

Exploration into the implementation of 7(a)(1)
Engaging in a conversation with our Federal partners
U.S. Fish & Wildlife Service and National Marine Fisheries Service
April 21, 2011

The U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services) are working to improve the implementation of the Endangered Species Act (ESA) by considering appropriate changes to our practices, guidance, policies, or regulations to enhance conservation of listed species. This paper and the questions at the end are designed to explore how we might better utilize section 7(a)(1) of the ESA. The Services recognize that many Federal agencies are conserving endangered and threatened species on their lands or under their authorities, although usually not under formal 7(a)(1) programs. We would like to learn more about these ongoing efforts and explore what staff in our own and other Federal agencies think about numerous issues around the implementation of section 7(a)(1). To that end the Section 7(a)(1) Work Group, composed of staff from the Services, developed the set of questions below. Please feel free to use the questions as a starting point for discussions with staff from the Services and other agencies. The responses to these questions will help determine next steps in our outreach and development of a 7(a)(1) program.

Background: Congress declared in section 2 of the Endangered Species Act (ESA) that it is their policy “that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” 16 U.S.C. 1531(c)(1). Section 7(a)(1) of the ESA, 16 U.S.C. 1536(a)(1), states that “The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.” To date, there are no guidance documents, policies or regulations to implement this section of the ESA. Most Federal agencies have concentrated their efforts on section 7(a)(2) of the Act and the requirement to ensure their actions are not likely to jeopardize the continued existence of listed species. Although some Federal agencies conduct effective habitat and species conservation programs, section 7(a)(1) remains underutilized (France and Tuholske 1986, Ruhl 1997-1998, USFWS 1998, Wood 2004).

The Services see section 7(a)(1) as an opportunity to operate in an affirmative manner on a programmatic level, allowing the Services to collaborate with Federal agencies to develop species conservation programs. Conversely, section 7(a)(2) consultations, which are triggered by a Federal action or Federal nexus to an action, tend to operate in a piecemeal fashion across the landscape and only when an action is proposed. How and if these sections are related is one of the issues we are exploring in the questions that follow.

All of the courts that have examined section 7(a)(1) have concluded that Federal agencies have an affirmative duty to develop and implement programs for the conservation of listed species. In 1998, the U.S. Court of Appeals for the 5th Circuit found that “section 7(a)(1) contains a clear statutory directive (it uses the word ‘shall’) requiring the Federal agencies to consult and develop programs for the conservation of each of the endangered and threatened species listed pursuant to

the statute.” *Sierra Club v. Glickman*, 156 F.3d 606, 617 (5th Cir. 1998). The court clarified that “under section 7(a)(1), each Federal agency must consult with FWS and develop programs for the conservation of each endangered species that it can affect within its authorities.” *Sierra Club at 606, 618 FN 7*. Other courts have come to the same conclusion. See, e.g., *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913 (D.C. Cir. 2008) (section 7(a)(1) gives the Coast Guard duties regarding the right whale); *Florida Key Deer v. Paulison*, (11th Cir. 2008) (Section 7(a)(1) imposes a judicially reviewable obligation to carry out programs for the conservation of listed species); *Wyoming Farm Bureau Federation*, 199 F.3d 1224 (10th Cir. 2000) (Section 7(a)(1) authorizes the trapping and transplanting of rare species in order to conserve them); *Pyramid Lake Paiute Tribe v. Navy*, 898 F.2d 1410 (9th Cir. 1990).

Goal: The Services seek to fully implement Section 7 “Interagency Cooperation” through actively implementing section 7(a)(1). Active participation by Federal agencies in section 7(a)(1) is a key component in working toward and fully supporting the purposes and policy of the ESA.

Objectives: To explore and determine how best to implement section 7(a)(1) within diverse Federal agencies, possibly including delineation of guiding principles and key components of section 7(a)(1) programs, and to develop and implement section 7(a)(1) conservation programs in partnership with Federal agencies.

Questions for Consideration (*Please answer as many or few as you want; it’s not necessary to respond to all. You may want to read through all of them before responding.*):

- 1) What should the role of section 7(a)(1) be in the conservation of endangered and threatened species and their ecosystems?
- 2) Can you give examples of conservation programs you might consider to be section 7(a)(1) programs or leading toward a section 7(a)(1) program? If so, what has and has not worked?
- 3) What should a section 7(a)(1) conservation program look like, e.g. how flexible and/or prescriptive should it be? Should there be requirements and procedures common to all 7(a)(1) conservation programs? What should the role of field, regional and national offices be (in both “action” and “consulting” agencies)? How should a 7(a)(1) program be documented? How should a program’s implementation be tracked?
- 4) How might a section 7(a)(1) program differ, if at all, for different agencies (e.g. land or water management agencies, regulatory agencies, and agencies with primary missions other than conservation)?
- 5) What should the relationship be between section 7(a)(1) and recovery plans or “recommended actions” from 5-year reviews?
- 6) Is there a relationship between section 7(a)(1) and section 7(a)(2)? If so, what is that relationship?

- 7) How would implementing section 7(a)(1) actions be advantageous to Federal agencies?
- 8) How does a Federal agency determine the scope of their section 7(a)(1) responsibility?
How do they know when they are meeting that responsibility?
- 9) What do you see as the greatest challenges to developing an effective conservation program under section 7(a)(1)?
- 10) What resources can your organization bring to the table to help Federal agencies develop or implement programs, planning, or on-the-ground conservation actions under section 7(a)(1)?
- 11) How best should we continue to engage you and others in discussions and development of section 7(a)(1) programs?
- 12) Do you have other comments and thoughts to share with respect to section 7(a)(1)?

Next Steps: Please send responses to questions, comments and ideas to Susan Pultz (susan.pultz@noaa.gov) and Heather Bell (heather.bell@noaa.gov). Everyone who responds will be kept apprised of developments in the progress of this initiative.

Literature Cited

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http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf
- Wood, Mary Christina. Spring 2004. Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act. Environmental Law, Vol. 34, pp. 605-645.