protect species, in part, because of weak oversight by the Services. Advocates said that the Services provide weaker oversight than in the past over proposed actions undergoing consultation for reasons such as understaffing, pressure to speed up the consultation process, the Services’

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focus on collaboration with the action agencies, and political pressure to avoid jeopardy biological opinions. Advocates were also concerned about new regulations that could further reduce oversight. These regulations allow action agencies to self-certify certain activities related to wildfire prevention without consulting with the Services, if certain procedures that involve the Services are followed.

Advocates also suggested that the Services may not be adequately protecting species because of a limited understanding of species' conditions. One environmental advocate said that these limitations impair the Services' ability to predict the effects of proposed activities, including whether they could jeopardize species' continued existence. FWS officials noted that their biological opinions include sections on the status of species in which they review the known information about a species and its biology. Two advocates said that one reason why the Services may not sufficiently understand species' conditions is that action agencies sometimes incorrectly determine that an action will not affect listed species. Since consultation is not required when an action agency makes a "no effects" determination, the Services may never know that the activity occurred and cannot take it into account when reviewing the potential effects of other activities. One advocate expressed concern that the Services and action agencies would be in a poorer position to predict the effects of proposed activities under the new regulations that allow self-certification because they might be unaware of activities permitted by other federal agencies using such certification. For example, one BLM district or national forest might not know the effects of other agencies' activities elsewhere in a species' range, and the combined effects of those activities could be harmful.

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### All Nonfederal Parties Shared Concerns about Transparency

Applicants and environmental advocates expressed concern that the consultation process lacks transparency. The majority of the nonfederal parties wanted a greater role in the consultation process, including more timely information about the action agencies' and the Services' deliberations or an opportunity to provide input. For example, one official from a group representing irrigators in Idaho described his organization's main role in consultations as "pounding on the door of [the Bureau of Reclamation]," on its constituents' behalf, in order to receive timely updates on the agency's deliberations with the Services and to provide input to the process. The representative noted that his constituents have a major financial stake in the outcome of consultations on the bureau's water storage and delivery infrastructure, which provides water for raising crops,

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livestock, or other activities. Past consultations, for example, have obligated Reclamation to increase river flows to benefit listed fish species, which could affect the water available to his constituents.

In addition, representatives from several environmental advocacy groups said that land management decision-making processes, such as consultations, are often closed to them until after final decisions are made, and that the only way they can make their voices heard is through administrative appeals and lawsuits. One environmental group's representative said that outside parties need to resort to requests under the Freedom of Information Act in order to get information about consultations, and that this wastes resources. To help alleviate this, he suggested that the public receive notification when consultation is taking place and be allowed to submit written comments. Officials at the Services pointed out that the Endangered Species Act does not provide for public involvement in the consultation process as it does for many other components of the act. Under Endangered Species Act regulations, certain procedural opportunities—such as the opportunity to submit information during the consultation and to review and comment on the draft biological opinion—are provided only for an applicant seeking federal approval for an activity.

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## Conclusions

The consultation process and many other aspects of the Endangered Species Act remain contentious and controversial after 30 years, and the situation shows no signs of changing. Efforts by the Services and action agencies to improve the process have had some clear benefits—improving interagency relationships and information dissemination about the process, and reducing workload in some cases. Still, frustration and confusion continue. Action agencies believe the Services sometimes go beyond what the act calls for, while the Services argue that they are simply fulfilling their legal obligations to protect species within the constraints of limited resources. Both the Services and action agencies recognize that fear of litigation is affecting the process. Clearly, there is no boilerplate approach to handling consultations. The nature of different species' biologies, dynamic ecosystems, and the multitude of activities performed and their various levels of effects, makes the consultation process a difficult task that is dependent on understanding specific conditions and exercising a healthy dose of best professional judgment. Hence, even with a perfect process, there will always be disagreements.

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However, we believe that given the importance of the consultation process on species' protection and federal and nonfederal activities, the Services and action agencies should do more to air persistent disagreements, discuss their respective positions openly, and identify additional steps that are needed to enhance a consistent understanding of what is required under the act. Improved information on the consultation process itself, including the level of effort devoted to preconsultation, is an important part of this effort as there are continual complaints about the lengthiness of and burden posed by the process. In addition, given constant concerns about the sufficiency of resources, it is imperative that the Services and action agencies take steps to ensure that they are using resources effectively, particularly by gathering more complete and reliable information about the level of effort devoted to the process and evaluating the efficacy of steps taken to improve the process.

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## Recommendations for Executive Action

We are making four recommendations to improve implementation of the Endangered Species Act consultation process.

- We recommend that the Secretary of the Interior and the Under Secretary of Commerce for Oceans and Atmosphere direct the Directors of the Fish and Wildlife Service and the National Marine Fisheries Service to work together with the action agencies we reviewed (and others the Services may deem appropriate) to determine how best to capture the level of effort devoted to preconsultation in their data systems and ensure that such information is gathered, maintained, and used to manage the process effectively.
- We further recommend that the Secretaries of the Interior and Defense, the Under Secretary of Commerce for Oceans and Atmosphere, and the Chief of the Forest Service, work together to
  - resolve disagreements about when consultation is needed and how detailed an analysis is necessary given a proposed activity's likely effects on species or habitat, and ensure that their agreements are disseminated quickly to all staff involved in consultations as well as to the public;
  - refine guidance, as needed, on the type and specificity of documentation required in consultations; and

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- evaluate the efficiency and effectiveness of efforts to improve the consultation process, such as programmatic consultations and streamlining, and use the evaluation results as a basis for future management actions.

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## Agency Comments and Our Evaluation

We provided copies of our draft report to the Departments of the Interior and Defense, NOAA, and the Forest Service. The Departments of the Interior and the Army, NOAA, and the Forest Service provided official written comments. (See appendixes II through V, respectively, for the full text of the comments received from these agencies and our responses.)

The departments, NOAA, and the Forest Service generally concurred with our findings. The Army commented that the report did a good job of identifying the multiple problems that contribute to delays and often to increased costs at U.S. Army Corps civil works and regulatory projects as preconsultation and informal and formal consultation proceed. The Forest Service commented that the report accurately describes many of the topics associated with interagency cooperation under the consultation process—with both the process itself and with agency use and implementation of it. The Department of the Interior, NOAA, and the Forest Service commented that the report should better reflect the benefits of preconsultation and consultation. We agree and have incorporated additional information on these issues in the report.

Concerning our recommendations, the departments, NOAA, and the Forest Service concurred with our recommendation to capture the level of effort devoted to preconsultation, although the Forest Service, NOAA, and the Department of the Interior noted concerns about finding an adequate but not overly burdensome process to do so. We discussed this difficulty in our draft report and recognize that the data management solution might not involve a precise tracking of individual official's time spent on specific consultations but instead might consist of higher-level indicators of the effort devoted to a consultation. Our recommendation is intended to provide the agencies with flexibility in finding an acceptable solution. The Army suggested that we clarify and strengthen this recommendation to ensure that the Services and the action agencies we reviewed are equal partners in efforts to improve data management related to preconsultation. We have modified this recommendation to ensure that our intent that all agencies be involved in identifying a data management solution is clear.



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The Departments of the Army and the Interior and NOAA agreed with our second recommendation, which directs the departments, NOAA, and the Forest Service to work together to resolve disagreements about when consultation is needed and how detailed an analysis is sufficient, but the Forest Service did not. The Forest Service commented that this recommendation was unnecessary because regulations set forth the requirements for consultation. We are retaining the recommendation because, while the criteria for consultation are provided in the regulations, the disagreements we found during our audit work indicate that clarification beyond these regulations is necessary. While the Army agreed with this recommendation, it suggested that the recommendation should be more specific as to how to resolve disagreements. We have not modified this recommendation because we do not want to prescribe “interagency procedures,” as suggested by the Army; we believe the departments, NOAA, and the Forest Service should have flexibility in determining what method is most effective, including proposing regulatory or legislative changes if needed.

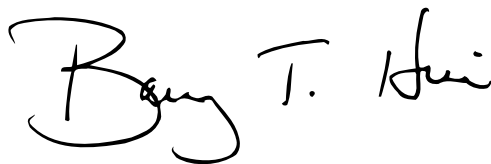
All the agencies agreed with our recommendations to refine guidance and to evaluate the efficiency and effectiveness of improvements made to the consultation process. The Department of the Interior, NOAA, and the Forest Service also provided other comments and technical clarifications on the draft report. We have made changes where appropriate.

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As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 5 days from the report date. At that time, we will send copies of this report to the Secretaries of Defense and the Interior, the Under Secretary of Commerce for Oceans and Atmosphere, and the Chief of the Forest Service, and to other interested parties. We also will make copies available to others upon

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request. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>. If you or your staff have any questions, please call me at (202) 512-3841. Key contributors to this report are listed in appendix VI.

A handwritten signature in black ink that reads "Barry T. Hill". The signature is written in a cursive style with a large, looped initial "B".

Barry T. Hill  
Director, Natural Resources  
and Environment

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# Objectives, Scope, and Methodology

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The Chairman, Subcommittee on Fisheries, Wildlife, and Water, Senate Committee on Environment and Public Works, and Senator Baucus, asked us to (1) assess the federal data available on consultations completed in Idaho, Montana, Oregon, and Washington, including data on the number completed and their timeliness, for fiscal years 1998 through 2003; (2) identify steps taken by the Fish and Wildlife Service, the National Marine Fisheries Service, and other federal agencies to improve the consultation process; and (3) discuss concerns of federal officials in the Services, officials with other federal agencies, and nonfederal parties about the process. As agreed with the Chairman, we limited our evaluation to four action agencies—the U.S. Army Corps of Engineers, Interior’s Bureau of Land Management and Bureau of Reclamation, and Agriculture’s Forest Service—for consultations conducted in Idaho, Montana, Oregon, and Washington. To assess the data available on consultations, we obtained data on the number of Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) consultations with the four action agencies for fiscal years 2001 through 2003. These data are being used primarily to provide context on consultations in Idaho, Montana, Oregon, and Washington.

We also requested data on consultation timeliness from NMFS regarding consultations with the U.S. Army Corps of Engineers, Interior’s Bureau of Land Management and Bureau of Reclamation, and Agriculture’s Forest Service in Idaho, Oregon, and Washington for fiscal years 1999 through 2003. (NMFS had no consultations in Montana with any of the four action agencies included in our review.) Timeliness data on consultations for this entire period were not readily available from NMFS. According to officials knowledgeable about these data, NMFS did not maintain a central regional database for consultations data until January 2001. Timeliness data on consultations that occurred before that date could be obtained from individual field offices; however, these data would not be complete and would have to be supplemented with data from the administrative record, according to officials knowledgeable about the data. As such, we used only the data from the NMFS regional system for the 3-year fiscal period 2001 through 2003.<sup>1</sup>

To assess the reliability of the timeliness data maintained by NMFS, we attempted to compare information contained in the administrative record

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<sup>1</sup>The NMFS data, however, exclude the first quarter of fiscal year 2001 because the NMFS regional database was implemented in January 2001.

with that in the database. We did so by asking biologists to discuss with us the administrative files for a few consultations they had conducted. However, most of the consultations chosen by the NMFS biologists were conducted in 1999 before the regional database was established. As such, we took further steps to ascertain the reliability of the timeliness data maintained in NMFS's regional consultations database. We interviewed an official knowledgeable about this database to determine whether timeliness data in this system are reasonably complete and accurate. This official had reasonable confidence in the data elements we analyzed. We also performed data reliability tests on the timeliness elements of this database to find missing data, transposed dates, or duplicate records. We allowed NMFS officials the opportunity to correct data errors and insert missing data. We then calculated error rates for the databases we examined; the error rates for fiscal years 2001, 2002, and 2003 were 21, 19, and 10 percent, respectively. We determined that the timeliness data on consultations maintained in the NMFS regional consultations database were sufficiently reliable for the purposes of this report, as long as the timeliness data are presented in the context of these error rates. NMFS officials said that these data should be sufficient to serve as indicators of the number and timeliness of consultations.

We also requested data on consultation timeliness from FWS regarding consultations with the U.S. Army Corps of Engineers, Interior's Bureau of Land Management and Bureau of Reclamation, and Agriculture's Forest Service in Idaho, Montana, Oregon, and Washington for fiscal years 1999 through 2003. Such timeliness data on consultations were not readily available from FWS. During the time of our review, FWS did not maintain a central regional database for consultations data; each of the six field offices in Idaho, Montana, Oregon, and Washington had developed and maintained separate systems for storing consultation data. We interviewed officials knowledgeable about these databases and examined the associated data dictionary. During the time of our review, five of the six field offices in Idaho, Montana, Oregon, and Washington did not consistently record a key data point required to calculate timeliness: the date a consultation was initiated. They did record the date a consultation package was received in their office; however, according to a FWS official, the interval between those two dates can sometimes be significant. As such, the systems that did not record the date a consultation was initiated would yield timeliness data that consistently overestimated the time a consultation took to complete. Because these data were not reliable enough for our purposes, we did not use those systems for our analysis. The only system that did record the date a consultation was initiated was,

at the time of our review, the one maintained by the FWS office in Portland, Oregon.<sup>2</sup> Accordingly, we used this system to analyze timeliness for consultations conducted by that FWS office with the U.S. Army Corps of Engineers, Interior's Bureau of Land Management and Bureau of Reclamation, and Agriculture's Forest Service in Idaho, Oregon, and Washington (the vast majority of the Portland office's consultations were in Oregon). From this system, we used data for fiscal years 2001 through 2003 to ensure consistency with our analysis of NMFS data from the same period.

To assess the reliability of the timeliness data in the FWS Portland, Oregon, office's database, we similarly compared information contained in the administrative record with that contained in the database, to a limited extent. We examined consultation records selected by biologists and found that, in some instances, information in the administrative record was not in the database. Additionally, some information was neither in the administrative record nor in the database and had to be relayed to us by the biologist who worked on the consultation. We determined that the best information on a specific consultation was the administrative record, coupled with the recollections of the biologist who worked on the consultation. However, asking the FWS to provide us with copies of the administrative file for numerous records and access to each biologist who worked on those consultations seemed unduly burdensome. Accordingly, we took further steps to ascertain the accuracy and completeness of the timeliness data on consultations maintained in the Portland office's database. We interviewed an official knowledgeable about this database to determine whether the timeliness data in this system are reasonably complete and accurate. This official had reasonable confidence in the data elements we analyzed. We also performed data reliability tests on the timeliness elements of this database to find missing data, transposed dates, or duplicate records. We allowed FWS officials the opportunity to correct data errors and insert missing data. We then calculated error rates for the databases we examined; the error rates for fiscal years 2001, 2002, and 2003 were 0, 6, and 14 percent, respectively. We determined that the timeliness data on consultations maintained in the FWS Portland field office consultation database were sufficiently reliable for the purposes of this

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<sup>2</sup>In March 2003, FWS implemented a three-state database for Idaho, Oregon, and Washington, but we did not use it because it contained data for only the second half of fiscal year 2003.

report, as long as the timeliness data are presented in the context of these error rates.

To identify improvements to and concerns about the consultation process in the four states, we interviewed officials of both Services and the four action agencies: the U.S. Army Corps of Engineers, the Bureau of Land Management, the Bureau of Reclamation, and the Forest Service. We administered—via telephone or in person—a comprehensive survey to a nonprobability sample of 66 officials of the Services and the four action agencies.<sup>3</sup> The practical difficulties of conducting any survey may introduce other types of errors, commonly referred to as nonsampling errors. For example, differences in how a particular question is interpreted, the sources of information available to respondents, or the types of people who do not respond can introduce unwanted variability into the survey results. We included steps in both the data collection and data analysis stages for the purpose of minimizing such nonsampling errors. We pre-tested this survey and, based on the results and comments received during pre-testing, made appropriate revisions. To help ensure that questions raised by the respondents were addressed similarly by each interviewer (i.e., to address inter-rater reliability), we included all of the primary interviewers in the pre-tests, and often more than one interviewer participated in administering the surveys.

To ensure appropriate survey coverage, we selected a variety of Service and agency field offices to survey based on geographic location, workload, and collocation with other offices. At these locations we obtained the opinions of officials representing different points of view within the consultation process, including fisheries biologists, wildlife biologists, program managers, and office managers. These officials included Service biologists responsible for working with the four action agencies, and action agency biologists responsible for conducting consultations in these locations, including action agency officials responsible for the agencies' various primary programs—including recreation, timber, and other programs. In cases where numerous potential interviewees met our selection criteria, we selected among them randomly. The sample of agency officials interviewed was not intended to be representative of all the

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<sup>3</sup>Results from nonprobability samples cannot be used to make inferences about a population. This is because, in a nonprobability sample, some elements of the population being studied have no chance or an unknown chance of being selected as part of the sample.

officials involved in the consultation process in the four states. In total, we surveyed 40 biologists and 26 program officials.

Through our survey we gathered officials' perceptions about consultations, based on their experience with them since the late 1990s. The survey included questions about what works well in the consultation process, whether the process has improved or worsened since the late 1990s, what concerns people have about the process, and what improvements, if any, have been made to the process. To identify very important concerns, we asked respondents to identify, from a list of concerns, any that they considered to be "very important," as well as their other concerns that did not appear in the list.

In addition, we conducted open-ended interviews with 143 officials, whom we selected because of their geographic locations or their roles in consultation. We interviewed officials from the following locations:

- FWS' headquarters in Washington, D.C.; regional office in Portland, Oregon; California-Nevada operations office in Sacramento, California; and field offices in Boise and Chubbuck, Idaho; Helena, Montana; Klamath Falls and Portland, Oregon; and Lacey, Spokane, and Wenatchee, Washington;
- NMFS' headquarters in Washington, D.C.; representatives from the Northwest Regional office in Seattle, Washington, and Portland, Oregon; and field offices in Boise and Salmon, Idaho; and Ellensburg and Lacey, Washington;
- the U.S. Army Corps of Engineers' Northwest Division office in Portland, Oregon; regulatory office in Helena, Montana; and district offices in Portland, Oregon; and Seattle and Walla Walla, Washington;
- the Bureau of Land Management's headquarters in Washington, D.C.; area office in Billings, Montana; and field offices in Boise, Challis, Coeur D'Alene, Cottonwood, Pocatello, and Salmon, Idaho; Billings and Missoula, Montana; Coos Bay, and Klamath Falls, Oregon; and Spokane and Wenatchee, Washington;
- the Bureau of Reclamation's headquarters in Lakewood, Colorado; Office of Policy in Washington, D.C.; Pacific Northwest regional office in Boise, Idaho; Montana area office in Billings, Montana (Great Plains region); and Lower Columbia area office in Portland, Oregon; and

- the Forest Service’s headquarters in Washington, D.C.; regional offices in Missoula, Montana, and Portland, Oregon; the ranger district in Leavenworth, Washington; district offices in Lost River and Challis, Idaho; the Salmon-Challis National Forest, in Salmon, Idaho; the Gallatin National Forest in Bozeman, Montana; the Lolo National Forest in Missoula, Montana; the Rogue River and Siskiyou National Forests in Medford, Oregon; the Gifford Pinchot National Forest in Vancouver, Washington; and the Olympic National Forest in Olympia, Washington.

We also interviewed 44 nonfederal parties, including applicants—nonfederal parties seeking federal authorization or funds to conduct an activity subject to consultation—and representatives of environmental advocacy groups. We identified these interviewees either through a referral from a Service or action agency official or through our knowledge of their involvement and interest in consultations. The nonfederal interviewees included representatives of

- port authorities;
- local governments;
- irrigation districts;
- private industry, including logging, ranching, and oil and gas exploration;
- environmental groups; and
- homeowners.

From these parties we solicited information on improvements made to the consultation process, concerns about the process, and suggestions for further improvement.

We performed our work from November 2002 through December 2003 in accordance with generally accepted government auditing standards.



# Comments from the Department of the Interior

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



United States Department of the Interior

OFFICE OF THE ASSISTANT SECRETARY  
POLICY, MANAGEMENT AND BUDGET  
Washington, DC 20240



FEB 27 2004

Mr. Barry T. Hill  
Director, Natural Resources and Environment  
U.S. General Accounting Office  
441 G Street, N.W.  
Washington, D.C. 20548

Dear Mr. Hill:

Thank you for providing the Department of the Interior the opportunity to review and comment on the draft U.S. General Accounting Office report entitled, "*Endangered Species: Federal Agencies Have Worked to Improve the Consultation Process, but More Management Attention is Needed*," GAO-04-93, dated January 20, 2004. In general, we agree with the findings and most of the recommendations in the report, however, we believe that the report would benefit from an acknowledgment of some of the benefits derived from section 7 consultation.

The enclosure provides comments from the U.S. Fish and Wildlife Service, Bureau of Reclamation, and Bureau of Land Management. We hope these comments will assist you in preparing the final report.

Sincerely,

P. Lynn Scarlett  
Assistant Secretary  
Policy, Management and Budget

Enclosures

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Enclosure

U.S. General Accounting Office Draft Report  
*Endangered Species: Federal Agencies Have Worked to Improve the Consultation Process,  
but More Management Attention is Needed*  
GAO-04-93

U.S. Fish and Wildlife Service

GENERAL COMMENTS

Change "act" to "Act" throughout the report when referring to the Endangered Species Act.

See comment 1.

It has recently come to our attention that the figures used by GAO to determine the timeliness of formal section 7 consultations completed by the Portland Fish and Wildlife Office were incorrect. Use of the proper figures indicates that the Service met established timelines 86 percent of the time rather than the 68 percent of the time as identified in the draft report. Please make the appropriate corrections throughout the report.

See comment 2.

We believe that the report would benefit from an acknowledgment of the benefits that are often derived from section 7 consultation rather than simply stressing the costs. For example, while in some circumstances significant time may be expended in section 7 consultation, if the consultation process results in projects being carried out in a manner that better maintains the integrity of the ecosystems of concern, this may provide added flexibility for action agencies to implement their future activities. In these situations, relatively minor investments of time can result in long-term benefits that compound over time as future actions that may otherwise run into environmental roadblocks can be implemented because proper planning was employed.

See comment 3.

Similarly, the report seems to suggest that the only important factor in evaluating the efficiency and effectiveness of section 7 consultation is its timeliness. Although the Service strives to complete all consultations within established timeframes, there are many instances when doing so is not in the best interest of the action agency, the applicant, or listed species being affected by the proposed action. One example is a situation where a critical study will soon be completed that allows for a more precise consideration of where and when the incidental take of listed species is likely to occur. By waiting for the results of this study, we can more accurately represent those effects and more effectively develop measures to minimize the impacts of the take on the species. This can often result in better maintaining future flexibility for action agencies and applicants. We recommend that the report place greater emphasis on the fact that there may be a number of valid reasons for a consultation to exceed established timeframes, and that such delays may occur at the request of the action agency.

The report should also acknowledge that: (1) the implementing regulations for section 7 of the ESA provide for extensions when additional data would provide a better information base from which to formulate a biological opinion; and (2) timely consultations are very dependent on the quality of information received from the Federal action agency.

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See comment 4.

Throughout the report, references are made to 'pre-consultation' and attempts are made to bundle these activities into the timeframes measuring consultation while pointing out that the Services do not have an effective mechanism to measure this time. It should be noted that the pre-consultation period generally precedes finalization of the proposed action and represents the period in which modifications to the action can be made based on technical assistance from the Services. On that basis, it is premature to include this period as part of the statutory consultation process since the Federal action agency has not completely defined its action, which ultimately may not even require consultation. In addition, it is important to recognize that, during this time period, action agencies typically develop information that is applicable for processes other than ESA section 7 consultation (e.g., the National Environmental Policy Act process, the Federal Land Policy And Management Act process, etc.). Even if it were determined to be useful to track such information, it is not typically appropriate to attribute this entire time period solely to the section 7 pre-consultation process. In addition, during the pre-consultation process, work on the action subject to section 7 consultation may be sporadic, that is, long periods of weeks, months, or even years may pass without significant work being completed on the proposed action. For these reasons, we do not believe that the report accurately portrays the pre-consultation process.

See comment 5.

Regarding the recommendations, the report and its recommendations focus on the timeliness of the consultation as a measure of the efficiency of the section 7 consultation process. However, timeliness is not necessarily the only or the best measure of efficiency. The effectiveness of the results of consultation in ensuring that Federal activities are implemented within the context of species conservation is also important. Furthermore, the Service has examples showing that when action agencies design their activities with this context in mind, the timeliness of consultations also is improved. To this end the Service recommends that the report contain a recommendation for the Services and action agencies to make better use of section 7(a)(1) of the ESA to improve both the efficiency and the effectiveness of the 7(a)(2) consultation process.

**SPECIFIC COMMENTS**

Page 1, second paragraph, second sentence: Please add "designated" before "critical habitat."

Page 1, second paragraph, third sentence: Please add "or similar document" after "... an agency submits a biological assessment" to better reflect the flexibility of the section 7 process.

Results in Brief

Page 3, second paragraph, third sentence: We recommend adding the following parenthetical to the end of this sentence - "(often referred to as "program-level" or "programmatic" consultation)."

Page 4, first full paragraph, third to last sentence: Please add "Administrative Procedure Act," before "Endangered Species Act." Under the APA, agencies must articulate a satisfactory basis and explanation for their actions including a rational connection between the facts found and the choices made. For additional information on this subject, please find the enclosed 1999 guidance provided by the United States Department of Justice.

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Page 4, first full paragraph, second to last sentence: Please replace "... for their decisions" at the end of this sentence with "supporting their decisions."

Background

Page 6, first full paragraph, second sentence: Please modify this sentence to read "Consultation can be resolved using the informal process when the agency has determined that an activity may affect, but is unlikely to adversely affect ..."

Page 6, last paragraph: It should be recognized that to a great extent the rarity of jeopardy opinions can be attributed to the collaborative work accomplished in pre-consultation.

Page 6, last paragraph, first sentence: Please add "or similar document" to the end of this sentence.

Page 6, last paragraph, second sentence: Please change "... whether the activity could jeopardize ..." to "... whether the activity is likely to jeopardize ..." and add "designated" before "critical habitat."

Completeness of Data Section

Page 11, first paragraph, last sentence: It is not appropriate to attribute this entire time to the effects of section 7 pre-consultation.

Page 12, last paragraph: Often delays in completion of informal consultations result from mutual agreements between the Services and action agencies. Such agreements are typically related to the action agency's work schedule. For example, an action agency may request that the Services delay completion of informal consultation on a group of actions that they do not anticipate being able to implement for several months due to the availability of appropriate staff in favor of completion of consultation on other projects that they anticipate being able to implement fairly soon. While it is true that the Service's databases often do not track such information, and perhaps these databases should track this information, it should be pointed out that at least a portion of these delays are the result of mutual agreement. While this information is presented a couple of pages later, by having it separated from the subject paragraph, the relevance of this point is lost.

Page 15, Available Data subsection: Please see our earlier comments regarding the amount and type of work that occurs during the pre-consultation period and the appropriateness of attributing this time delay to the ESA. While much of this information is presented in the last paragraph of this subsection, it would be more effective if this information were better integrated into the first paragraph of this subsection.

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Improvement Efforts Section

Page 16, last paragraph: The report fails to address staffing levels required to implement “Level 1 streamlining.” Please note in the report that a commitment to streamlining generally requires a greater commitment of staff resources.

Page 17, last sentence: Please change “accommodating” to “fulfilling.” In addition, we recommend that the information provided in this paragraph be presented within the context that timely consultations are very dependent on the quality of the information the Services receive from the action agency.

Page 19, Figure 6, Diamond-shaped box: The question listed in this box is not appropriate. A more appropriate question would be “Has the action agency provided sufficient information to fulfill the initiation requirements of 50 CFR 402.14(c)?”

Page 21, last paragraph: The programmatic consultation process described in this paragraph has been determined in a series of district and Ninth Circuit court rulings to be invalid because it fails to provide for project-specific review and consultation. As a result, the Service has modified this consultation process to be consistent with the process described in the preceding paragraph of the report. We recommend that the paragraph be omitted.

Page 23, second paragraph: We recommend replacing this paragraph with the following text: “Third, the Services and action agencies have taken advantage of the Internet and internal agency web pages to disseminate information on the consultation process and on specific consultations. The Services, the Bureau of Land Management, and the Forest Service have an interagency web site that links to the Endangered Species Act, its regulations, and key guidance documents. Both Services have Intranet and internal web sites with agency guidance. NMFS has developed an on-line Biological Assessment template and is working with the FWS to standardize this template for both agencies. Both NMFS and the FWS have implemented searchable on-line consultation tracking systems so that action agencies (e.g., the Army Corps of Engineers) and others can identify the status of any consultation. Once a user has located a specific consultation in either tracking system they can easily link to information on that consultation provided by the other Service and, for example, with any Corps permit associated with the consultation. NMFS currently posts final biological opinions on their web site and is now working to link those documents with their consultation tracking system. The FWS has implemented a procedure for collecting all final biological opinions in digital format and is exploring the feasibility of posting them on their web page and linking them to their consultation tracking system.”

Page 26, last paragraph: The Service has found that by engaging action agencies early during either pre-consultation or section 7(a)(1) program reviews, action agencies often develop a better understanding of the species’ conservation needs and how their actions may affect them. This commonly leads to project designs that better incorporate species conservation. Because the bulk of the time in consultation is usually spent working with action agencies to determine how their proposed actions will affect the conservation needs of the species, actions that come to the Service with these factors already addressed typically require far less effort in consultation.

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See comment 6.

Pages 26 - 30: The graphs on these pages present a lot of information that is not discussed. While the report discusses consultations that exceed established timeframes, these graphs present data showing that many of the Services' consultations are conducted well ahead of established timeframes. To present a fair and accurate picture that may better assist in improving the section 7 consultation process, the same consideration should be given to consultations completed early as to consultations completed late.

Page 31: Reducing the total time spent in section 7 consultation is not the only goal of "streamlining." An additional goal is to provide more timely service to action agencies so their consultations are completed when they are ready to implement their actions. Thus, if the total amount of time spent completing consultation has not been shortened, but if by engaging in pre-consultation the work is completed earlier, i.e., when the action agency is ready to implement their action, then the Service, as well as the action agency, typically consider this to be a success.

Page 32, first full paragraph, last two sentences: We agree with the assessment of vulnerability presented here and it is consistent with the guidance received from the Department of Justice. For this reason, the Service is recommending that all programmatic consultations include provisions for site-specific (or project-specific) analysis. Thus, although actions covered by programmatic consultations may be vulnerable to legal challenge if they do not have a site-specific analysis, the report should note that programmatic consultations can be structured to reduce or eliminate this vulnerability.

Federal Concerns Section

Page 33, top paragraph, first full sentence: The Services do not have the authority to "require" consultation. Action agencies determine for themselves when consultation is "really necessary." This sentence would be more appropriate if "require consultation" were replaced by "recommend consultation."

Page 36, first full paragraph, last two sentences: The Service very much respects the professional expertise housed in many action agencies; however, this expertise, the information available, and the perspective of action agencies typically differ from the Services. While action agencies typically focus on the conservation of the species on their lands (or in the case of a permitting agency such as the Army Corps, on their project sites), the Service is charged with the responsibility of addressing the conservation of the species throughout its range.

Page 36, last paragraph, second sentence: This sentence misrepresents the consultation handbook. Please add "informal" in front of "... consultation should be conducted on ..." and delete the word "negligible" from this sentence (see page 2-3 of the consultation handbook). Also, please note that informal consultation is the process used to determine whether effects are discountable, insignificant, or completely beneficial.

Page 38, first sentence: In the *Pacific Coast Federation of Fisherman's Association v. National Marine Fisheries Service* court ruling cited in footnote 15 of the report, the Court found that the Services must evaluate "negative short-term effects." We recommend the final report clearly convey that all discretionary Federal actions that are likely to adversely affect (in the short or

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long-term) listed species or critical habitat must comply with section 7(a)(2) of the Endangered Species Act through the formal consultation process. When completing this analysis, the Service also considers the long-term benefits of the action; however, one must recognize the importance of ensuring that the species survives the short-term negative effects and persists within the action area so it will be present to reap the long-term benefits of the proposed action. Action agencies do not always consider such factors. In addition, without access to range-wide information regarding the status of the species, it may not be possible to accurately evaluate the short-term negative effects. This further points to the distinctions between the roles of the action agencies and the Services in the consultation process. Finally, we also recommend that the report acknowledge that many actions with long-term benefits to listed species result in short-term adverse effects that involve incidental take of these species, which is authorized through the formal consultation process.

Page 39, first sentence: The Service does not require additional research to be conducted during the section 7 consultation process. While additional studies or monitoring are sometimes recommended when the information presented by the action agency is insufficient to ensure that the action agency can fulfill their 7(a)(2) responsibilities, such work is not required by the Service. However, failure to provide sufficient information to adequately characterize the anticipated effects of the proposed action may cause the Service to rely on assumptions that increase the likelihood of a jeopardy or adverse modification determination; therefore, action agencies may, at times, consider the Service's recommendations to be requirements.

Page 39, second paragraph, third sentence: Section 7 does not use the practicability standard as does section 10 and the Service has been very clear on the point that section 7 is not to be used as a tool to leverage species' recovery. Regarding Figure 18, without the plantings of shrubs and trees described in the text of this figure, the bank stabilization achieved by the project would only be temporary. Solutions that avoid jeopardizing the continued existence of a listed species only in the short-term do not fulfill action agencies' responsibilities under section 7(a)(2).

Page 41, first paragraph, last sentence: The Service strongly encourages this approach as it appears to meet the intent of the statute, which contains the title of "Interagency Cooperation" for section 7.

Page 41, second paragraph, second sentence: Action agencies determine for themselves the level of documentation needed to support a conclusion that a proposed action is not likely to affect listed species. The Service typically only requests information supporting such determinations if the action agency requests the Service's concurrence on their determination (which is not required by statute or regulation). If asked for its professional opinion regarding the action agency's determination, the Service is very likely to request the same level of detail and scientific analysis as it does for actions that are likely to have negative effects, because this is needed to evaluate the potential for a proposed action to affect listed species. Please note that if an action agency is comfortable with their "no-effect" determination, they do not need to seek the concurrence of the Service.

Page 41, second paragraph, fifth sentence to the end of the paragraph: In the past there has been confusion regarding how to evaluate and use the environmental baseline for ongoing actions

See comment 7.

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such as dam maintenance. Given the level of detail provided in this example, we would agree with the characterization of the situation. The Service has recently worked to ensure that all participants understand that during the effects analysis it is not appropriate to go back in time and set the baseline at the species condition prior to dam construction.

Page 42, first full paragraph: This paragraph provides a good description of the tensions that can exist in the section 7(a)(2) process. That is, while action agencies are free to utilize their professional judgment, they typically seek the Service's opinion through some form of consultation. Once consultation is entered into, if the agency's professional judgment is appropriately supported and documented, then the Service's job is relatively simple; however, such support and documentation often is not present. To some extent, this issue may be addressed through better communication between the Service and action agencies. To this end, the Services have been developing a training course to assist action agencies in the development of information needed to support section 7 consultation.

Page 43, first paragraph, last sentence: It appears that "Service" in this sentence is referring to the Forest Service. If so, we recommend that this be made clear.

NonFederal Parties' Concerns Section

Page 44, last paragraph: Please see our comments regarding Page 4, last paragraph.

Page 45, first paragraph: We believe that this paragraph highlights the advantages that can sometimes be achieved for the action agency from obtaining additional information.

Recommendations for Executive Action

1. We recommend that the Secretary of the Interior and the Undersecretary of Commerce for Oceans and Atmosphere direct the Directors of the Fish and Wildlife Service and the National Marine Fisheries Service, in collaboration with the action agencies we reviewed (and others the Services may deem appropriate), to determine how best to capture the level of effort devoted to pre-consultation in their data systems and ensure that such information is gathered, maintained, and used to manage the process effectively.

Response: Concur. While discussions can be initiated with the action agencies regarding steps to take to implement this recommendation, we foresee considerable difficulty associated with tracking this time. For example, while pre-consultation may continue over many months or even years, only small portions of this time may be attributed to the ESA pre-consultation process. This may require tracking of individual hours or even portions of hours over long periods of time. In addition, much of the information used in ESA consultation is actually developed for other processes such as NEPA, FLPMA, etc. We foresee difficulty determining how to appropriately apportion the work among the action agencies' various responsibilities.

Title of Responsible Official: Assistant Director, Endangered Species, Fish and Wildlife Service

Target Date: January 2006.

See comment 8.



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**Appendix II**  
**Comments from the Department of the**  
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2. We recommend that the Secretaries of the Interior and Defense, the Undersecretary of Commerce for Oceans and Atmosphere, and the Director of the Forest Service, work together to resolve disagreements about when consultation is needed and how detailed an analysis is required given a proposed activity's likely effects on species or habitat. The Secretaries and the Director should ensure that their agreements are disseminated quickly to all staff involved in consultations as well as the public.

Response: Concur. We will work with the action agencies to come to agreement regarding when consultation is needed and the level of detail needed in analyses to support section 7 determinations. Once agreement is achieved, we will quickly distribute the results as appropriate.

Title of Responsible Official: Assistant Director, Endangered Species

Target Date: March 2005

3. We recommend that the Secretaries of the Interior and Defense, the Undersecretary of Commerce for Oceans and Atmosphere, and the Director of the Forest Service, work together to refine guidance, as needed, on the type and specificity of documentation required in a consultation.

Response: Concur. We will engage the action agencies in an effort to refine guidance regarding the type and specificity of documentation needed for their situations.

Title of Responsible Official: Assistant Director, Endangered Species

Target Date: November 2005

4. We recommend that the Secretaries of the Interior and Defense, the Undersecretary of Commerce for Oceans and Atmosphere, and the Director of the Forest Service, work together to evaluate the efficiency and effectiveness of improvements made to the consultation process, such as programmatic and streamlining, and use the evaluation results as a basis for future management actions.

Response: Concur. We will engage the above entities in an effort to determine how best to accomplish this task.

Title of Responsible Official: Assistant Director, Endangered Species

Target Date: June 2005.

Bureau of Reclamation

Overall, the report accurately describes the concerns and problems agencies are encountering with Endangered Species Act (ESA) Section 7 consultations. However, there are several issues

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and several specific statements in the report regarding the ESA process that need to be clarified or corrected.

GENERAL COMMENTS

GAO was asked to examine the consultation process—including process concerns and steps taken by Federal agencies to improve the process. The report generally focuses on steps taken to improve the *conduct* of the process (e.g., efficiency, timeliness, transparency). It is not clear from reading the report whether any Federal agencies are concerned with, or are taking steps to improve, the *effectiveness* of the process (i.e., attainment of fundamental, on-the-ground objectives for endangered species through Section 7 consultations). The report would be strengthened by speaking first to the observed effectiveness of the process, and second to process efficiency. [We suspect that GAO will find that there is even less data available to judge process effectiveness than is available to judge process efficiency. Nonetheless, it seems important for the report to establish whether or not the process is reasonably effective - even if inefficient - in achieving its underlying purpose. If it is reasonably effective, then the report's emphasis on efficiency is clearly justified. If the process is not reasonably effective, or if its effectiveness cannot be determined, then perhaps the report should reach conclusions and provide recommendations in both areas (effectiveness and conduct).]

For example, on page 4, first paragraph, last sentence, the report states that, "Given resource constraints, it is imperative that resources invested in process changes be justified by gains in process efficiency." We would suggest that process changes should be equally justifiable by gains in process effectiveness.

The report indicates in several places that GAO asked the Services for data regarding consultations completed and their timeliness. GAO found the Services' data to be insufficient (although improving). We believe the report would be strengthened by addressing the quality of similar data retained by the action agencies, particularly in light of the concerns expressed by action agencies. For example, on page 3, first paragraph, last sentence, the report states: "In addition, the Services cannot confirm or deny complaints about the lengthiness of the entire consultation process or know where the most significant problems arise." A reader might reasonably ask: can the action agencies support their complaints with complete and reliable data?

Similarly, on page 15, second full paragraph, first sentence, the report states that "Without information on the time spent in preconsultation, the Services cannot determine how long the entire consultation process really takes. . ." Would this same statement also apply to action agencies?

The report is inconsistent in its concept of informal consultation. It uses the terms "preconsultation" and "informal consultation" interchangeably to describe the process technically defined as informal consultation. We recommend not using the term "preconsultation" and instead use "informal consultation" as defined in the regulations.

See comment 9.

See comment 10.

See comment 11.

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The report is also inconsistent in its use of Bureau of Reclamation and Reclamation. We recommend using the abbreviation "Reclamation" for Bureau of Reclamation used throughout the remainder of the report. This abbreviation should be included in the list of abbreviations following the table of contents.

**SPECIFIC COMMENTS**

Page 1, second paragraph, fourth sentence: The report states that "Consultation usually ends with the Services' issuing their own assessments of the likely effects." We suggest that "assessments" be changed to "opinion" as reflected in the regulations.

Page 4, first full paragraph, third sentence: We would suggest changing the wording from "... increases in the number of consultations." to "... increases in the number and complexity of consultations."

Page 6, first full paragraph, second sentence: The report states: "Informal consultation occurs when the agency has determined that an activity is unlikely to adversely affect listed species or critical habitat." We suggest the report clarify that informal consultation is a process that involves a series of steps and communications between the action agency and the Services to determine whether a Federal action will affect listed species or critical habitat. If the action agency determines that the action is unlikely to adversely affect listed species or critical habitat after completing a biological assessment (for major actions) or similar analysis (for non-major actions), and the Services concur, then the action agency may proceed with the activity without further consultation.

Page 9, Figure 2: The map incorrectly places Helena, Montana, west of the continental divide. We believe Missoula, Montana, is the city that GAO is attempting to identify.

Page 10, Figure 3: We suggest changing the heading to "Workers Install Electronic Fish Barrier Fabric on Canal Diversion Structure."

Page 17, line on top of page: Insert "formal" before "consultation."

Page 23, first paragraph: The report should note that Reclamation has also developed a central repository for biological assessments prepared by Reclamation staff to assist staff in preparing biological assessments.

Page 36, last paragraph, second sentence: In referring to the Services' consultation handbook, the report states that "... consultation should be conducted on activities with [negligible, discountable, or completely beneficial] effects in addition to those with clearly negative effects." This needs to be corrected. The handbook actually states the opposite. "No formal consultation is required if a finding can be made, with the Services' concurrence, that all reasonably expected effects will be beneficial, negligible, or discountable."

Page 41, second paragraph, fifth sentence: Insert "operation and" after "dam." Sixth sentence, insert "operations and" before "maintenance." In this discussion, the document should note that

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Reclamation and the Services are in the process of working out their differences on how effects will be analyzed for on-going operations and maintenance at existing facilities.

Page 44, second full paragraph, first sentence: Sentence states that applicants “must consider their effects to protected species.” This needs to be narrowed down to reflect that applicants must have their effects addressed in agency Section 7 consultations. Suggest that the sentence be revised to state that applicants “must have the effects of their actions on protected species addressed within the Section 7 consultation so that it addresses the agency’s action to fund or authorize their proposed activity.”

See comment 12.

Page 49, Recommendations for Executive Action: In tracking the consultation process, the report notes the Services’ failure to document the causes for missed deadlines. We believe this is a major deficiency which needs to be corrected in order to improve the process. There may be trends that become apparent that could be readily remedied. We encourage GAO to include this in its recommendations.

The text of the report discusses, in general, disagreements with essentially all action agencies as to when consultation is needed and the level of detailed analysis required. Yet, the recommendations seem to only call for the Forest Service (as an action agency) and the regulatory agencies to resolve this problem. We suggest that these recommendations be expanded to indicate more clearly that action agencies such as the Reclamation and the Bureau of Land Management, within the Department of the Interior, are part of the process to address these recommendations.

See comment 13.

The report also discusses certain needs with respect to improving agency training, however, none of the recommendations are addressing this issue. We believe training needs will become acute as new and inexperienced staff is hired to replace experienced staff that are moving on to new jobs or retiring. We suggest that GAO include a recommendation encouraging the Services and action agencies to join forces in developing cross-agency training to better understand the consultation process and how it relates to action agencies’ programs, authorities, and decision processes.

See comment 14.

Making the consultation process more transparent to outside interest groups and stakeholders is also a need that will continue to grow as consultations become more complex and affect stakeholders in more significant ways. Action agencies have begun to make draft biological assessments available to the public for certain actions as part of National Environmental Policy Act documents and have shared those public comments with the Services. This has its benefits and drawbacks. We suggest that the GAO include a recommendation that agencies study this issue and perhaps develop guidance on when this might be appropriate and how it should be conducted.

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Bureau of Land Management

GENERAL COMMENT

We look forward to continuing to work with the U.S. Fish and Wildlife Service, National Oceanic and Atmospheric Administration Fisheries, and other action agencies to resolve disagreements, refine guidance, and evaluate improvements to the Section 7 consultation process.

SPECIFIC COMMENTS

Page 4, second paragraph: In the sentence beginning "While staff levels have increased," is a reference to "increases in the number of consultations." It should read ".increases in the number and complexity of consultations."

Page 22: In the second paragraph, the last two sentences do not pertain to the BLM. The reference to "forest plans" appears to be generic; the BLM does not prepare forest plans. The BLM's land use plans are called Resource Management Plans and include compliance with the National Environmental Policy Act. Also, please add to the third paragraph that two to three times annually the BLM offers training on the Endangered Species Act to BLM and other agency personnel.

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The following are GAO's comments on the Department of the Interior's letter dated February 27, 2004.

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## GAO Comments

We modified the report as appropriate based on the technical comments that the Department of the Interior provided us. In addition, detailed responses to some of Interior's other comments are provided below.

1. We identified the need to correct some of the data we presented in the draft report during the agency comment period and informed FWS of this; we have made the appropriate changes to the report.
2. We agree and have incorporated additional information on the benefits of the consultation process in the report.
3. We agree that there may be good reasons for some consultations not to be completed within established time frames. We recognized in our draft report that some consultations we identified as exceeding time frames may have had agreed-upon extensions, and we have incorporated additional information to provide some of the reasons for such extensions.
4. The draft report does not assert that preconsultation is or should be considered a part of the statutory consultation. We are recommending that the Department of the Interior and NOAA work with relevant action agencies to improve tracking of the level of effort spent in preconsultation because, as many of our interviews with agency officials and some of the agency comments received on the draft report indicate, the time spent in preconsultation is an important component of the consultation process and may reduce the length of time spent in formal and informal consultation (which the Services consider to have begun once they receive a complete biological assessment or similar document). We recognized in the draft report that preconsultation may include periods of time when neither the Services nor the action agencies are working on a proposed project and that, in some cases, information developed during this period may be used to support other environmental requirements and therefore cannot be attributed solely to the consultation process.
5. We agree that the effectiveness of the consultation process for species conservation is very important and discuss, in several places in the report, indicators and officials' opinions of its effectiveness; we also

recommend that the departments, NOAA, and the Forest Service evaluate the effectiveness of any improvements made to the process. Officials with the Services told us that they believe that the low number of jeopardy opinions indicates that the process is effectively ensuring that federal activities are not jeopardizing listed species. In addition, officials with the Services and action agencies told us that the consultation process, especially time spent in preconsultation, has resulted in better projects that have fewer impacts on species or are influenced by the consultation process early enough so that any needed project modifications cost less than if done later in project development and have minimal or no impact on project implementation schedules. However, as later noted in the Department of the Interior's comments, there are few data available to evaluate the effectiveness of the consultation process overall. While we discussed Endangered Species Act section 7(a)(1) responsibilities with some officials, we did not evaluate whether agencies were using their authorities to carry out programs for the conservation of threatened and endangered species, as directed by this section of the act (such programs are in addition to the section 7(a)(2) requirement for federal agencies to consult on activities that may affect listed species or designated critical habitat). We are, therefore, not making a recommendation about the use of section 7(a)(1).

6. We agree and have incorporated additional information about consultations completed early in the report.
7. The point of whether section 7 of the act can be used to “leverage” species’ recovery would benefit from an official position from the Services. As we reported, some action agency officials are concerned that the Services are taking consultations too far by requesting that agencies implement what the officials perceive are actions intended to recover species, not just avoid jeopardy or adverse modification of critical habitat.
8. The draft report recognized the difficulties of tracking the level of effort devoted to preconsultation. We are not prescribing a systems solution so that the departments, NOAA, and the Forest Service have flexibility in identifying a feasible option. Tracking level of effort does not necessarily mean precisely tracking the amount of time—down to the hour—spent on an individual consultation. One potential alternative is to have an information system from which biologists and agency staff could select various options to indicate whether they were spending a

minimal amount of time on a consultation (with a definition of “minimal” provided such as less than 1 hour a week) or if their involvement was moderate or heavy. This information could then be used to track, in general terms, the level of effort devoted to proposed actions before formal or informal consultation is initiated; it could also be combined with the level of effort or time expended on the “official” consultation to determine the magnitude of the entire consultation process.

9. We believe the report does reflect interest and concerns from the Services and action agencies about the effectiveness of the consultation process. As we discussed in comment 5, some officials said that the consultation process is resulting in projects that have less effect on species and habitat. In addition, officials with the Services believe the process is working effectively to protect species because so few projects are found to jeopardize a listed species. Conversely, environmental advocates raised concerns about whether the process adequately protected species. However, as the Department of the Interior notes, there are few data available to comprehensively evaluate the effectiveness of the consultation process, although we recommend that the departments, NOAA, and the Forest Service evaluate the efficiency and effectiveness of any efforts to improve the process.
10. We asked the action agencies included in our review for their data on the consultation process. While some action agencies maintained some data related to consultations, the data did not always track consultation as a discrete activity and, therefore, were not useful for the purposes of our evaluation.
11. We recognize the distinction in the regulations regarding informal consultation, but in practice the Services do not consider informal consultation “initiated” until they receive a complete biological assessment or similar document. In our report, preconsultation is being used to describe all activities occurring before a formal or informal consultation is initiated by the Services.
12. We agree that information on the causes of missed time frames would be useful information and is something for the departments, NOAA, and the Forest Service to consider in identifying data management options for tracking the entire consultation process.



13. We believe training is included in our recommendations regarding clarifying disagreements and disseminating information quickly and refining guidance; how the departments, NOAA, and the Forest Service choose to disseminate such information and guidance could include providing additional training courses. In addition, several of the Services and action agencies reported that they were in the process of developing and/or refining consultation courses.
14. We agree that providing transparency of federal actions is an important element for maintaining the confidence of the public. However, as we discuss in the report, the Endangered Species Act does not provide for public involvement in the consultations process as it does for many other components of the act. Making draft biological opinions available to the public may be something that the departments, NOAA, and the Forest Service may want to consider studying.

# Comments from the Department of the Army

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
CIVIL WORKS  
108 ARMY PENTAGON  
WASHINGTON DC 20310-0108



REPLY TO  
ATTENTION OF

19 FEB 2004

Mr. Barry T. Hill  
Director  
Natural Resources and Environment  
U.S. General Accounting Office  
441 G Street, N.W.  
Washington, D.C. 20548 -1000

Dear Mr. Hill:

This letter provides the Department of Defense (DoD) response to the GAO draft report, "ENDANGERED SPECIES: Federal Agencies Have Worked to Improve the Consultation Process, but More Management Attention is Needed," dated January 20, 2004, (GAO CODE 360259/GAO--04-93).

The GAO report was prepared to assess the consultation processes for compliance with the Endangered Species Act. Federal agencies must consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service to ensure that actions taken or permitted by those agencies do not jeopardize the continued existence of listed species or adversely modify their habitats. The report provides an examination of the processes and timeframes for these consultations. Army Civil Works comments on the report follow.

In general, the GAO report does a good job of identifying the multiple problems that contribute to delays and often to increased costs at Corps civil works and regulatory projects as the pre-consultations (and informal consultations) and formal consultations proceed. However, those problems are not sufficiently highlighted in the recommendations to provide adequate clarity for the affected resource agencies to develop policies or interagency agreements that might address ways of improving the consultation processes. We note that there are very limited data upon which the recommendations are based.

Therefore, we recommend that the first recommendation of the report on page 49 be restated to apply to the affected and resources agencies equally, including DoD. Moreover, we suggest replacing the word "collaboration" with the word "conjunction" in this recommendation to allow affected agencies to ensure that the data accurately reflect the length of the entire consultation process, including the early informal or pre-consultation stages. Quite frequently, the pre-consultation process results in the project proponents delaying their activities while amassing data and re-designing the proposed projects to avoid a potential jeopardy opinion. To highlight this point, page three of the report specifies that

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"more than one-third" of the 1,700 consultations exceeded the established time frames for consultation, while on page six the report identified only eight jeopardy opinions in all of fiscal year 2003. There is no correlation among the data; thus it is difficult to make accurate comparisons. However, the information presented may suggest that those delays account for a significant number of projects going through modifications and incurring additional costs in order to avoid a jeopardy opinion. Keeping more accurate data might assist in identifying those projects, the causes of delays and the modifications that occur in advance of initiation of formal consultation.

Furthermore, we generally concur with the next three recommendations on page 50 of the report, which are those stated on the attached formatted comment sheet. We do recommend some revisions, however. For example, the first recommendation on page 50 of the report can be clarified and made more specific. Separating this one recommendation into three separate but related recommendations would emphasize the importance of the need to have improved procedures that are developed jointly among the Services and the agencies that consult with the Services. This recommendation should be broken into three parts to highlight their importance as underscored in the report. The clear connection between the likely adverse impacts and the level of detailed analysis should be a central component of such procedural guidelines.

We also believe the term "work together" in this recommendation is vague and not actionable and should be replaced with the more specific requirement to develop procedures. We believe that a coordinated and collaborative process, developed jointly, for resolution is necessary to establish consistent procedures for identifying and resolving conflicts. Thus, we recommend substituting these three recommendations for the first recommendation on page three:

- Develop interagency procedures to resolve disagreements about when consultation is needed;
- Develop interagency procedures identifying data and analysis needs for typical projects so that the services might determine more readily the likely effects on species or habitat; and
- Ensure that any procedures developed are disseminated to all staff and made available to the affected public.

We generally concur with the remaining two recommendations on page 50, but with a suggested modification to strengthen Recommendation 3. We base that suggestion on the need to demonstrate the effectiveness of the improvements and provide for measurement of progress.

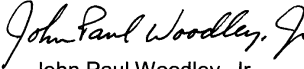
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**Appendix III**  
**Comments from the Department of the Army**

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With these proposed modifications as stated herein and on the attached comment sheet, changes we believe will strengthen the report, both Army Civil Works and the Army Corps of Engineers concur with your findings. We look forward to working with the Services and our partner agencies to improve the consultation process, to develop useful methods for tracking, and to identify the many contributions the entire process, both formal and informal, have made to preservation of threatened and endangered species and their critical habitats.

Very truly yours,

  
John Paul Woodley, Jr.  
Assistant Secretary of the Army  
(Civil Works)

Enclosure

GAO DRAFT REPORT - DATED JANUARY 20, 2004  
GAO CODE 360259/GAO-04-93

"ENDANGERED SPECIES: Federal Agencies Have Worked to Improve the  
Consultation Process, but More Management Attention is Needed"

DEPARTMENT OF DEFENSE COMMENTS  
TO THE RECOMMENDATIONS

**RECOMMENDATION 1:** The GAO recommended that the Secretary of Defense work together with the Secretary of the Interior, the Undersecretary of Commerce for Oceans and Atmosphere, and the Director of the Forest Service to resolve disagreements about when consultation is needed and how detailed an analysis is required given a proposed activity's likely effects on species or habitat. The Secretary of Defense should ensure that their agreements are disseminated quickly to all staff involved in consultations as well as the public. (p. 50/GAO Draft Report)

**DOD RESPONSE:** We concur with your recommendation but, as stated in the letter, we believe that the recommendation should be clarified and reworded to emphasize the importance of this process, which is further highlighted in the body of the report. Therefore, we suggest that this recommendation be broken into three and that the term "work together" in this recommendation be replaced to ensure specificity and action. The three suggested replacements are:

1. Develop interagency procedures to resolve disagreements about when consultation is needed and for which kinds of actions;
2. Develop interagency procedures identifying data and analysis needs for typical projects so that the Services might determine likely effects on species or habitat more readily; and
3. Ensure that any procedures developed are disseminated to all staff and made available to the affected public.

**RECOMMENDATION 2:** The GAO recommended that the Secretary of Defense work together with the Secretary of the Interior, the Undersecretary of Commerce for Oceans and Atmosphere, and the Director of the Forest Service to refine guidance, as needed, on the type and specificity of documentation required in a consultation. (p. 50/GAO Draft Report)

**DOD RESPONSE:** We concur with this recommendation.

**RECOMMENDATION 3:** The GAO recommended that the Secretary of Defense work together with the Secretary of the Interior, the Undersecretary of Commerce for Oceans and Atmosphere, and the Director of the Forest Service to evaluate the efficiency and effectiveness of improvements made to the consultation process, such as programmatic and streamlining, and use the evaluation results as a basis for future management actions. (p. 50/GAO Draft Report)

**DOD RESPONSE:** We concur with your findings with the following modification: "The affected and resource field agencies should report on their efficiency and effectiveness in making improvements to the consultation process." Ways to make improvements should not be constrained. However, demonstrating the effectiveness of the improvements should be reported so that the agencies can measure progress.

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The following are GAO's comments on the Department of the Army's letter dated February 19, 2004.

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**GAO Comment**

The Army generally concurred with our recommendations but suggested that we clarify and strengthen them. See our response to their suggestions in the "Agency Comments and Our Evaluation" section in this report.

# Comments from the National Oceanic and Atmospheric Administration

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



UNITED STATES DEPARTMENT OF COMMERCE  
The Under Secretary of Commerce  
for Oceans and Atmosphere  
Washington, D.C. 20230

FEB 26 2004

Mr. Barry T. Hill  
Director, Natural Resources  
and Environment  
United States General Accounting Office  
Washington, D.C. 20548

Dear Mr. Hill:

Thank you for the opportunity to review and comment on the General Accounting Office's draft report entitled, "Endangered Species: Federal Agencies Have Worked to Improve the Consultation Process, but More Management Attention is Needed." GAO-04-93. Enclosed are the National Oceanic and Atmospheric Administration's comments on the draft report.

These comments were prepared in accordance with the Office of Management and Budget Circular A-50.

Sincerely,

A handwritten signature in black ink, appearing to read "Conrad C. Lautenbacher, Jr.", written over a horizontal line.

Conrad C. Lautenbacher, Jr.  
Vice Admiral, U.S. Navy (Ret.)  
Under Secretary of Commerce for  
Oceans and Atmosphere

Enclosure

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THE ADMINISTRATOR





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**Appendix IV  
Comments from the National Oceanic and  
Atmospheric Administration**

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**NOAA Comments on the Draft GAO Report Entitled:  
“Endangered Species: Federal Agencies Have Worked to Improve the Consultation Process,  
but More Management Attention is Needed” (GAO-04-93/February 2004)**

**General Comments**

NOAA Fisheries recognizes and appreciates concerns over delays in consultations and resultant effects on action agencies and the public. NOAA Fisheries implemented a web-based “Public Consultation Tracking System” (PCTS) in FY 2001 to allow NOAA Fisheries, action agencies, and the affected public to easily review and track the status of all ESA consultations conducted by the Northwest Region of NOAA Fisheries in Washington, Oregon, and Idaho. PCTS was expanded to a national system in FY 2003 and continued enhancements are underway. The impetus for developing the PCTS was to have a system that could be used to track and manage consultations by management in NOAA Fisheries, the action agencies, and the affected public. For example, applicants for Army Corps of Engineers permits can enter their permit number into PCTS and view when their consultation request was submitted by the action agency, whether it was complete or not, when consultation was initiated, and the expected time for completion. We are pleased that GAO was also able to use PCTS to directly access our consultation information for this report.

NOAA Fisheries has made significant progress with the action agencies in expediting and streamlining the consultation process especially for routine Federal actions. This has been accomplished through streamlining agreements and by working with the action agencies to use programmatic consultation approaches to batch and bundle similar actions, and to use watershed-scale consultations as much as possible to take advantage of economies of scale. For the most part, routine actions which pose little serious effect on ESA listed species or their habitat do not require significant staff time to process. While NOAA has effectively managed its workload for these actions, it is beginning to experience an increase in the number of more complex actions that require increased technical sophistication and in some instances the involvement by contractors and scientists. Some of these include large water storage projects, water quality standards consultations, and point discharges. Consultation on these actions needs to be carefully completed to reduce adverse effects on threatened and endangered species and to withstand external scrutiny.

NOAA Fisheries has developed a “Consultation Initiation Template” (CIT) to assist the action agencies in their preparation of more complete biological assessments that should assist in further expediting the consultation process. The initial “pilot version” of the CIT is available on the NOAA Fisheries Northwest Region website, and was provided to GAO during their visit. The CIT provides a structured format for inputting the core requirements of biological assessments and should eliminate some of the concerns raised about communication between agencies on the content and adequacy of biological assessments.

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**Appendix IV  
Comments from the National Oceanic and  
Atmospheric Administration**

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**Specific Comments**

**Page 6, paragraph 2, second sentence:** Please modify the sentence to read “Informal consultation occurs when an agency determines its action may affect, but is not likely to adversely affect listed species or critical habitat.”

**Page 7:** We recommend providing a matrix or other graphic to display which action agencies are responsible for which species.

**Page 15, second full paragraph:** The report does not include mention that the PCTS does in fact track time spent in preconsultation. NOAA Fisheries added preconsultation to the PCTS system in May 2002 in recognition of this being an important component of the consultation process.

**NOAA Response to GAO Recommendations**

**Recommendation 1:** The GAO report states: “We recommend that the Secretary of the Interior and the Undersecretary of Commerce for Oceans and Atmosphere direct the Directors of the Fish and Wildlife Service and the National Marine Fisheries Service, in collaboration with the action agencies we reviewed (and others the Services deem appropriate), to determine how best to capture the level of effort devoted to preconsultation in their data systems and ensure that such information is gathered, maintained, and used to manage the process effectively.”

**NOAA Response:** NOAA agrees with this recommendation and did modify PCTS in May 2002 to capture these data. The PCTS does track initiation of preconsultation activities and does link it to the subsequent consultation initiation. It will be difficult, as GAO noted on page 16, to apportion a specific amount of the preconsultation time frame solely to ESA requirements because much information generated during preconsultation is applicable to processes other than consultation, such as NEPA. Nonetheless, we are using PCTS to better track preconsultation efforts.

Regarding preconsultation, early involvement by the Services does not necessarily add more process time to the overall ESA consultation. In many instances very early staff-to-staff coordination reduces effects from projects on ESA-listed species and designate critical habitat before the section 7 consultation is initiated. NOAA is aware of many examples where “likely to adversely affect” actions would have triggered the more complicated and time consuming formal consultation process but because of staff-to-staff preconsultation, effects were lessened to the “not likely to adversely affect” level which triggered the less complicated informal consultation process. As noted in the report, preconsultation can increase time spent on early project-level coordination; however, NOAA has found that preconsultation activities enable the preparation of concurrence letters instead of more time consuming biological opinions. The U.S. Forest Service

See comment 1.

See comment 2.

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**Appendix IV  
Comments from the National Oceanic and  
Atmospheric Administration**

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See comment 3.

for February and March 2004, and the agencies are scheduled to address common execution problems in the preconsultation and consultation processes.

One additional issue not addressed in the GAO report that can have significant effects on preconsultation and consultation time lines is teasing out the extent of Federal discretion action agencies have over projects they authorize, fund, or permit. For many actions authorized by Federal agencies, it is difficult to determine how much discretion action agencies have to modify the action and evaluate effects. In some cases, agency policy has been inconsistent and court cases conflict between states. For example, the Forest Service found it necessary to elevate a question regarding its own agency's discretion to condition access to private inholdings. Similarly, where there is not clear discretion regarding the land management agency authorities to condition special use permits for activities, such as mining and/or water diversions, the consultation process can be significantly bogged down. NOAA believes that unresolved issues regarding whether or not action agencies have discretion remain an important challenge for the agencies to resolve. In the absence of resolution of these issues, consultation affected by such uncertainty should be duly noted in the system such that they do not unnecessarily lengthen the preconsultation and consultation time lines.

**Recommendation 2:** The GAO states: "We recommend that the Secretaries of the Interior and Defense, the Undersecretary of Commerce for Oceans and Atmosphere, and the Director of the Forest Service, work together to:

- [1] Resolve disagreements about when consultation is needed and how detailed an analysis is required given a proposed activity's likely effects on species or habitat. The Secretaries and the Director should ensure that their agreements are disseminated quickly to all staff involved in consultations as well as the public.
- [2] Refine guidance, as needed, on the type and specificity of documentation required in a consultation.
- [3] Evaluate the efficiency and effectiveness of improvements made to the consultation process, such as programmatic and streamlining, and use the evaluation results as a basis for future management actions.

**NOAA Response:**

**Recommendation 2.1.**

NOAA agrees with this recommendation. NOAA's preconsultation experience with the USFS and BLM has been in place for many years and the agencies have gained significant benefits. The agencies have signed agreements and established a hierarchical dispute resolution process designed to prevent unresolved ESA issues from languishing during preconsultation. The dispute resolution process has been used several times and effectively resolved disagreements. Although experiences vary across the states, some locations like the Pacific Northwest have been able to pursue time saving programmatic consultation innovations for routine actions with predictable effects and obviate the need for site specific consultations. In this area, NOAA has been the lead in exporting dispute resolution processes and other successful tools to other action agencies less familiar with the section 7 process.

See comment 4.

**Recommendation 2.2**

NOAA agrees with this recommendation. In 2003, NOAA developed and deployed a pilot "Consultation Initiation Template" (CIT) an on-line consultation initiation template and user guide to assist action agencies in the development of biological assessments and biological evaluations (BA/BEs). NOAA developed this standardized template to encourage consistency in format and content of BA/BEs and to reduce potential for delays in the consultation process experienced previously associated with requests for additional information.

The template also contains a completion checklist that action agencies and NOAA can use to ensure that all necessary information has been provided. When NOAA determines that a BA/BE is complete it, would notify the action agency that it has initiated consultation. The CIT will be linked directly to the PCTS so each step of the consultation process, including receipt of a completed BA/BE, are automatically tracked by PCTS.

The CIT is designed to elicit the type of information necessary at the appropriate level of detail, highlighting information NOAA has often found missing in BA/BEs. When information is missing, consultation delays often occur. We are hopeful this tool, when completed, will enable NOAA and the action agencies to have a common set of instruction and ESA application to avoid or reduce ambiguity over information needs and resolve questions over whether consultation has been initiated. NOAA believes the consultation initiation template, user guide, and check list, when completed, will reduce disagreements regarding how much information is needed and whether consultation has been initiated.

**Recommendation 2.3**

NOAA agrees with this recommendation. NOAA Fisheries will continue to work with the action agencies to explore the effectiveness and efficiency of the consultation process. In addition, we look forward to continued cooperation with the action agencies to explore opportunities to utilize programmatic consultations where possible. Along with the USFS, BLM, and FWS, NOAA Fisheries is conducting a review of all programmatic consultations issued to the USFS and BLM in Oregon, Washington, and Idaho. The purpose of the review is to determine what actions are currently included in programmatic consultations and whether any existing programmatic consultations should be expanded or new programmatic consultations created. As a result of GAO's report, NOAA will advise cooperating action agencies of this recommendation and determine how best to measure the effectiveness of programmatic consultation as an improvement tool in the consultation process.

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The following are GAO's comments on the National Oceanic and Atmospheric Administration's letter dated February 26, 2004.

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## **GAO Comments**

We modified the report as appropriate based on the technical comments that NOAA provided us. In addition, detailed responses to some of NOAA's other comments are provided below.

1. We recognize that PCTS tracks preconsultation activities, but it does not track the level of effort devoted to preconsultation, which is the intent of our recommendation. However, PCTS may be a good starting point for identifying possible data management solutions.
2. We recognize the potential benefits of preconsultation, and have incorporated additional information on these benefits in the report.
3. We recognize the difficulties of determining federal discretion in some cases, and have incorporated information on this issue in the report.
4. We recognize that many of the agencies have guidance and information-sharing mechanisms in place or under development. Given the disagreements that still exist about the process between the Services and action agencies, we intend our recommendation to ensure that the departments, NOAA, and the Forest Service coordinate these efforts to ensure consistency in interpretations and guidance provided, and, ideally, to maximize scarce resources by sharing and leveraging each others' progress.

# Comments from the Forest Service

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



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Forest  
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File Code: 2670  
Date: FEB 27 2004

Mr. Barry T. Hill  
Director Natural Resources and the Environment  
U.S. General Accounting Office  
441 G Street N.W.  
Washington, DC 20548

Dear Mr. Hill:

Thank you for the opportunity to review and comment on the draft General Accounting Office (GAO) Report, "Endangered Species: Federal Agencies Have Worked to Improve the Consultation Process, but More Management Attention is Needed," GAO-04-93. This draft is more thorough and comprehensive than the first draft we reviewed. The Forest Service generally agrees with the report's content and its recommendations. The report accurately describes many of the topics associated with interagency cooperation under the consultation process – with both the process itself and with agency use and implementation of the process.

In general, the report should more effectively acknowledge the following points: (1) the multiple "benefits" often gained from the Section 7 consultation rather than just focusing on the costs, (2) there are many factors involved in evaluating the efficiency and effectiveness of Section 7 consultation in addition to timeliness, (3) Section 7 implementing regulations of the Endangered Species Act provide for mutually agreed-to extensions, and (4) timely consultations are dependent on the adequacy of information provided to the Fish and Wildlife Service or National Marine Fisheries Service. Additional comments, that may improve the overall scope of the report, are enclosed.

If you have additional questions or concerns, please contact the Forest Service Agency Audit Liaison, Sandy Coleman, at (703) 605-4940.

Sincerely,

DALE N. BOSWORTH  
Chief

cc: pdl wo nfs wfw directors team, Sandy T Coleman

Enclosure



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**USDA Forest Service Comments on the  
U.S. General Accounting Office Draft Report GAO-04-93  
“Endangered Species: Federal Agencies Have Worked to  
Improve the Consultation Process, but More  
Management Attention is Needed”**

**Forest Service Comments**

**The report in general:**

See comment 1.

The report would be more effective if it acknowledged the “benefits” that are often derived from Section 7 Consultation rather than simply stressing the “costs” involved in doing consultation. Many Agency projects have been better formulated and implemented, to achieve multiple resource and management objectives, due to early and frequent consultation with the U.S. Fish and Wildlife Service (USFWS) and the Department of Commerce National Marine Fisheries Service (NMFS). While significant time may be expended in Section 7 Consultation, if the consultation process results in projects that are done in a manner that better maintains the integrity of the ecosystems of concern, it may provide added flexibility for the Forest Service to implement its future activities. Relatively minor investments in consultation can result in benefits that compound over time, as future actions that could otherwise be problematic, are implemented faster due to comprehensive consultation.

See comment 2.

Similarly, the report seems to suggest that the only important factor in evaluating the efficiency and effectiveness of Section 7 Consultation is its timeliness. Although the agencies strive to complete all consultations within established timeframes, there are often instances when doing so is not the highest priority of the action agency, the applicant, or listed species being affected by the proposed action. The Forest Service recommends that the report place greater emphasis on the fact that there may be a number of valid reasons for a consultation to exceed established timeframes. Delays sometimes occur at the request of the Forest Service. In the past such reasons have included: higher priority newer regulatory agency staffing limitations, emergency consultation priorities, and National Environmental Policy Act (NEPA) and National Forest Management Act (NFMA) analyses delays/timeframes.

See comment 3.

The report should also acknowledge that: (1) the implementing regulations for Section 7 of the Endangered Species Act (ESA) provide for mutually agreed-to extensions when additional data would provide the necessary information base from which to formulate a biological opinion; and (2) timely consultations are dependent on the adequacy of information provided to the FWS or NMFS and staff resources they can provide. An important factor for the Forest Service is to ensure projects are prepared, approved, and implemented in a manner that minimizes the likelihood of being legally challenged due to inadequate consultation with the FWS or NMFS.

See comment 4.

Throughout the report, references are made to “pre-consultation” and attempts are made to bundle these activities into the timeframes measuring consultation while pointing out that the agencies do not have an effective mechanism to measure this time. It should be noted that the pre-consultation period generally precedes finalization of the proposed action and represents the period in which the action is formulated and possibly modified, based on technical assistance from the FWS or NMFS. On that basis, it is premature to include this period as part of the statutory consultation process, since the Federal action agency has not completely defined its action, which ultimately may not even require consultation.

See comment 5.

In addition, it is important to recognize that, during the pre-consultation period, action agencies typically develop information that is applicable for processes other than ESA Section 7 Consultation (e.g., doing NEPA environmental analysis, doing NMFA viability evaluations, etc.). Even if it were determined to be useful to track such information, it is not typically appropriate to attribute this entire time period solely to the Section 7 pre-consultation process. During the pre-consultation process, work to develop and evaluate proposed actions may be sporadic, that is, periods of weeks, months, or longer may pass without significant work being completed on a proposed action. When consultation is needed, we encourage agency personnel to “consult early and consult often”. This has paid off in developing and implementing better projects. We do not even attempt to track resources (staff, time, money) used only for consultation, because this activity serves so many other key purposes in land and resource management mission, is very difficult to attribute to one purpose alone, and because it would remove resources from actually doing the T&E species effects analyses that comprise consultation. For these reasons, we do not believe that the report accurately portrays the value and contribution of the pre-consultation process.

**Comments regarding the GAO Recommendations for Executive Action:**

See comment 6.

Regarding the recommendations, the report focuses on the timeliness of the consultation as a measure of the efficiency of the Section 7 Consultation process. However, timeliness is not necessarily the only or the best measure of effectiveness and efficiency. The effectiveness of the results of consultation is ensuring that Federal activities are implemented within the context of species and ecosystem conservation. The Forest Service has many examples of designing activities with this context in mind and the timeliness of consultations also is improved. The Agency recommends that the report contain a recommendation for all agencies to make better use of Section 7(a)(1) of the ESA consultation process to improve both the efficiency and the effectiveness of the 7(a)(2) part. Other comments regarding the recommendations are as follows:

**GAO Recommendation:** GAO recommended that the Secretary of the Interior and the Undersecretary of Commerce for Oceans and Atmosphere direct the Directors of the Fish and Wildlife Service and the National Marine Fisheries Service, in collaboration with the



action agencies we reviewed (and others the Services may deem appropriate), to determine how best to capture the level of effort devoted to pre-consultation in their data systems and ensure that such information is gathered, maintained, and used to manage the process effectively.

See comment 7.

**Forest Service Response:** We concur with such a recommendation. However, while we and the other agencies determine what can be done to implement such a recommendation, we foresee considerable difficulty and cost associated with identifying and tracking such levels of effort. For example, while pre-consultation may continue over many months or even years, only small portions of this time may be attributed to the ESA pre-consultation process. This may require identifying and tracking of individual hours or even portions of hours over long periods of time. In addition, much of the information used in ESA consultation is actually developed for other processes such as NEPA, NFMA, etc. We foresee difficulty determining how to appropriately separate, identify and apportion “consultation” work relative to our other responsibilities, and also difficulty in adequately determining the potential benefits of doing this.

**GAO Recommendation:** We recommend that the Secretaries of the Interior and Defense, the Undersecretary of Commerce for Oceans and Atmosphere, and the Director of the Forest Service, work together to resolve disagreements about when consultation is needed and how detailed an analysis is required given a proposed activity’s likely effects on species or habitat. The Secretaries and the Director should ensure that their agreements are disseminated quickly to all staff involved in consultations as well as the public.

See comment 8.

**Forest Service Response:** We do not concur with such a recommendation. Regulations contained at 50 CFR 402 specify when consultation is needed. If there is disagreement regarding the application of these regulations within the context of specific actions, resolution should be based on the specific facts of the situation before the agencies. In addition, how “detailed” an analysis is required depends on the numerous unique components of three general factors: the proposed action, the site characteristics, and the species involved. It does not necessarily vary according to “a proposed activity’s likely effects on the species or habitat”. This is, in fact, one of the purposes of doing consultation. Regardless of the likely effects, sufficient detail needs to be provided to support the determinations made. We believe that the intent of the second portion of this recommendation can be addressed in Recommendation 3 below.

**GAO Recommendation:** Refine guidance, as needed, on the type and specificity of documentation required in a consultation.

**Forest Service Response:** We concur with this recommendation. Refining such guidance would improve use and implementation of the Section 7 consultation process. However, we foresee difficulty achieving consensus regarding specific guidance, given the uniqueness of each consultation situation (see comments above).

**Specific comments by page:**

**Page 1, first paragraph, second sentence:** For some proposed actions, some adverse effects to species are fully acceptable, as long as the action does not jeopardize the species. In fact, this commonly occurs. This should be reworded.

**Page 1, first paragraph, last sentence:** This gives an incomplete summary of the purpose and objectives of the consultation process. It also does not adequately highlight the importance of using the process to develop and implement proactive agency actions whether or not they directly advance T&E species recovery. We suggest the more comprehensive and better wording given on the bottom of page 5 and top of page 6 be incorporated into this paragraph.

**Page 4, second paragraph:** The two key issues are correct. Staffing by FWS and NMFS has been a very significant concern to us. While significant improvements have been made by the FWS and NMFS (in addition to separate staffing increases to do National Fire Plan consultation), there remain instances where insufficient staff is available to do timely consultations. Disagreements about the extent to which consultation is necessary also occur, but this is inherent in, and at the heart of using, the consultation process tool – doing the effects analyses for a given action, on a given site, and (potentially) involving a given T&E species. Each situation is different.

**Page 6, last paragraph:** It should be recognized that to a great extent the rareness of any jeopardy opinions can be attributed to the collaborative work accomplished during pre-consultation.

**Page 10, first sentence in top paragraph:** Change to read: Similarly, Forest Service projects can range from trail maintenance, to timber harvesting and construction, and decommissioning of roads.

**Page 12, last paragraph:** Often delays in completion of informal consultations result from mutual agreements between the agencies. Such agreements are typically related to the action agency's work schedule. For example, the Forest Service may request that the FWS delay completion of informal consultation on a group of actions that they do not anticipate being able to implement for several months due to the availability of appropriate staff in favor of completion of consultation on other projects that they anticipate being able to implement fairly soon. While it is true that the FWS and NMFS databases often do not track such information, and perhaps these databases should track this information, it should be pointed out that at least a portion of these delays are the result of mutual agreement. While this information is presented a couple of pages later, by having it separated from the subject paragraph, the relevance of this point is lost.

**Page 15, Available Data subsection:** Please see our earlier comments regarding the amount and type of work that occurs during the pre-consultation period and the appropriateness of attributing this time delay to the ESA. While much of this information is presented in the last paragraph of this subsection, it would be more effective if this information were better integrated into the first paragraph of this subsection.

**Page 19, Figure 6 (Diamond-shaped box):** The question, listed in this box, is not appropriate. A more appropriate question would be, "Has the action agency provided sufficient information to fulfill the initiation requirements of 50 CFR 402.14(c)?"

**Page 21, last paragraph:** The specific programmatic consultation processes described in this paragraph are influenced not only by the statute and consultation regulations, but also by a series of district and ninth circuit court rulings regarding the adequacy of project-specific review and consultation, and the specificity of information available involved in the consultation.

**Page 26, last paragraph:** We have found that by engaging with the FWS or NMFS early during either pre-consultation or Section 7(a)(1) program reviews, we often develop a better understanding of the species' conservation needs and how our actions may affect them. This commonly leads to project designs that better incorporate species conservation and meeting project objectives.

**Pages 26 - 30:** The graphs on these pages present a lot of information that is not discussed. While the report discusses consultations that exceed established timeframes, these graphs present data showing that many of the consultations are conducted well ahead of established timeframes. To present a fair and accurate picture that may better assist in improving the Section 7 Consultation process or how agencies use the Section 7 Consultation process, the same consideration should be given to consultations completed early as to consultations completed late.

**Page 31:** Reducing the total time spent in Section 7 Consultation is not the only goal of "streamlining." Other goals are to formulate better projects and to ensure better effects analysis so that consultations are completed when they are ready to implement their actions. Thus, if the total amount of time spent completing consultation has not been shortened, but if by engaging in pre-consultation the work is completed earlier, i.e., by the time we are ready to implement our action, we typically consider this to be a success.

**Page 32, first full paragraph, last two sentences:** We agree with the assessment of vulnerability presented here and it is consistent with the guidance received from the Department of Justice. For this reason, we recommend that all programmatic consultations include provisions for site-specific (or project-specific) analysis. This provides useful check that effects are not different than previously identified and documented, and also helps ensure that actions covered by programmatic consultations

See comment 9.

are not vulnerable to successful legal challenge. The report should note that programmatic consultations can be structured to reduce or eliminate this vulnerability.

**Page 33, top paragraph, first full sentence:** The FWS and NMFS do not have the authority to “require” consultation. Action agencies determine for themselves when consultation is “really necessary.” This sentence would be more appropriate if “recommend consultation” replaced “require consultation.”

**Page 36, last paragraph, second sentence:** This sentence misrepresents the consultation handbook – “negligible” is not used. Note that informal consultation (not “consultation”) is the process used to conduct and complete consultation when identified effects are discountable, insignificant, or completely beneficial.

**Page 38, first sentence:** In the *Pacific Coast Federation of Fisherman’s Association v. National Marine Fisheries Service* court ruling cited in footnote 15 of the report, the Court found that the FWS and NMFS must evaluate “negative short-term effects.” We recommend the final report clearly convey that all discretionary Federal actions that are likely to adversely affect (in the short or long-term) listed species or critical habitat must comply with Section 7(a)(2) of the Endangered Species Act through the formal consultation process. When completing their biological opinion, the FWS or NMFS also considers the long-term benefits of the action; however, one must recognize and identify whether and the extent to which it may be important to ensure that individuals of the species survive the short-term negative effects and persists within the action area so they will be present to reap the long-term benefits of the proposed action. In addition, without access to range-wide information regarding the status of the species, it may not be possible to accurately evaluate the short-term negative effects. This further points to the distinctions between the roles of the action agencies and the FWS and NMFS in the consultation process. Finally, the Forest Service also recommend that the report acknowledge that many actions with long-term benefits to listed species result in short-term adverse effects that involve fully acceptable incidental take of these species, which is authorized through the formal consultation process.

**Page 41, first paragraph, last sentence:** The Forest Service strongly encourages this approach as it appears to meet the intent of the statute, which contains the title of “Interagency Cooperation” for Section 7.

**Page 43, first paragraph, last sentence:** The word “Service” should be “Forest Service.”

**Page 46:** The same “average \$10,000 costs” for a permit at Lake Washington is cited three times in the report and two times in this same section (pg. 42).

**Page 50:** The Director of the Forest Service should be changed to Chief of Forest Service or to a Department Level recipient comparable to the others receiving the review.

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The following are GAO's comments on the Forest Service's letter dated February 27, 2004.

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## GAO Comments

We modified the report based on the technical comments that the Forest Service provided us, as appropriate. In addition, discussed below are GAO's corresponding detailed responses to some of Forest Service's other comments.

1. As we noted in comment 2 in our response to the Department of the Interior, we agree and have incorporated additional information on the benefits of the consultation process in the report.
2. As we noted in comment 3 in our response to the Department of the Interior, we have incorporated additional information about the reasons for extensions to time frames for the consultation process.
3. We agree that the timeliness of the entire consultation process will be affected by the adequacy of the information provided to the Services. However, given that the Services initiate formal or informal consultation only when they have a complete biological assessment or similar document, the additional time to provide adequate information would be considered a part of preconsultation and not subject to the established time frames for formal or informal consultations.
4. As we noted in comment 4 in our response to the Department of the Interior, the report does not assert that preconsultation should be considered a part of the statutory consultation.
5. As we noted in comment 2 in our response to NOAA, we have incorporated information on the value of preconsultation in the report.
6. As discussed in comment 5 in our response to the Department of the Interior, we agree that the effectiveness of the consultation process for species conservation is very important; however, we did not evaluate whether agencies were using their authorities to carry out programs for the conservation of threatened and endangered species, as directed by section 7(a)(1) of the Endangered Species Act.
7. As we noted in comment 8 in our response to the Department of the Interior, we recognize the difficulties of tracking the level of effort

devoted to preconsultation and are providing the agencies flexibility in identifying a feasible option to do so.

8. We believe the recommendation is still needed to resolve disagreements about when consultation is needed. Based on our survey and interviews, disagreements about when consultation is necessary was one of the more significant concerns identified. Hence, the Services and the action agencies should identify and resolve the most persistent disagreements in this regard and disseminate clarification quickly to avert further disagreements. If the Services and action agencies cannot resolve their differences, then Congressional direction may be necessary. The Services and action agencies should be addressing such disagreements continuously as they arise given the new and unique situations that constantly present themselves.
9. As we noted in comment 6 in our response to the Department of the Interior, we have incorporated additional information about consultations completed early in the report.

# GAO Contact and Staff Acknowledgments

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**GAO Contact**

Trish McClure (202) 512-6318

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**Staff  
Acknowledgments**

In addition to the individual named above, Bob Crystal, Jennifer Duncan, Doreen Stolzenberg Feldman, Jaelith Hall-Rivera, Barbara Johnson, Cynthia Norris, Tony Padilla, Judy Pagano, Jeff Rueckhaus, and Pamela Tumler made key contributions to this report.

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