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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, Maryland 20910
THE DIRECTOR

MEMORANDUM FOR: Regional Administrators
Office of Protected Resources

FROM: *Ed* William T. Hogarth, Ph.D.

SUBJECT: Application of the "Destruction or Adverse Modification"
Standard under Section 7(a)(2) of the Endangered Species
Act

Recent litigation has focused on the regulatory standard for determining whether proposed Federal agency actions are likely to result in the "destruction or adverse modification" of designated critical habitat under Section 7(a)(2) of the Endangered Species Act (ESA). On August 6, 2004, the Ninth Circuit Court of Appeals rendered a decision in *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, No. 03-35279, finding that the Service's regulatory definition of "destruction or adverse modification" of critical habitat, at 50 C.F.R. § 402.02, is contrary to law. Previous Federal court rulings have reached similar conclusions (see *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir.2001) (held regulation to be facially invalid); *American Motorcycle Ass'n District 37 v. Norton, Civ. No. C03-0209-S.I. (N.D. Cal., Aug. 3, 2004)* (California Desert Conservation Area case)). Due to the strategic importance of the 9th Circuit ruling, the potential effects of the ruling on recent and prospective biological opinions, and the need for interim measures to be in place while NOAA's National Marine Fisheries Service (NOAA Fisheries Service) and US Fish and Wildlife Service (FWS) develop a proposed rulemaking that addresses this ruling, the following guidance is provided to Service biologists conducting Section 7 consultation pending the adoption of any new regulatory definition of "destruction or adverse modification."

Destruction or adverse modification determinations will be made using the analytical framework described below. First, however, (along with NOAA General Counsel), we want to emphasize that when we conduct a Section 7 consultation that involves the evaluation of whether a Federal agency action is likely to destroy or adversely modify designated critical habitat, we do not cite to or use the regulatory definition of "destruction or adverse modification" at any point in the consultation process. In fact, our biological opinions state explicitly that we do not rely on this regulatory definition, using this language:

"This biological opinion does not rely on the regulatory definition of "destruction or adverse modification" of critical habitat at 50 C.F.R. 402.02. Instead, we have relied upon the statutory provisions of the ESA to complete the following analysis with respect to critical habitat."



Analytical Framework for Adverse Modification Determinations

Until we have promulgated a new regulatory definition of “destruction or adverse modification,” our evaluation of effects to proposed or designated critical habitat should consider the statutory concepts embodied in Sections 3 (the definitions of “critical habitat” and “conservation”), 4 (the procedures for delineating and adjusting areas included in a designation), and 7 (the substantive standard in paragraph (a)(2) and the procedures in paragraph (b)). The analytical framework described here will guide Service biologists in applying these considerations in Section 7(a)(4) conferences on proposed critical habitat, when a conference is requested by the Federal action agency. The following framework is intended to be applied as a whole since the individual parts have no meaning outside the context of this guidance.

1. In the “Status of the Species/Critical Habitat” analysis in the biological opinion, discuss the entire designated critical habitat area in terms of the biological and physical features that are essential to the conservation (discussion of “survival” in this and other sections of the adverse modification analysis is not appropriate) of the species. This analysis should identify and discuss the primary constituent elements of the critical habitat (as described in the final rule) and, very importantly, the current condition, the factors responsible for that condition, and the conservation role of individual critical habitat units or specific areas identified in the designation as containing primary constituent elements or as essential to the conservation of the species.

Some critical habitat designations may pre-date the requirement for identification of primary constituent elements that are essential for the conservation of the listed species. In consultation on actions that involve this type of critical habitat, the best available scientific and commercial data should be used to determine and document these elements or habitat qualities.

2. In the “Environmental Baseline” analysis, discuss the current condition of the critical habitat unit(s) or specific areas, in the action area, the factors responsible for that condition, and the conservation roles of the unit(s) or specific areas, with appropriate supporting documentation. In particular, discuss the relationship of the affected unit(s) or specific areas in the action area to the entire designated or proposed critical habitat with respect to the conservation of the listed species, unless the proposed or final rule designating critical habitat has already clearly done so.

Based on the results of this analysis, we will have a clear and credible basis for determining the significance of any adverse or beneficial effects of the action (and cumulative effects) on the function and conservation role of the affected unit(s) or specific areas.

3. In the “Effects of the Action” analysis, characterize the direct and indirect effects of the action and those of interrelated and interdependent actions of the proposed

or designated critical habitat. Describe how the primary constituent elements or habitat qualities essential to the conservation of the species are likely to be affected and, in turn, how that will influence the function and conservation role of the affected critical habitat unit(s) or specific areas. This part of the analysis should focus exclusively on the effects to critical habitat. Conservation activities (e.g., management, mitigation, etc.) outside of critical habitat should not be considered when evaluating effects to critical habitat. Based on the analyses under (1) and (2) above, discuss the significance of anticipated effects to critical habitat.

4. In the "Cumulative Effects" analysis, characterize the effects of future, non-Federal action reasonably certain to occur in the action area in terms of how the primary constituent elements or habitat qualities essential to the conservation of the species are likely to be affected and, in turn, how that will influence the function and conservation role of the affected critical habitat unit(s) or specific areas. Based on the analyses under (1) and (2) above, discuss the significance of these anticipated effects to critical habitat.
5. In the "Conclusion" section, following the standard text, present the reasons why we reached our 7(a)(2) conclusion. Discuss whether, with implementation of the proposed Federal action, critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species, based on the analysis under (1) through (4) above.

Reevaluation of Existing Biological Opinions

Federal action agencies may examine, in the context of the 9th Circuit ruling in *Gifford Pinchot*, consultations that have been completed, on a variety of Federal actions. NOAA General Counsel has advised us that this review should not be premised on the theory that the ruling has necessarily invalidated all existing opinions. We recognize, however, that these reviews may result in a number of requests for reinitiation of formal consultation to examine more closely "no destruction or adverse modification" conclusions. This analytical framework should be used in any reinitiated consultations. Please work with the action agencies to give the appropriate priority to any reinitiated consultations, in light of other consultations with these agencies and your available resources.

This guidance is provided to enhance national consistency in the conduction of Section 7 consultations (and conferences) where effects to designated (and proposed) critical habitat are being evaluated, in light of recent Court decisions; it does not set forth binding legal interpretations. This guidance will be in effect until a new regulation has been adopted or revised guidance issued. Please contact Jim Lecky at 301-713-2332, if you have any questions.