

By Terry Rabot

# The Federal Role in Habitat Protection



**Red-cockaded woodpecker**

USFWS photo by John & Karen Hollingsworth

The Endangered Species Act (ESA) has broader mandates than simply directing the Fish and Wildlife Service to protect listed plants or animals. It directs *all* Federal agencies, not just the Fish and Wildlife Service and National Marine Fisheries Service, to participate in endangered species conservation. Specifically, section 7 of the ESA charges Federal agencies to aid in the conservation of listed species (section 7 (a)(1)) and requires Federal agencies to ensure that their activities will not jeopardize the continued existence of listed species or adversely modify designated critical habitats (section 7 (a)(2)).

## Federal Conservation Activities

One way that we actively carry out conservation activities for listed species under section 7(a)(1) is through our Partners for Fish and Wildlife Program. This program is geared toward habitat restoration on private lands. Listed species are considered a priority in this program; as a result, habitat restoration efforts funded by the Partners program have directly benefitted a number of listed species, such as the Louisiana black bear (*Ursus americanus luteolus*) and the red-cockaded woodpecker (*Picoides borealis*).

Other Federal agencies also have used their existing authorities to conserve listed species. For example, some wildlife conservation programs administered by the U.S. Department of Agriculture's Natural Resources Conservation Service, including the Wetland Reserve Program, the Wildlife Habitat Incentive Program, the Conservation Reserve Program, and the Environmental Quality Incentive Program, have incorporated listed species.

## The Consultation Process

The provision under section 7 that is most often associated with the FWS and other Federal agencies is section 7(a)(2). It requires Federal agencies to consult with the FWS to ensure that actions they fund, authorize, permit, or otherwise carry out will not jeopardize the continued existence of any listed species or adversely modify designated critical habitats. FWS issued regulations in 1986 detailing the consultation process, and we have since completed a handbook describing the process in detail (see website address below).

Before initiating an action, the Federal action agency (the agency planning a specific action), or its non-Federal permit applicant, must ask the FWS to provide a list of threatened, endangered, proposed, and candidate species and designated critical habitats that may be present in the project area. If we answer that no species or critical habitats are present, then the Federal action agency has no further ESA obligation under section 7(a)(2) and consultation is concluded. If a species is present, then the Federal action agency must determine whether the project *may affect* a listed species. If so, consultation is required. If the action agency determines (and the FWS agrees) that the project *does not adversely affect* any listed species, then the consultation (informal to this point) is concluded and the decision is put in writing.

On the other hand, if the Federal action agency determines that a project *may adversely affect* a listed species or designated critical habitat, formal consultation is required. There is a designated period of time in which to consult (90 days), and beyond that,

another set period of time for the FWS to prepare a biological opinion (45 days). The determination of whether or not the proposed action would be likely to jeopardize the species or adversely modify its critical habitat is contained in the biological opinion. If a *jeopardy* or *adverse modification* determination is made, the biological opinion must identify any *reasonable and prudent alternatives* that could allow the project to move forward.

If the FWS issues either a *nonjeopardy* opinion or a jeopardy opinion that contains reasonable and prudent alternatives, it may include an incidental take statement. "Take" is defined as harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting or attempting to engage in any such conduct. ("Harm" is further defined to include significant habitat modification or degradation that results in death or injury to a listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering.) "Incidental take" is defined as take that is incidental to, and not the purpose of, an otherwise lawful activity. The FWS must anticipate the take that may result from the proposed project and, providing such take will not jeopardize the listed species, describe that take in the incidental take statement. The latter contains clear terms and conditions designed to reduce the impact of the anticipated take to the species; these terms are binding on the action agency.

### Results of Agency Cooperation

The FWS responds to thousands of consultation requests every year. (In Fiscal Year 1999, for example, the FWS informally consulted on about 12,000 actions.) The vast majority of evaluated actions have no effect on listed species or their designated critical habitat. A large percentage of projects that would have, at least as initially planned, adverse impacts to listed species are dealt with through informal consultation, in which the Federal action agency

makes changes to the project design so that impacts to listed species are avoided. Sometimes formal consultation is required, and even less frequently, the FWS determines that a project may jeopardize listed species or adversely modify a designated critical habitat. These conflicts, rather than the thousands of projects that move forward with little or no changes or negative impacts on wildlife, are often highlighted in the media. (Again, in FY 1999, the FWS conducted 83 formal consultations and issued 1 jeopardy opinion.) As more and more Federal agencies begin to work proactively with the FWS under section 7(a)(1), the conservation benefits should be reflected in an even lower number of jeopardy opinions.

We plan to provide more written guidance to other Federal agencies on how to meet their conservation obligations under section 7(a)(1). Once completed, this guidance will make it easier for other Federal agencies to actively promote the welfare and ultimate recovery of listed species. For more information, see our section 7 webpage at <http://endangered.fws.gov/section7/index.html>.

---

*Terry Rabot is a Biologist with the Division of Endangered Species, Branch of Consultation and HCPs, in the FWS Arlington, Virginia, headquarters office.*



*The Louisiana black bear in this picture was one of the largest ever captured on Tensas River National Wildlife Refuge, weighing in at over 400 pounds. The bear was trapped using a leg-hold cable snare that does not injure the animal. The biological information obtained, including weight, sex, a tooth for aging, and other measurements, are part of the Service's ongoing research efforts to aid in the recovery of this threatened subspecies. Afterwards, the bear was released on site.*

*Photo by Dan Anderson/USFWS*