

ESA Section 7 Proposed Rule Changes

Public Comment Processing
Attention: 1018-AT50
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 North Fairfax Drive, Suite 222
Arlington, VA 22203

Subject: Proposed Rule to Amend Part 402 of Title 50 of the Code of Federal Regulations Implementing Section 7 of the Endangered Species Act of 1973

Thank you for the opportunity to comment on the proposed rule to amend part 402 of title 50 of the Code of Federal Regulations, which implements Section 7 of the Endangered Species Act of 1973 (ESA). For 37 years The Xerces Society for Invertebrate Conservation has worked with the U.S. Fish and Wildlife Service (FWS) and many other federal, state and local partners to conserve threatened and endangered species under the Endangered Species Act of 1973. The Xerces Society is an international organization representing over 5,000 members.

The Xerces Society believes the proposed changes to the Section 7 regulations would, in many cases, be detrimental to listed species and habitat conservation on the ground. We understand that approximately 85% of Section 7 consultations are “informal,” reflecting the solid partnerships between federal agencies and the small impacts that most activities may have on listed species. We also understand that very large projects will likely require formal Section 7 consultations under the proposed rules. However, we believe that the proposed changes to Section 7 of the ESA will allow seemingly insignificant projects that have significant impacts to listed species of invertebrates to move forward without the expertise of the FWS. The Xerces Society believes that the existing requirement for an independent biological assessment of how a federal project may affect an endangered species is extremely valuable. If federal action agencies are allowed to decide for themselves whether or not an action will harm a species, and when they stand to gain monetarily from a finding that there will be no harm to an endangered species, there is a conflict of interest. These proposed rule changes to Section 7 of the ESA remove a system of checks and balances that has worked well to protect animals and plants from extinction for the past 35 years.

We believe that endangered insects and other invertebrates would experience a heightened risk of extinction with these proposed rule changes because the destruction or degradation of even a small area of habitat can have a large negative impact on these species. Many endangered invertebrates, such as the Alabama cave shrimp (*Palaemonias alabamiae*), are relegated to very small areas of habitat. A project that negatively impacts even a quarter of an acre of their habitat—which may seem inconsequential from the standpoint of the action agency—could lead some invertebrate species to extinction.

Would an action agency have the knowledge to understand that putting a highway adjacent to a butterfly’s habitat would change the hydrology of land nearby, leading to the local extirpation of that butterfly? This is exactly what happened when a highway off ramp was built

adjacent to the habitat of the Carson wandering skipper (*Pseudocopaodes eunus obscurus*). Although the off ramp was not directly on the habitat of the butterfly, it led to the extirpation of one nearby population and ultimately influenced the USFWS to list the species as Endangered.

If this rare species had been listed as Endangered at the time of the highway off-ramp development, the action agency would have been required to consult with the FWS under Section 7 of the ESA, as it currently stands. The Xerces Society, which has worked with the FWS on the conservation of this species, is confident that the FWS would have known that the off-ramp development would have negatively impacted the Carson wandering skipper. In this case, and many more endangered species cases, the FWS has a solid understanding of the biology of endangered species and unique expertise into how projects may impact those species.

We believe that the proposed rule will give action agencies the opportunity to ignore or downplay negative impacts to listed invertebrate species. The proposed rule appears to provide nearly unilateral authority to federal action agencies, and shifts the threshold of impact that triggers a consultation away from species protection towards project imperatives. Decisions of action agencies to decide whether or not an action will impact a species are now placed in the hands of federal action agencies with incentives to move projects forward, not to protect endangered species. There are likely thousands of examples across the country where action agencies have developed internal determinations of no effect or minimal effect on listed species that have been reversed following FWS review. The proposed rule allows action agencies to remove from action those effects that are deemed insignificant, uncertain, unlikely or beneficial. These undefined qualifications provide substantial leeway for projects to move forward without consultation.

Moving initial determinations of impact to action agencies is further complicated by the proposed rule's new definition "effects of the action" and the new causation standard to be used for determining effects of agency actions. Based on our reading, ongoing impacts to listed species resulting from historical actions from action agencies will not be addressed unless a newly proposed action is determined by "in house" staff to exacerbate the ongoing negative impact. Since action agencies often benefit from finding "no effect of action," the pressure within action agencies to reach a finding of "no effect" will be intense.

The Xerces Society believes the proposed changes weaken the ESA by giving decision making authority for informal consultation to action agencies that have no vested interest in conserving listed species. Combined with newly proposed and ambiguous definitions and the shortened timelines for informal and formal consultation by the FWS, the section 7 consultation process will be severely weakened. If implemented, the proposed rule will give Federal action agencies unilateral authority to determine whether an informal consultation takes place. Many Federal actions would be expected to move forward with little to no involvement of the FWS, to the detriment of the many listed invertebrate species that are dependant upon federal lands, managers, and agencies.

In summary, the Xerces Society has strong concerns with the changes in the proposed rule and believes these changes would allow Federal agency actions to move forward with little regard to their impacts on ESA-listed species and their habitat.

Scott Hoffman Black
Executive Director
The Xerces Society for Invertebrate Conservation
4828 SE Hawthorne Blvd.
Portland, OR 97215
www.xerces.org