FWS overreaches with Section 7 in Southwest

By Norman D. James

Over the past decade, Section 7 of the Endangered Species Act ("ESA") has evolved into a land regulation program, dictating the manner in which private projects are allowed to proceed. Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), requires federal agencies to ensure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." Thus, federal actions may not proceed if they would either jeopardize the existence of a listed species or destroy or adversely modify a listed species' critical habitat. Indeed, this was the basis for the Supreme Court's injunction halting construction of the Tellico Dam in *Tennessee Valley Authority*, which would have resulted in the extinction of a listed species of fish.

Commentary

Nevertheless, the applicability of Section 7(a)(2) is limited. On its face, this provision applies only to federal actions, and not to private projects. Moreover, Section 7(a)(2) applies only to activities "in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. As other federal regulatory programs have expanded, however, an increasing number of private land uses require some sort of federal permit or approval or have some other federal nexus. At the same time, the U.S. Fish and Wildlife Service ("FWS") has become increasingly aggressive in exploiting the Section 7 consultation process to extract concessions from landowners and to control the manner in which private land is used.

It is obviously important to the consultation process to appropriately define the federal action that triggers Section 7 consultation. For example, many private construction activities currently require one or more federal permits under the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.* Two of the most common permits are permits regulating the discharge of pollutants in storm water from construction sites, which are issued pursuant to Section 402 of the CWA, and permits for the discharge of dredged or fill material into the navigable waters of the United States, which are issued pursuant to Section 404 of the CWA. 33 U.S.C. §§ 1342 and 1344. In both cases, the relevant federal action is the issuance of the permit and the activities it authorizes, i.e., the discharge of storm water containing pollutants into waters of the United States in the case of a permit issued under Section 402 and the discharge of dredged or fill material into waters of the United States in the case of a permit issued under Section 404.

While it may seem obvious that the federal action is the issuance of the permit, FWS frequently (and often without explanation) treats the entire project as the federal action for consultation purposes, even if there is no discretionary federal involvement in or control over the balance of the project. This mistake effectively "federalizes" the private project for the purposes of Section 7 consultation, and compounds the scope and complexity of the analysis of the effects of the action on listed species and critical habitat, as discussed below. *Compare, e.g., Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1116-18 (9th Cir. 2000) (upholding Corps of Engineers' decision to limit the scope of its NEPA analysis to the activities specifically authorized by the real estate developer's permit).

Properly delimiting the "action area," another term defined in 50 C.F.R. § 402.02, is also vital to the consultation. This term is defined in terms of the effects of the underlying federal action:

Action area means all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action.

Consequently, the analysis of the federal action's effects on listed species and critical habitat may extend beyond the federal action's project area, depending on the extent of the action's direct and indirect effects. Moreover, this definition requires a determination of the federal action's effects in order to define the scope of the geographic area to be considered during the consultation.

FWS frequently "federalizes" private projects, compounding the scope and complexity of the analysis of the effects of the action on listed species and critical habitat.

"Effects of the action" include both the direct and indirect effects of the federal action that is the subject of the consultation. 50 C.F.R. § 402.02. Under this definition, "direct effects" are the direct or immediate effects on listed species or critical habitat caused by the federal action. "Indirect effects are those that are caused by the proposed action and are later in time, but are still reasonably certain to occur." *Id.*

For example, the impacts caused by the construction of a street crossing or flood control structure within a watercourse subject to the Corps of Engineers' jurisdiction would constitute direct effects of the Corps' Section 404 permit, while future impacts caused by the placement of structures and fill material within the watercourse that are reasonably certain to occur (e.g., altered flood flows or increased downstream sedimentation) would constitute indirect effects of the permit. In this example, the "action

(Continued on next page)

(Continued from previous page)

area" associated with the Corps' permit would include not only the portion of the watercourse directly impacted by the construction of the street crossing, but also any areas upstream or downstream of the crossing reasonably certain to be impacted in the future.

In recent biological opinions, however, FWS has gone well beyond the definitions in the agency's regulations. In consultations involving the impacts of CWA permits on the cactus ferruginous pygmy-owl in the Tucson metropolitan area, for example, FWS has determined that the permit's "action area" includes all land within 19 miles of the project site. *E.g.*, U.S. Fish and Wildlife Service, *Final Biological Opinion on the Effects of the Thornydale Road Improvement Project in Pima County, Arizona*, 20 (Feb. 25, 2002). These determinations were based on unpublished data suggesting that the dispersal distance of juvenile pygmy-owls may be as much as 19 miles – an area containing more than 725,000 acres! Thus, the "action area" was delimited by the maximum, potential movement of a member of the species, rather than by the effects of the federal action.

In recent biological opinions, FWS has gone well beyond the definitions in the agency's regulations.

The specific Pima County project identified in the cited biological opinion involved the widening and improvement of 1.6 miles of a major arterial street, which would result in the permanent loss of approximately 1.4 acres of desert vegetation. The federal action consisted of coverage under the Environmental Protection Agency's general permit for storm water discharges from construction activities and a Section 404 permit authorizing certain minor flood control and drainage structures. The biological opinion contained no explanation of how the activities authorized by these federal permits were reasonably certain to result in direct or indirect effects throughout the 725,000-acre "action area." Nevertheless, FWS required Pima County to acquire approximately 36 acres of suitable pygmy-owl habitat, to be set aside and managed in perpetuity for the benefit of the species, in addition to complying with numerous on-site conservation measures.

The fundamental flaw in the analysis employed by FWS is the implicit determination that vegetation removal and related activities outside of "waters of the United States" are authorized or otherwise induced by the federal permit. Under the so-called "but for" test typically used by FWS to determine a federal action's indirect effects, the federal action (i.e., the CWA permit) cannot be the cause of an effect unless the federal action is necessary for the occurrence of that effect. Normally, a landowner may remove or thin vegetation on his property without a federal permit. While the removal or modification of vegetation may adversely impact the ability of a parcel of land to serve as habitat for a listed species, this impact is not attributable to the federal permit because the destruction of vegetation could take place in the absence of the permit. In other words, true "but for" causation does not exist outside the federal agency's jurisdiction.

Using this flawed "but for" test, FWS routinely imposes conditions and requirements on landowners during the consultation process, such as those imposed on Pima County in the example given above, based on the federal nexus provided by a CWA permit. In southern Arizona, these conditions and requirements have included the following:

- The acquisition and preservation of off-site conservation land (typically three or four times the area disturbed by the project)
- Land disturbance is limited to 30% or less within the development
- Open space within the development (including individual lots) must be permanently maintained and access restricted
- No use of pesticides within the development
- Restrictions on exterior lighting and outdoor activities, such as organized events and outdoor cooking
- An education program for construction workers and/or residents in the development
- Cats, dogs and other pets, if permitted outdoors, must be kept on leashes

These "conservation measures" are typically not imposed as terms and conditions in an incidental take statement in order to minimize "take," but are included as conditions of the CWA permit. If the permit applicant refuses to accept these conditions, he is faced with the prospect of a "jeopardy" determination. The scope of the permitting agency's jurisdiction is ignored. *Compare* 50 C.F.R. § 402.02 (definition of "reasonable and prudent alternatives").

Given these sorts of regulatory abuses, it is little wonder that private landowners and trade organizations are suing the federal government with greater frequency. Fortunately, these abuses have developed over the past decade and are the result of internal agency policies – not the ESA or its implementing regulations. *See, e.g., Endangered Species Act Consultation Handbook*, 4-15 – 4-19 (U.S. Fish & Wildlife Service and National Marine Fisheries Service 1998). A narrower and more focused approach to consultation, in which the limits of federal regulatory authority are recognized, would not only eliminate these abuses, but also conserve agency resources and reduce conflicts with the regulated community.

Mr. James is an attorney with the Fennemore Craig firm in Phoenix who specializes in natural resources law.