1-1-1999

Limiting the Scope of the Endangered Species Act--Discretionary Federal Involvement or Control under Section 402.03

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Recommended Citation
Derek Weller, Limiting the Scope of the Endangered Species Act--Discretionary Federal Involvement or Control under Section 402.03, 5 Hastings West Northwest J. of Envtl. L. & Pol'y 309 (1999)
Available at: https://repository.uchastings.edu/hastings_environmental_law_journal/vol5/iss3/9

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I. Introduction

In 1973, Congress enacted the Endangered Species Act (ESA or the Act) to reverse the trend toward species extinction resulting from "economic growth and development untempered by adequate concern and conservation." In the ESA, Congress created a powerful statutory framework for the protection and conservation of endangered and threatened species and the ecosystems upon which they depend. Its stringent provisions were intended to apply across the board, to all private and governmental activity. Section 9 of the Act, the general take prohibition, makes it unlawful for any private, state, or federal entity to "take" an endangered or threatened species. In addition, section 7 imposes a number of additional obligations on all federal agencies intended to insure that federal governmental activity does not jeopardize the continued existence of threatened and endangered species.

At the heart of the ESA's protective measures, section 7(a)(2) provides that:

[Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined to be critical.]

Section 7(a)(2) imposes two mandatory obligations on all federal agencies, one substantive and one procedural. The substantive mandate of section 7(a)(2) requires agencies to "insure" that its actions are "not likely to
jeopardize the continued existence" of any threatened or endangered species or "result in the destruction or adverse modification" of critical habitat. To facilitate agency compliance with the substantive mandate, section 7(a)(2) also includes a procedural mandate requiring all federal agencies to consult with the Fish & Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (collectively, the Service) to identify both the effects of a proposed agency action on threatened or endangered species and reasonable alternatives that may be employed by the agency to avoid jeopardizing those species.

For any of section 7(a)(2)'s mandates to apply to a given agency activity, the activity must fall within the definition of "agency action" under section 7(a)(2). "Agency action" is defined as "any action authorized, funded or carried out" by a federal agency. In Tennessee Valley Authority v. Hill, the United States Supreme Court concluded that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer" and that the language "admits of no exception." The Court based its conclusion on a plain reading of the statutory language, which it found further supported by the legislative history and underlying purposes of the ESA. The Court also concluded that "the legislative history underlying section 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species" and "to give endangered species priority over the 'primary missions' of federal agencies."

Congress subsequently amended the ESA in response to the Hill decision, confirming the Supreme Court's interpretation of section 7 as a crosscutting provision intended to impose obligations that are in addition to, and with priority over, other federal agency obligations. Accordingly, federal courts have interpreted the scope of "agency action" under section 7(a)(2) broadly. The Service's joint regulations are also in accord with the above authorities with respect to the definition of "action." Section 402.02 of the joint regulations defines "action" as "all activities or programs of any kind authorized, funded or carried out, in whole or in part, by [federal agencies in the United States or upon the high seas]."

Based on the plain language of section 7(a)(2), Congress' underlying intent and purpose, the Supreme Court's findings, and the Service's own definition of "action," it seems clear that "agency action," triggering the mandates of section 7(a)(2), includes "any action authorized, funded or carried out" by federal agencies with no exceptions. The Service's joint regulations interpreting the applicability of section 7, however, do provide an exception to section 7(a)(2)'s mandates. Section 402.03 of the joint regulations provides that "[s]ection 7 and the requirements of this Part apply to all actions in which there is discretionary [federal] involvement or control." A number of judicial opinions have relied on section 402.03 to find agency action that would otherwise fall within the scope of section 7(a)(2) to be exempt as nondiscretionary agency action. Thus, section 402.03 has in effect redefined the scope of "agency action" subject to section 7(a)(2)'s mandates to exclude agency action that can be deemed nondiscretionary. Moreover, since an agency's discretionary authority is defined by its operative statute, the exclusion of nondiscretionary agency action from section 7(a)(2)'s mandates gives the agency's obligations under its operative statute greater priority over the

6. See id.
7. Id. §§ 1536(a)(4), 1536(b)(4).
8. Id. § 1536(a)(2).
9. 437 U.S. 153, 173 (1973) (holding that section 7 of the ESA required the Court to enjoin the operation of a nearly completed federal dam project, authorized prior to the enactment of the ESA, where the ongoing operation of the project would destroy the habitat of the endangered snail darter).
10. See id. at 174-93.
11. Id. at 185.
12. See infra text accompanying notes 188-91.
13. See infra note 62.
15. Id. § 402.03 (emphasis added).
16. See infra Part III.
mandates of section 7(a)(2). This is clearly inconsistent with the Supreme Court's conclusion that Congress intended for agencies "to give endangered species priority over the 'primary missions' of federal agencies." 17

The nondiscretionary element created by section 402.03 does not appear in the statutory language of the ESA, its legislative history, or any judicial interpretations of the scope of section 7(a)(2), other than those relying on section 402.03 itself. In addition, the term "discretionary" did not appear in the proposed rule-making that preceded the publication of the final rule promulgating section 402.03. Rather, it was inserted into the regulatory language and published as a final rule without any opportunity for public discussion or comment concerning the change. Also, no explanation for the insertion of this term was provided in the final rule. This failure on the part of the Service to provide for notice and comment and to publish a statement of the basis and purpose for amending section 402.03 violated the requirements of the Administrative Procedure Act (APA). 18

Given that section 402.03 creates an exception to a statutory provision that has been interpreted as having no exception, and given that it was promulgated in violation of the APA, a close examination of the meaning, effect and validity of section 402.03 should be conducted. This Note conducts such an analysis. Part II sets forth a brief summary of the provisions of the ESA and how "agency action" under section 7(a)(2) has been defined and interpreted. Part III looks at the judicial opinions applying section 402.03 and concludes that section 402.03 has indeed changed the analysis courts employ to determine whether section 7(a)(2) applies to a given agency action. Part IV details the APA violations implicated by the Service's promulgation of section 402.03. Part V inquires into the reasonableness of the Service's interpretation of the applicability of section 7(a)(2). Part VI then examines whether in the absence of section 402.03 the judicial opinions relying on it would have come out differently.

II. The Endangered Species Act (ESA)

A. Statutory Framework

In 1973, Congress enacted the ESA in response to mounting evidence that many species of plant and animal life have been rendered extinct, endangered or threatened "as a consequence of economic growth and development untempered by adequate concern and conservation." 19 Recognizing the "esthetic, ecological, educational, historical, recreational, and scientific value [of these species] to the Nation and its people," Congress created in the ESA a powerful and stringent statutory framework for the protection of endangered and threatened species. 20 By far the most comprehensive legislative effort to date for the protection of species, the ESA represents a conscious congressional decision to give endangered and threatened species the utmost protection. This is clear from Congress' approval of the Supreme Court's decision in Hill, which concluded that the "the plain intent of Congress in enacting the ESA was to halt and reverse the trend toward species extinction, whatever the cost." 21 In addition, with respect to federal government activities, the Supreme Court found that Congress intended "to give endangered species priority over the 'primary mission' of federal agencies." 22

The regulatory structure of the ESA provides for the protection of endangered and threatened species on a species by species and project by project basis. 23 A species comes within the protections of the ESA when, pursuant to

20. Id., § 1531(a)(3).
21. 437 U.S. at 184 (emphasis added).
22. Id. at 185.
23. An endangered species is one which "is in danger of extinction" 16 U.S.C. § 1532(6) (1994). A threatened species is one which is "likely to become an endangered species within the foreseeable future." Id. § 1532(20). "Species" includes "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." Id. § 1532(16).
section 4, it is “listed” as endangered or threatened, and its critical habitat is designated. Species are listed by the FWS or the NMFS, the two federal agencies charged with administering the ESA.

Once a species has been listed, a number of provisions providing for its protection are triggered. One of the most significant protections afforded a species under the ESA is found in the general take prohibition. Section 9 prohibits the “taking” by any private, state, federal or foreign entity of any species of fish or wildlife that has been listed as endangered. In addition, the section 9 take prohibition has been applied to most threatened species of fish and wildlife under regulations promulgated by the Service pursuant to section 9(a)(1)(G). Listed plant species are governed by section 9(a)(2), prohibiting the removal, damage, or destruction of listed endangered plant species. A violation of section 9 subjects the violator to possible civil penalties, criminal penalties, and/or the issuance of an injunction resulting from an enforcement action or citizen suit. Section 10 of the ESA provides a number of exceptions to section 9’s prohibitions, the most significant of which authorizes the Service to issue an “incidental take permit” for takings that are “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”

Section 7 of the ESA imposes a number of substantive and procedural duties on all federal agencies. Section 7(a)(1) requires that all federal agencies, “in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of [listed endangered and threatened species].” Although agencies must affirmatively use their authority for the conservation of listed species, the ESA affords agencies discretion in deciding how to carry out conservation programs and “does not mandate par-

24. See id., § 1533(a). The Secretary of the Department of Interior and the Secretary of the Department of Commerce with the Department of Interior’s approval, have the authority to list species as threatened or endangered based on five factors: (1) destruction or threat to the species’ habitat; (2) overutilization of the species for commercial, recreational, scientific, or educational purposes; (3) disease of predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting the species continued existence. See id., § 1533(a)(1). The determination must be based “solely on the best scientific and commercial data available.” id., § 1533(b)(1)(A).

25. See id., § 1533(b)(1)(B). “Critical habitat” is defined as areas containing physical or biological features that are “essential to the conservation of the species” and that “may require special management considerations or protection.” Id., § 1532(5)(A). Unlike the listing of species, the Secretary must take into account both biological and economic consideration when making critical habitat designations. See id., § 1533(b)(1).

26. “Take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct.” Id., § 1532(19).

27. Section 9 applies to any “person,” defined broadly to include “an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government; of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality or political subdivision of a State, or any other entity subject to the jurisdiction of the United States.” Id., § 1532(13)


29. See 50 C.F.R. § 17.31 (1998)

30. 16 U.S.C. § 1538(a)(2) (1994). Section 9 also includes various prohibitions against the importation, possession, sale, transportation, delivery, or shipment of listed species. Id., § 1538(a)(1)-(2).

31. Id., § 1540.

32. Id., § 1539(a)(1)(B) A person seeking to obtain an incidental take permit must submit a conservation plan to the Service specifying the impacts that will likely result from the taking, what steps will be taken to minimize those impacts, what alternative actions were considered and why they were not utilized, and any other measures the Service requires See id., § 1539(a)(2)(A). After review of the conservation plan, the Service will issue an incidental take permit if it finds that the taking will be incidental, will not appreciably reduce the likelihood of the survival or recovery of the species, and the applicant will minimize and mitigate the impacts, provide adequate funding, and employ any additional measures required by the Service See id., § 1539(a)(2)(B) Any taking of an endangered or threatened species pursuant to and in accordance with the terms of an incidental take permit will not constitute a violation of the section 9 take prohibition See id.

33. Id., § 1536(a)(1).
ticular actions be taken by federal agencies to implement section 7(a)(1)."  

Section 7(a)(2), the focus of this Note, requires all agencies to "insure that any action authorized, funded or carried out by such an agency is not likely to jeopardize the continued existence of any [listed species] or result in the adverse modification of [critical] habitat of such species." This provision requires all federal agencies to "insure that its actions are not likely to jeopardize the continued existence of a listed species or adversely modify their habitats. As a means to facilitate compliance with this duty, section 7(a)(2) also requires agencies to consult with the Service to identify the potential effects an agency action may have on listed species and any reasonable alternatives that may be employed by the agency to avoid adverse impacts on listed species and their habitats. 

The FWS and the NMFS have jointly promulgated regulations establishing a multiphase process for implementing the consultation requirement of section 7. First, the action agency is required to convey to the Service "a written request for a list of any listed or proposed species that may be present" in the action area. If the Secretary advises that a listed species may be present in the action area and that the federal action is a "major construction activity," then the agency will be required to prepare a Biological Assessment (BA) to evaluate the potential effects the action will have on listed or proposed species. If the BA concludes, and the Service concurs in writing, that the proposed action is not likely to adversely affect listed species, the consultation process is concluded. If, however, the BA concludes that the proposed project will likely have adverse effects, the agency is required to enter into formal consultation with the Service.

If the proposed action is not a "major construction activity," a BA is not required and the agency must make an independent evaluation of whether the action "may effect" a listed species. If so, the agency is required to enter into formal consultation with the Service. Alternatively, an agency can satisfy its obligation to consult by either preparing a BA where one is not required and seeking Service concurrence as explained above, or by entering into informal consultation with the Service.

The purpose of both the BA and the informal consultation requirements is to determine whether the proposed action is likely to affect listed species or critical habitat. In either event, if the Service concludes no likely effect, consultation is terminated. If the Service concludes that the proposed action will likely have adverse effects, formal consultation is required.

Formal consultation culminates in the Service issuing a Biological Opinion (BO) evaluating whether the proposed action is likely to "jeopardize the continued existence of" a listed species or likely to result in the "destruction or adverse modification" of critical habitat.


35 50 C.F.R. § 402.12(c) (1998). "Action area" is defined as all areas that may be "affected directly or indirectly by the [federal action and not merely the immediate area involved in the action."


37 See 50 C.F.R. § 402.12 (1998). "Major construction activity" is defined as a "construction project (or other undertaking having similar physical impacts) which is a major [federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA 42 U.S.C. 4334(2)(C)]"

38 See id. § 402 14.

39 See id. § 402 14(b).

40 See id. § 402 14(a).

41 See id. § 402 13. Informal consultation includes any type of communication with the Service.

42 See id. § 402 14.

43 See id. § 402 14.
BO concludes that the action is not likely to jeopardize listed species or adversely modify critical habitat, the Service will issue a "no jeopardy" opinion. If the BO concludes, however, that the action is likely to jeopardize or modify, the Service is required to determine whether there are any "reasonable and prudent alternatives" to the proposed action that would not result in a jeopardy opinion. If there are reasonable and prudent alternatives, the Service will issue a "jeopardy opinion with reasonable and prudent alternatives;" if not, the Service will issue a "jeopardy opinion without reasonable and prudent alternatives."

The action agency has the ultimate responsibility to comply with the mandates of section 7(a)(2) and is not required to implement the reasonable and prudent alternatives in the BO. If the agency, however, does proceed in accordance with the alternatives suggested by the Service, it will have complied with both section 7(a)(2)'s mandates. If the agency departs from the Service's suggested alternatives in the event of a jeopardy opinion, it may still comply with section 7(a)(2)'s substantive mandate by taking "reasonable adequate steps to insure the continued existence" of listed species. In addition, if the Service determines that the agency action will incidentally take listed species and concludes that neither the agency action nor the incidental take will violate section 7(a)(2), it is required to provide an "incidental take statement."

If the action agency adheres to the terms and conditions of the incidental take statement, it will be exempt from any claim under the section 9 take prohibition.

The consultation requirements are important to agencies for two reasons. First, consultation provides a means by which the agency can guarantee compliance with section 7(a)(2)'s mandate to insure that its actions are not likely to jeopardize the continued existence of listed species or result in the adverse modification of critical habitat. Second, through the incidental take statement contained in the BO, an agency may insulate itself from liability under the section 9 take prohibition. The implication then is that if an agency incorrectly concludes that its actions are not subject to section 7(a)(2), it may unknowingly expose itself to a potential lawsuit for the failure to meet its duties to insure and consult under section 7(a)(2) and for the takings of species under section 9.

B. Applicability of Section 7(a)(2): Triggered by "Agency Action"

The requirements of section 7(a)(2) lie at the heart of the ESA's protective measures with respect to federal governmental activities. Section 7(a)(2) imposes a substantive mandate on all federal agencies to insure that their actions are not likely to jeopardize the existence of listed species or destroy their critical habitat. It also requires that agencies consult with the Service. This process is aimed at identifying the effects a given action will have on listed species and any alternatives that may be employed to satisfy the substantive mandate. In this respect,
section 7(a)(2) is of primary importance both to those agencies trying to comply with the ESA and to those species whose continued existence depends on the protective measures of the ESA.

The requirements of section 7(a)(2) are triggered by the existence of an "agency action," defined as "any action authorized, funded or carried out" by a federal agency. In Tennessee Valley Authority v. Hill, the Supreme Court found the scope of this definition to be all-inclusive and without exception. Based on a plain reading of the statutory language, further supported by the legislative history and underlying purpose of the ESA, the Supreme Court concluded:

One would be hard pressed to find a statutory provision whose terms were any plainer than in section 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species." This language admits of no exception.

The Court also found that "the legislative history underlying [section] 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species and "to give endangered species priority over the 'primary missions' of federal agencies." In response to Hill, Congress amended the

57. Id. § 1536(a) (1994).
58. 437 U.S. at 173.
59. Id.
60. Id. at 185.
61. See infra text accompanying notes 188-91
62. See, e.g., O'Neill v. United States, 50 F.3d 677, 680-81 (9th Cir. 1995) (explaining why section 7(a)(2) applies to a preexisting water service contract where the United States must act each year to supply water), Conservation Law Found. v. Andrus, 623 F.2d 712, 715 (1st Cir. 1979) (holding that the ESA will apply to any contract

ESA, confirming the Court's interpretation of the language of section 7 and of the ESA as a powerful statute intended to impose obligations on agencies that are in addition to, and with priority over, other agency obligations. As such, federal courts have followed the Hill decision and interpreted the scope of "agency action" under 7(a)(2) broadly.

The Service's joint regulations are also in accord with the above authorities with respect to the definition of "action". Section 402.02 of the joint regulations defines "action" as

| All activities or programs of any kind authorized, funded or carried out, in whole or in part, by | federal agencies in the United States or upon the high seas. Examples include, but are not limited to (a) actions intended to conserve listed species or their habitat, (b) the promulgation of regulations, (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants in aid, or (d) actions directly or indirectly causing modifications to the land, water, or air. |

This definition of "action" does not limit the definition of "agency action" found in section 7(a)(2) except for the geographical limitation, making section 7(a)(2) applicable only to actions taken "within the United States or upon the high seas."

In sum, congressional intent, judicial interpretations, and the Service's definition of "action" all support the conclusion that the definition of "agency action" under section 7(a)(2) means exactly what it says. "any action

the Secretary enters into which requires a future action on the Secretary's part). Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1054 (9th Cir. 1994) ("[T]here is little doubt that Congress intended to enact a broad definition of agency action in the ESA, and therefore the (Forest Services land resource management plans) are continuing agency action."). Lane County Audubon Soc'y v. Jamison, 958 F.3d 290, 294 (9th Cir. 1992) (holding that a document promulgated by the Bureau of Land Management for conservation of the northern spotted owl was "agency action" requiring consultation under the ESA)

authorized, funded or carried out" by federal agencies must meet the mandates of section 7(a)(2). The only exception to this clear requirement is where an agency has obtained an exemption pursuant to section 7(h).64 Otherwise, the scope of agency action subject to section 7(a)(2) is without exception. Given the above authorities, any interpretation limiting the scope of "agency action" under section 7(a)(2) should be impermissible as contrary to congressional intent. Nevertheless, the Service has limited the scope of section 7(a)(2) by promulgating section 402.03 of the joint regulations.

Section 402.03, defining the applicability of section 7, provides that "classification 7 and the requirements of this Part apply to all actions in which there is discretionary [f]ederal involvement or control."65 In effect, section 402.03 redefines the definition of "agency action" under section 7(a)(2) from "any action authorized, funded or carried out" by an agency, to "any discretionary action authorized, funded, or carried out" by an agency. Thus, the Service's interpretation of the applicability of section 7 creates an exception to section 7(a)(2)'s mandates for nondiscretionary actions, directly conflicting with the Supreme Court's finding that section 7(a)(2) "admits of no exception."66 Nevertheless, a number of courts have given section 402.03 the force of law and relied on it to find agency action exempt from section 7(a)(2).67

Prior to the promulgation of the current version of section 402.03 in June 1986, the discretionary character of a given agency action played no part in determining the applicability of section 7. This discretionary element does not appear in the statutory language of the ESA, its legislative history, or any judicial interpretations of section 7(a)(2) other than those relying on section 402.03 itself. In fact, the version of section 402.03 in place prior to 1986 did not contain any reference to agency discretion. The pre-1986 version of section 402.03 interpreted the applicability of section 7 as applying "to all activities or programs where [f]ederal involvement or control remains which in itself could jeopardize the continued existence of a listed species or modify or destroy critical habitat."68 So, on what basis was the change made and what does it mean?

The Service has not explained the basis for exempting nondiscretionary actions and has not provided any guidance for ascertaining what it means. Rather, it has been left solely to the courts to determine the existence or lack of discretion with respect to a given agency action on a case by case basis. Interestingly, a number of courts have willingly applied section 402.03, but no court to date has yet addressed its validity. In order to delineate the meaning of "nondiscretionary agency action," the following discussion will analyze those judicial opinions relying on section 402.03.

III. Judicial Application of Section 402.03

Since the promulgation of the current version of section 402.03, judicial analysis regarding the applicability of section 7(a)(2) has changed in a number of courts to include an analysis of the discretionary character of the "agency action" in question. In a handful of cases, courts have found agency action that would have otherwise triggered section 7(a)(2)'s mandates to be exempt from its requirements. In all of the cases applying section 402.03, the courts have ascertained the discretionary character of the agency action at issue by looking at the agency's operative statute, a contract the agency was party to, or the ability of the agency to control the ultimate acts that may threaten listed species. Three categories of holdings emerge: (1) the agency has no express discretionary authority to con-
consider and provide for the protection of wildlife; therefore, the application of section 402.03 renders section 7(a)(2) inapplicable; (2) the agency does have express discretionary authority to consider and provide for protection of wildlife; therefore, the application of section 402.03 does not exclude the agency action from section 7(a)(2); and (3) the agency does not have the authority to control or influence the actions of other parties who may threaten listed species, making any actions taken by the agency nondiscretionary and not subject to section 7(a)(2). The following section discusses each of these categories in turn and identifies potential issues raised by the courts’ holdings.

Two recorded opinions have held agency action exempt from section 7(a)(2) where the agency did not possess any express discretionary authority to consider or provide for the protection of wildlife. In *Strahan v. United States Coast Guard*, 69 a district court in Massachusetts held that the Coast Guard’s documentation and inspection of vessels is a nondiscretionary activity, and, as such, the Coast Guard is not required to consult with the NMFS concerning the effects of those actions. The court looked to the Coast Guard’s operative statute and concluded that “the Coast Guard is required to issue Certificates of Documentation and Inspection if the specific statutory and regulatory criteria, which make no reference to environmental concerns, are met.”70 The court held that these specific criteria leave the Coast Guard with only nondiscretionary responsibilities; therefore, the application of section 402.03 renders the Coast Guard’s inspection and documentation of vessels exempt from the requirements of section 7(a)(2).71

In *Sierra Club v. Babbitt*, 72 the Ninth Circuit held that the Bureau of Land Management (BLM) had no discretion to consider the protection of the endangered spotted owl when approving the construction of a logging road pursuant to a right-of-way agreement. The plaintiffs in the case sought to enjoin the construction of a logging road by Seneca Sawmill Company on BLM lands under a right-of-way agreement entered into prior to the passage of the ESA.73 The right-of-way agreement permitted the BLM to consider only three specific factors in approving the proposed road project.74 Plaintiffs claimed that the BLM violated section 7(a)(2) by approving the road construction in question without consulting with the FWS concerning the effects of the road’s construction on the threatened spotted owl.75 The court framed the issue as the following: “To what extent does section 7 apply where the BLM granted right-of-way by contract to a private entity before passage of the ESA and the agency’s continuing ability to influence the private conduct is limited to three factors unrelated to the conservation of the threatened spotted owl.”76 The court stated that “[t]he regulations supply the answer.”77 Specifically, section 402.03 provides that section 7 applies only to agency actions where there is “discretionary involvement or control.”78 Based on section 402.03 and the conditions of the right-of-way agreement, the court concluded that the BLM does not possess any discretionary authority because it lacks the ability to influence Seneca’s right-of-way project.79 As such, the court held that the requirements of section 7(a)(2) do not apply and that the BLM is not required to consult with the FWS regarding the effects of Seneca’s road construction on the endangered spotted owl.80

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70. Id. at 621.
71. See id. at 621-22.
72. 65 F.3d 1502, 1509 (9th Cir. 1995).
73. See id. at 1505-06.
74. Under the right of way agreement, the BLM could reject a proposed road construction only if the proposed route was: (1) not the most direct, (2) substantially interfering with existing or planned facilities, or (3) resulting in excessive soil erosion. Outside of these three factors, the BLM was unable under the terms of the agreement to oppose the road construction. See id. at 1505-06.
75. See id. at 1507.
76. Id. at 1508.
77. Id. at 1509.
78. 50 C.F.R. § 402.03 (1998).
79. See *Sierra Club*, 65 F.3d at 1509-10.
80. See id. at 1509 (citing 50 C.F.R. § 402.03).
Derek Weller Volume 5, Number 3

Strahan and Sierra Club present two situations where an agency's discretion was limited either by statute or under contract. In both, the agencies were deemed to have no express discretionary authority to consider species protection. Both agencies, however, did have some discretionary authority to consider other factors. For instance, in Sierra Club, the BLM had discretion to consider and protect against excessive soil erosion. Thus, it can be drawn from these two cases that section 402.03 limits the applicability of section 7(a)(2) to those situations where an agency's action is conducted pursuant to express discretionary authority to consider the protection of wildlife species. Not just any type of discretionary power will suffice to bring the agency action within the scope of the discretionary involvement or control requirement of section 402.03.

The second group of cases holds that section 402.03 does not exempt agency action from section 7(a)(2) where the agency possesses discretionary authority to consider and provide for the protection of wildlife. In Florida Key Deer v. Stickney, a district court in Florida held that the Federal Emergency Management Agency (FEMA) had discretionary authority to consider the protection of wildlife and was therefore required to consult with the FWS pursuant to section 7(a)(2). The plaintiffs sought declaratory and injunctive relief to force FEMA to consult with the FWS pursuant to section 7(a)(2) concerning the potential impacts FEMA's flood relief actions might have on listed species. In examining whether section 402.03 provided an exception to the requirements of section 7(a)(2), the court initially stated that "[a] construction of section 402.03 as being a limitation on the geographical discretion of federal agencies is the only construction that is compatible with the statutory provisions of Section 7 and the legislative history of the ESA." Nevertheless, the court proceeded to examine the scope of FEMA's discretionary powers under the National Flood Insurance Program (NFIP). The court found that FEMA had broad discretionary authority under the National Flood Insurance Act (NFIA) to promulgate regulations necessary to carry out the purposes of NFIA. Under this authority, FEMA promulgated regulations implementing the Council on Environmental Quality's regulations under the National Environmental Policy Act (NEPA), as well as regulations to implement an executive order for the protection of wetlands. Under these regulations, FEMA was authorized to consider wildlife protection, but under FEMA's operative statute no such discretion was cited. Based on these findings of discretionary authority, the court concluded "as a matter of law that FEMA has broad discretion to 'issue such regulations as may be necessary to carry out the purpose of [the NFIP]' and, therefore [section] 402.03 does not operate to exempt FEMA from the requirements of Section 7 of the ESA." The court granted plaintiffs' request for declaratory and injunctive relief and ordered FEMA to consult with the FWS.

In Natural Resources Defense Council v. Houston, the Ninth Circuit addressed the issue of whether the United States Bureau of Reclamation (USBR) engaged in "agency action" under section 7(a)(2) of the ESA when it renewed water supply contracts with several water districts in California. The water districts argued that the USBR had no discretion to alter the terms of the renewal contracts to decrease the amount of water to be delivered because the districts had a first right to a stated quantity of project water. The court stated that "[w]here there is no agency discretion

81. Id. at 1505. 82. 864 F. Supp. 1222, 1226 (D. Fla. 1994).
83. See id. at 1224.
84. Id. at 1239.
85. See id. at 1239-40.
86. See id. at 1239.
87. See id.
88. See id.
89. Id. at 1240.
90. See id. at 1242.
91. 146 F.3d 1118, 1125-26 (9th Cir. 1998).
92. See id.
93. See id.
to act, the ESA does not apply. Because federal reclamation laws required that water contracts be renewed on "mutually agreeable terms" and that the USBR had discretion to limit the amount of available project water for sale if necessary to comply with the ESA, the court concluded that the USBR had discretion to limit the quantity of water to be delivered when renegotiating the renewal contracts. Thus, the court held that the USBR's renewal of the water contracts constituted "agency action" for purposes of section 7(a)(2).

Both Houston and Florida Key Deer follow the same analysis in that they find section 7(a)(2) applicable to a given agency action where the agency is found to possess express discretionary authority to consider wildlife protection. In this respect, their holdings reach the opposite result as in Strahan and Sierra Club. Florida Key Deer, however, differs from the other three with respect to where it found the discretionary authority. Both Houston and Strahan look to the USBR's operative statute as the source of discretionary authority. In Florida Key Deer, the court only finds a general grant of authority to promulgate regulations "as may be necessary to carry out the purposes of [the NFIA in FEMA's operative statute]." Yet, the court cites no authority stemming from FEMA's operative statute. Instead, the court relies on regulations promulgated by FEMA providing for consideration of wildlife protection but intended to implement NEPA and an executive order for the protection of wetlands.

The question then is to what extent may discretionary authority be derived from congressional enactments other than the agency's operative statute. If such authority can be drawn from statutes such as NEPA, does any federal agency lack discretionary authority? Or is it necessary that the agency first promulgate regulations specifying that it intends to consider wildlife protection in its efforts to comply with NEPA? Moreover, under this analysis can it be argued that the ESA itself grants agencies discretionary authority to implement its mandates? If so, section 402.03 is inconsistent with the ESA in that it exempts that which the ESA grants. Specifically, the ESA grants agencies the discretion to consider wildlife protection.

The final group of published decisions where section 402.03 was applied involved the question of whether the FWS engaged in "agency action" with regard to proposed logging operations in the Pacific Northwest. In Marbled Murrelet v. Babbitt (Marbled Murrelet I), the Ninth Circuit lifted a preliminary injunction issued by a district court against a number of lumber companies from salvaging dead, dying and decaying trees, and against the Department of Interior and the FWS from approving any cutting or removal pursuant to exemption notices without first preparing a BA and a BO as required by the ESA. A summary of the underlying facts is necessary to fully comprehend the outcome of this case.

California law requires that before commencing any timber operations, a Timber Harvest Plan (THP) must be submitted for approval by the California Department of Forestry and Fire Protection (CDF). An exemption from this general requirement applies for the cutting and removal of "dead, dying and diseased trees," subject to certain conditions. To obtain a permit to remove dead, dying and diseased trees, a notice of the proposed operation must be submitted to the CDF, and within ten days of receipt of such notice, the CDF must determine whether the notice is "complete and accurate." If it is complete and accurate, the CDF sends the submitter a notice of acceptance. If not, the CDF...
returns the notice to the submitter. If the CDF fails to act within ten days of receiving the notice, the submitter may commence with its operations.

The lumber companies involved in Marbled Murrelet I initially submitted a notice of proposed timber salvage for a 5994-acre parcel in Humboldt County, including Headwaters Forest, and indicated that some of the area may be important to threatened or endangered species. The CDF rejected the notice and requested the lumber companies to identify the location and habitat of any rare, threatened, or endangered species. The lumber companies then resubmitted their notice with the requested information. The CDF accepted the resubmitted notice and reiterated the conditions that the companies consult with and inform the California Department of Fish and Game (CDFG) and the FWS before commencing any operations. The lumber companies disputed these conditions with the CDF and later met with representatives of the CDFG and the FWS on the issue. In response to this meeting, the CDFG and the FWS sent a joint letter to the lumber companies reviewing the on-site inspections and setting forth a number of conditions that had to be met to comply with state law and to avoid a take of identified species under the ESA.

On this same date, the Environmental Protection Information Center (EPIC) filed a complaint alleging that the FWS had engaged in discretionary agency action, thus requiring the FWS to conduct internal consultation and to prepare a BA and a BO. EPIC sought to enjoin the Secretary of Interior and the FWS from approving any cutting or removal pursuant to the exemption notices. The district court issued a preliminary injunction against the lumber company defendants, but declined to enjoin the federal defendants. The lumber company defendants appealed to the Ninth Circuit.

The Ninth Circuit framed the issue to be decided as "whether evidence was presented to the district court which indicated discretionary federal involvement or control over the lumber companies' intended tree salvage operations sufficient to raise a serious question whether the FWS engaged in 'agency action' under the ESA." Citing section 40203 and Sierra Club, the court stated "[a]n action is an 'agency action' if there is 'discretionary federal involvement or control.'" In rejecting the argument that the FWS exercised discretionary involvement or control, the court emphasized that nothing in the communications that took place "justifies an inference that the FWS has the authority to enforce California's laws or regulations" and that "there..."
is no evidence that the [FWS] had any power to enforce those conditions other than its authority under section 9 of the ESA, and this is not enough to trigger 'federal action' under section 7.118 Furthermore, the court stated that "[w]hen an agency 'lacks the discretion to influence the private action' there is no 'agency action.'"119

The court concluded that the FWS was "merely providing advice on how the [l]umber companies could avoid a 'take' under section 9" and that "as a matter of law, such advisory activity does not constitute discretionary involvement or control over the [l]umber companies' proposed tree harvests."120 The court then held that there was no serious question as to whether the FWS engaged in "agency action" under section 7, and it reversed the preliminary injunction issued by the lower court.121

Following the Ninth Circuit's decision in Marbled Murrelet I, EPIC sought to obtain a temporary restraining order (TRO) preventing the [l]umber companies from harvesting under the exemption notices accepted by the CDF.122 The basis for EPIC's TRO motion was the same as in Marbled Murrelet I: The FWS had engaged in "agency action" requiring consultation under section 7(a)(2) of the ESA. The district court rejected EPIC's motion, holding that the "Service does not engage in 'agency action' when it provides technical advice or informal guidance to state agencies as to whether and to what extent a proposal to harvest trees might affect a listed species."123 The court cited both section 402.03 and the Ninth Circuit's decision in Marbled Murrelet I in holding that nondiscretionary agency action is outside the scope of section 7(a)(2) requirements.

EPIC continued its fight to prevent logging in Humboldt County and once again found itself before the Ninth Circuit. In Marbled Murrelet v. Babbitt (Marbled Murrelet II),124 the Ninth Circuit ruled that two concurrence letters issued by the FWS and used by the [l]umber companies to satisfy the requirements of a California law did not constitute an "agency action" requiring the FWS to internally consult. Under California law, any logging operation must proceed under a Timber Harvest Plan (THP) approved by the CDF.125 To obtain approval, an applicant must proceed in accordance with one of seven alternatives to provide the CDF with the necessary information to determine whether the logging operation will result in the take of an endangered species.126 One of these options allows the CDF to consider an opinion issued by the FWS that the operation is not likely to take a listed species.127 The FWS issued two concurrence letters that were used by the [l]umber companies to satisfy the information submittal requirement and obtain the CDF's approval of eight THPs.128 Based on the argument that the FWS had engaged in "agency action" by issuing the concurrence letters, EPIC had successfully obtained a preliminary injunction on the THPs from the district court.129 The issue before the Ninth Circuit then was whether the district court, in granting the preliminary injunction, was correct in finding that there existed a serious question as to whether the FWS's issuance of concurrence letters constituted "agency action" and its failure to initiate internal consultation violated section 7(a)(2).130 The Ninth Circuit disagreed with the district court's finding that the concurrence letters constituted an approval of the THPs.131 The Ninth Circuit cited to its previous opinion in Marbled Murrelet I and held that "when an agency lacks the discretion

118. Id. at 1074 (citing Sierra Club, 65 F.3d at 1511 n.15).
119. Id. at 1074 (citing Sierra Club, 65 F.3d at 1509)
120. Marbled Murrelet I, 83 F.3d at 1074-75.
121. See id.
123. Id. at *5.
124. 111 F.3d 1447, 1450 (9th Cir. 1997).
125. See Cal. PUB RES C:5 § 4581 (Deenng 1993).
127. See id. § 919 9(e).
128. See Marbled Murrelet II, 111 F.3d at 1449
129. See id. at 1447
130. See id. at 1449
131. See id. 
to influence private action, there is no 'agency action.'" The Ninth Circuit concluded that it is the CDF, not the FWS, which possesses the discretion to influence the private action in this case, and, as such, there was no serious question as to whether the FWS engaged in "agency action" under section 7(a)(2). Based on this reasoning, the Ninth Circuit vacated the preliminary injunction.

Subsequent to the Ninth Circuit's decisions in Marbled Murrelet I and Marbled Murrelet II, the lower court entered summary judgment in favor of the FWS and the [lumber] companies with respect to both the exemption harvests and the THPs at issue in the those lawsuits. Following the Ninth Circuit's previous holdings and its own holding denying EPIC's TRO motion, the court held that the FWS had not engaged in an action over which it had discretionary involvement or control, and thus, was not required to initiate internal consultation.

The Marbled Murrelet cases put an interesting twist on the determination of an agency's discretionary authority. The Ninth Circuit held in both Marbled Murrelet I and Marbled Murrelet II that "when an agency lacks the discretion to influence private action, there is no 'agency action.'" It is evident from the court's analysis in Marbled Murrelet I that "lack of discretion to influence" means lack of authority to enforce species protection measures under state law; without such enforcement capabilities, the FWS is acting only in an advisory capacity.

Instead of looking to the FWS's operative statute or the agency's regulations, the Ninth Circuit looks to the enforcement capabilities of the FWS to determine whether there is discretionary authority. This implies that discretionary agency action may only be found where the agency has authority to require specific conduct. In Southwest Center for Biological Diversity v. Federal Energy Regulatory Commission, the court characterized the Ninth Circuit's position as "placing] a stronger emphasis on the weightier requirement of 'control' versus the lesser requirement of 'involvement.' Accordingly, advisory activity does not constitute 'agency action' under the ESA."

The above opinions are the only published cases to date that have applied section 402.03. They reveal that section 402.03 is given the force of law. As a result, the analysis for determining whether an agency action is subject to the requirements of section 7(a)(2) has changed to include an analysis of the discretionary character of the agency action in question. These cases also provide a frame of reference for defining the scope and meaning of section 402.03. Taking the cases together, it appears that section 402.03 exempts from section 7(a)(2) those agency actions proceeding under congressional mandates that do not provide for express discretionary authorization to consider and provide for the protection of wildlife. Where the agency does possess express discretion to protect wildlife under its operative statute, or possibly under other congressional mandates, then section 7(a)(2) will apply to the discretionary actions taken pursuant to them. In addition, even if the agency has sufficient discretion but does not possess the authority to control the outcome of private or state actions, any action it takes with respect to that private or state entity will be deemed nondiscretionary and not subject to section 7(a)(2).

In sum, the above cases have applied section 402.03 to exempt certain agency actions from the mandates of section 7(a)(2). Given that the definition of "agency action" under section 7(a)(2) has been interpreted as "admitting] of no exception" and that Congress has expressed its clear intent to give species protection priority over the primary missions of federal agencies, the exceptions carved out by section 402.03 seem to pull back
the reach of the ESA as it applies to agency actions. Part IV addresses the question of whether section 402.03 was promulgated lawfully and whether it is a reasonable interpretation of section 7(a)(2).

IV. Section 402.03 was Promulgated In Violation of the APA

The promulgation of the current version of section 402.03 by the Service in 1986 violated the procedural requirements of the Administrative Procedure Act (APA) in two respects. First, the promulgation of section 402.03 did not satisfy the notice and comment requirements of section 553 of the APA. Section 553(b) provides that “[g]eneral notice of proposed rule making shall be published in the Federal Register” and that such “notice shall include (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” Section 553(c) also requires that “the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”

In response to a number of substantive congressional amendments to the ESA, the Service published a Proposed Rule Making (PRM) in the Federal Register for the purpose of “amending existing rules governing section 7 consultation by implementing changes required by the amendments and by incorporating procedural changes designed to improve interagency cooperation.” The public was then given the opportunity to comment. Eventually, the Service promulgated the Final Rule in 1986. In the PRM, section 402.03 read: “Applicability. Section 7 and the requirements of this Part apply to all actions in which there is [f]ederal involvement or control.” This language presented no change from the version of section 402.03 appearing in the joint regulations prior to the publication of the PRM. However, in the Final Rule, section 402.03 stated: “Applicability. Section 7 and the requirements of this Part apply to all actions in which there is discretionary [f]ederal involvement or control.” The insertion of the word “discretionary” into the Final Rule, where it did not appear in the PRM, violates section 553 of the APA.

Notice of proposed rules can be satisfied by providing notice which either specifies the “terms or substance” of the proposed regulation or merely identifies the “subjects and issues involved” in the rule making proceedings. The PRM fails to satisfy the notice requirement under either of these two methods with respect to section 402.03. By failing to include the term “discretionary” in the PRM version of section 402.03 and later inserting it into the Final Rule version, the Service failed to give notice of the “terms or substance” of the changed language, and thus, the applicability of section 7. In addition, there is nothing in the PRM or in the congressional amendments to the ESA indicating that changing the applicability of section 7 by amending section 402.03 was a “subject” or “issue” involved in the rule making proceedings. The PRM merely restated word for word the language of the already existing section 402.03. No discussion relating to a change in the applicability of section 7 is found anywhere in the PRM, the issue was never raised. In fact, the Final Rule does not even acknowledge that the change occurred.

In *American Medical Association v United States,* the Seventh Circuit held that:

141. Id. § 553(b).
142. Id. § 553(c).
146. 51 Fed. Reg. at 19,958 (emphasis added).
147. 50 U.S.C. § 553(b)(3).
148. American Med. Assn. v United States 887 F.2d 760, 767 (7th Cir. 1989) (stating National Black Media Coalition v Federal Communications Comm'n 791 F.2d 1016, 1022 (2nd Cir. 1985) ("While a final rule need not be an exact replica of the rule proposed in the Notice, the final rule must be a logical outgrowth of the rule proposed and it the final rule deviates too sharply from the proposal affected parties will be deprived of notice and an opportunity to respond to the proposal.")) Small Rehner Lead Phase-Down Task Force v EPA 705 F.2d 506, 547 (D.C Cir. 1983) (The test for determining the
notice [of proposed rule making] is adequate if it apprises interested parties of the issues to be addressed in the rule making proceeding with sufficient clarity and specificity to allow them to participate in the rule making in a meaningful and informed manner. Stated another way, a final rule is not invalid for lack of adequate notice if the rule finally adopted is "a logical outgrowth" of the original proposal.

With regard to section 402.03, the PRM did not inform the public that the Service was considering limiting the applicability of section 7 to discretionary involvement or control or was intending to change the language of section 402.03 in any way. As a result, the public was not given an opportunity to comment on the issue, and interested parties were not able to "participate in the rule making in any meaningful and informed manner."

Furthermore, there is no language in the PRM to support a conclusion that the final language of section 402.03 was a "logical outgrowth of the original proposal." Due to these omissions, the promulgation of section 402.03 violated section 553 of the APA by failing to provide adequate notice and comment.

Section 553 does provide for an exception to its notice and comment requirements for "interpretive rules." Because section 402.03 does interpret the meaning of section 7's applicability, it could be argued that it falls within this exception. The scope of this exception, however, has been construed narrowly. In American Mining Congress v. Mine Safety & Health Administration, the District of Columbia Circuit Court found that the determination of whether a rule is an interpretative rule or a legislative rule depends on whether the rule has "legal effect," which in turn is best ascertained by asking (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

While the first question does not come into play because section 402.03 is actually limiting the legislative basis for ensuring the performance of duties, the other questions from American Mining Congress are answered in the affirmative. Section 402.03 was published in the Code of Federal Regulations, the Service explicitly invoked its legislative authority when it promulgated the joint regulations, and the prior version of section 402.03 was effectively amended. Moreover, the cases applying section 402.03 make it clear that section 402.03 does indeed have legal effect. Therefore, because section 402.03 has a clear legal effect, it is not an interpretive rule exempt from the notice and comment requirements of section 553.

In addition to violating the notice and comment requirements of section 553(b) of the APA, the promulgation of section 402.03 also violated section 553(c) by failing to provide an adequate statement of the basis and purpose in the Final Rule. Section 553(c) provides that "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of..."

149. American Med. Ass'n, 887 F.2d at 767
150. See id. at 768 ("A rule will be invalidated if no notice was given of an issue addressed by the final rules.").
their basis and purpose."\(^{153}\) In Independent U.S. Tanker Owners Committee v. Dole,\(^{154}\) the court stated that "[a]t least, such a [concise and general] statement should indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did, particularly in light of the statutory objectives that the rule must serve." The purpose of this rule is to inform the public of the basis and purpose of the promulgated rule and to provide for effective judicial review.\(^{155}\) The Final Rule did provide a statement, but it was far from adequate. The statement read:

This section, which explains the applicability of Section 7, implicitly covers [f]ederal activities within the territorial jurisdiction of the United States and upon the high seas as a result of the definition of "action" in [section] 402.02. The explanation for the scope of the term "action" is provided in the discussion under [section] 402.01 above.\(^{156}\) Nowhere in this explanation, or in the explanations under section 402.01 or 402.03, is there any discussion concerning the insertion of the word "discretionary" or any discussion concerning the amended language. In fact, the Final Rule does not even acknowledge that a change took place. The "concise and general statement" required by section 553(c) for explaining the basis and purpose for amending section 402.03 inadequately identified why the change in section 402.03 was even an issue being addressed. Furthermore, the Final Rule did not explain in any way why the language was amended. For this reason, the statement was inadequate, and the promulgation of section 402.03 violated section 553(c) of the APA.

Even though the Service failed to satisfy the requirements of the APA when promulgating section 402.03, any attack based on these procedural violations may be time-barred under the general statute of limitations, which bars civil actions against the United States not commenced within six years of the date when the cause of action begins to accrue.\(^{157}\) The APA violations here occurred well over six years ago. Where regulations are challenged as exceeding statutory authority, however, the six-year statute of limitations does not apply.\(^{158}\) Thus, section 402.03 could be challenged as exceeding statutory authority.

V. Section 402.03 Is Not a Reasonable Interpretation of Section 7(a)(2)

Section 402.03, which limits the applicability of section 7(a)(2) to agency actions where there is discretionary involvement or control, cannot be reconciled with the plain language of section 7(a)(2) that its requirements are applicable to "any action authorized, funded or carried out by a federal agency."\(^{159}\) Furthermore, the legislative history of the ESA makes it abundantly clear that the ESA was intended to apply

\(^{153}\) See 5 U.S.C. § 553(c).

\(^{154}\) See 809 F.2d 847, 852 (D.C. Cir. 1987), cert. denied, 484 U.S. 819 (1987) (holding that in promulgating a shipping rule, the Maritime Administration acted arbitrarily and capriciously by failing to provide an adequate discussion of the basis and purpose of the rule).

\(^{155}\) See also United States v. Nova Scotia Food Prod. Co. 568 F.2d 240, 252 (2nd Cir. 1977) ("[i]f the judicial review which Congress has thought important to provide is to be meaningful, the 'concise general statement of basis and purpose' will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.").

\(^{156}\) See Department of Justice, Attorney General's Manual on the Administrative Procedure Act 32 (1947).


\(^{158}\) See also Strahan v. Linnon, 967 F. Supp. 581, 607 (D Mass. 1997) (holding policy-based challenge to section 402.03 time-barred because brought over six years after promulgation).

to all agency actions, regardless of the degree of discretion possessed by the agency. The promulgation of section 402.03, therefore, exceeded the Service’s statutory authority and should be invalidated in order to give effect to Congress’ intent that agencies insure, through consultation with the Service, that any action they take will not jeopardize the continued existence of listed species or result in the modification of critical habitat.

When Congress enacted the ESA, it delegated broad administrative and interpretive power to the Secretary of the Interior and the Secretary of Commerce, who in turn delegated this authority to the Service. In section 11(f) of the ESA, the Secretary of Interior and Commerce are “authorized to promulgate such regulations as may be appropriate to enforce this Chapter.” This language constitutes an express delegation of authority to interpret the provisions of the ESA.

In Chevron, U.S.A. v. Natural Resources Defense Council, the Supreme Court made it clear that agencies are to be given a great deal of deference in interpreting their operative statutes when such a delegation exists. The Court set forth the framework for determining whether an agency’s construction of a statute is permissible:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

The Court explained that the question is not whether the agency’s construction is appropriate, but whether it is “reasonable” in the context of the particular statutory provision. Furthermore, an agency interpretation taken pursuant to an express delegation is “given controlling weight unless it is arbitrary, capricious or manifestly contrary to the statute.”

Given this framework, the question of whether section 402.03 is a permissible construction first depends on whether Congress expressed a clear intent when it directly spoke to the applicability of section 7(a)(2). If it did, the Service had no authority to alter Congress’ intent, and section 402.03 should be repealed in order to give effect to that intent. If Congress’ intent on the matter is deemed ambiguous, however, the question becomes whether the interpretation of section 7 applicability found in section 402.03 is a reasonable interpretation.

Following the Chevron analysis, the first question is whether Congress spoke to the matter at hand. Here, the question is what agency actions are subject to section 7(a)(2)’s mandate. Congress spoke directly to the issue within section 7(a)(2) itself, by defining “agency action” as “any action authorized, funded or carried out” by a federal agency.

The next question then, is whether construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”

160. See id. §§ 1533, 1540(f); 50 C.F.R. § 402.01 (1998).
163. The Court inserted a footnote at this point, reading “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional rules of statutory

164. Id. at 842-43.
165. See id.
166. Id. at 844.
167. Id. at 842.
Congress' intent on the matter, as expressed in the statutory language, is clear.\textsuperscript{169} If the intent is clear, then the agency must give it effect.\textsuperscript{170} In answering this question, it cannot be ignored that the Supreme Court has already construed the intent of Congress and stated that the language of section 7 "admits of no exception."\textsuperscript{171} The Supreme Court further recognized that "there are no exceptions in the ESA for federal agencies."\textsuperscript{172} Given the clarity of the language "any action authorized, funded or carried out," the Supreme Court could not have reached any other conclusion.

First, the term "any" is all-inclusive, it does not have any limiting effect. Second, Congress' choice of words to define the scope of action indicates an intent that all agency actions fall within the scope of section 7. Congress' use of the words "authorized, funded or carried out" makes it clear that if an agency is involved in a given project in any way, its actions will be subject to the requirements of section 7. This is apparent by the fact that one would be hard pressed to imagine an agency action taken where there is federal involvement or control in a given project that does not fall within the range of actions covered by these three words. Hence, the definition of section 7 appearing in section 402.03 prior to 1986 read as: "Section 7 applies to all actions in which there is federal involvement or control."\textsuperscript{173} The plain language of section 7(a)(2) leaves no room for exceptions, indicating that the intent of Congress in enacting the ESA was to subject all agency actions to the requirements of section 7, regardless of the degree of discretion held by that agency. Given the clarity of the statutory language, the Service exceeded its statutory authority by exempting nondiscretionary actions from the requirements of section 7(a)(2). As such, section 402.03 of the joint regulations should be rejected under the first step of the \textit{Chevron} analysis as contrary to congressional intent expressed in the plain language of section 7(a)(2).

Even though the language of section 7(a)(2) seems to encompass every imaginable agency action, it could still be argued that it is not clear whether Congress intended that it apply to nondiscretionary agency actions. Under this view, one would ask how Congress could possibly have intended that agencies carry out the mandate of the ESA when the agency does not even possess the authority to take such actions? Under this reasoning, and because Congress did not speak directly to the issue of discretion, section 7(a)(2) could be found to be ambiguous. If it is ambiguous, the next question under the \textit{Chevron} analysis is whether the Service's interpretation of section 7(a)(2) is reasonable. If the Service's interpretation is read consistent with the underlying purposes of the ESA and its legislative history, then it is a reasonable interpretation and a court must give deference. If it is not reasonable, then it must be invalidated as contrary to congressional intent. A close examination of the underlying purposes of the ESA and its legislative history reveal a clear congressional intent that section 7 is meant to apply to all agency actions, regardless of whether the agency possesses only nondiscretionary powers.

In \textit{Hill}, the Supreme Court conducted a searching probe into the legislative history of the ESA.\textsuperscript{174} The Court concluded that the "language, history, and structure of the ESA indicate beyond doubt that Congress intended endangered species to be afforded the highest of priorities."\textsuperscript{175} In addition, the Court stated that the "plain intent of Congress in enacting the ESA was to halt and reverse the trend toward species extinction, whatever the cost."\textsuperscript{176} The Court noted that the clarity of the statutory language made a search of the legis-

\textsuperscript{169} \textit{See} \textit{Chevron}, 467 U.S. at 842-43.
\textsuperscript{170} \textit{See id}.
\textsuperscript{172} \textit{Id} at 188. Following the \textit{Hill} decision, Congress did amend the ESA to include a process whereby agencies could receive an exemption by petitioning the newly created Endangered Species Committee. \textit{See} 16 U.S.C \textsection\textsection 1536(e-h).
\textsuperscript{173} 50 C.F.R \textsection 402.03 (1998)
\textsuperscript{174} 437 U.S. at 174-88
\textsuperscript{175} \textit{Id} at 184
\textsuperscript{176} \textit{Id}
The legislative history unnecessary to reach its conclusion that the language of section 7 "admits of no exception." The Court, however, did engage in a searching evaluation of the legislative history in order to rebut the dissenting opinion's assertion that the majority's result was not in accord with congressional intent.

The Court began by looking at legislation for species protection in place prior to the ESA of 1973. The Court emphasized that the ESA of 1966 and the Endangered Species Conservation Act (ESCA) of 1969 both contained qualifying language in its mandates to federal agencies and that this language had been omitted when Congress enacted the ESA of 1973. The 1966 Act provided that all federal agencies should protect species "insofar as is practicable and consistent with their primary purpose." This limiting language was also found in the 1969 Act. The Court also pointed out that every bill introduced into Congress in 1973 contained similar qualifying language. However, the bill that originally passed the House, House Resolution 37, and the final language of section 7 carefully omitted this qualifying language.

The House Committee Report accompanying House Resolution 37 stated:

This subsection requires the Secretary and the heads of all other federal departments and agencies to use their authorities in order to carry out programs for the protection of endangered species, and it further requires that those agencies take the necessary action that will not jeopardize the continuing existence of endangered species or result in the destruction of critical habitat of those species.

The qualifying language was omitted. However, the bill that passed the Senate, Senate Bill 1983, retained the qualifying language.

Ultimately the issue went to the Conference Committee for resolution. The Conference Report explained that the Committee adopted Senate Bill 1983 for the most part but that it rejected the Senate version of section 7 and adopted the mandatory language of House Resolution 37, which excluded the qualifying language. Emphasizing this chain of events, the Supreme Court concluded that the legislative history undergirding section 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.

The Supreme Court's search of the legislative history makes it clear that Congress intended the ESA to impose upon all agencies mandates that are in addition to and with priority over those mandates contained in the agencies' operative statutes. Moreover, by explicitly omitting all qualifying language, Congress expressed a clear intent that all agency actions shall be subject to the requirements of section 7, regardless of the degree of discretion possessed by the agency. To read otherwise would go against the stated purpose of the ESA—"to provide a means whereby the ecosystems upon which endangered species and threatened species..."
depend may be conserved” and “to provide a program for conservation of such endangered species and threatened species.” 189 It would also run contrary to the stated policy of the ESA that “all federal departments and agencies seek to conserve endangered species and threatened species.” 190 “Conserve” is defined by the ESA as: “to use and the use of all methods and procedures which are necessary to bring endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” 191 In sum, the Supreme Court was correct in reading Congress’ intent when it stated that section 7 “admits of no exception.”

In addition, the Supreme Court’s interpretation of section 7 in Hill and its reading of the congressional intent behind section 7 were subsequently affirmed by Congress in its 1978 amendment to the ESA. Congress’ primary purpose in amending the ESA was to address the apparent inflexibility of the ESA by establishing the Endangered Species Committee to review certain actions for determining whether exemptions should be granted. 192 Two bills, House Resolution 14104 and Senate Bill 2899 were at odds, and the issue went to the Conference Committee for resolution. 193 In explaining why the Senate version of section 7 was adopted, which contained identical language as its predecessor, the Conference Report states that “[t]he conferees felt that the Senate provision by retaining existing law, was preferable since regulations governing section 7 are now familiar to most federal agencies and have received substantial interpretation.” 194 Given that Congress was well aware of the Supreme Court’s decision in Hill, this statement affirms the Court’s reading that section 7 was intended to apply to all agency action, without exception.

This conclusion is further supported by the fact that the final 1978 amendment contained the House version of an exemption process to be carried out by the Endangered Species Committee. 195 This exemption process provides that in order for an agency to be excused from its obligations under section 7 it must obtain an exemption from the Endangered Species Committee. 196 The House Report accompanying the House bill provided a full discussion of the Hill decision and its implications. The Report states that “evidence developed at hearings suggests that the consultation process can resolve many if not most of the conflicts that might develop under the Act” 197 Furthermore, the Report states that “[i]t is clear, nevertheless, that there will continue to be some federal actions which cannot be modified in a manner which will avoid a conflict with a listed species” 198 Finally, the Report explains that the committee decided “that some flexibility is needed in the Act to allow consideration of those cases where a federal action cannot be completed or its objectives cannot be met without directly conflicting with the requirements of Section 7” 199 As explained in the House Report, the means for achieving this flexibility was the exemption process and the Endangered Species Committee. 200 Aside from the exemption process, the 1978 amendments retained the stringent mandate of section 7. Moreover, Congress has amended the ESA three times since 1978, and each time it has explicitly retained the mandatory language of section 7(a)(2). 201

In light of the above discussion appearing in both the House and Conference Reports, and the fact that Congress has retained the

190. Id. § 1531(c)(1).
191. Id. § 1532(3).
193. See id.
194. Id.
195. See id.
198. Id.
199. Id.
200. See id.
language of section 7(a)(2) to this day, it is clear that the congressional intent underlying section 7(a)(2) is that all agency actions are subject to the requirements of section 7 and that any exception to section 7(a)(2) requirements must come as a result of the exemption process. No discussion of the discretionary character of an agency's mandate appears anywhere in the legislative history. The exception to section 7(a)(2) requirements provided by section 402.03 of the joint regulations for non-discretionary agency actions, therefore, is clearly at odds with Congress' intent. As such, the Service's interpretation of the applicability of section 7(a)(2) may be construed as unreasonable, making section 402.03 vulnerable to invalidation as exceeding statutory authority.

VI. Implications of Removing Section 402.03 from the Analysis

Given that section 7(a)(2) of the ESA was not intended to be limited to discretionary agency action, the cases discussed in Part III relied upon section 402.03 in error. No evaluation of the discretionary character of agency action is permissible under section 7(a)(2), which precludes such an evaluation from serving as a threshold question for determining the applicability of its mandates. The question then is: what should the analysis have been in those cases and did the courts reach the correct result?

In Strahan, the court was faced with a situation where an agency's operative statute mandated the agency to carry out specific actions under specific and limited criteria that did not allow for any consideration of species protection. With section 402.03 removed from the analysis, the court should have, as a threshold matter, determined whether the Coast Guard's licensing and certification of vessels fell within the definition of "agency action" under section 7(a)(2). "Agency action" is defined under section 7(a)(2) as "any action authorized, funded or carried out" by a federal agency. The Coast Guard's licensing and certification of vessels authorize sea vessels to operate within the Coast Guard's jurisdiction, clearly an "agency action" under section 7(a)(2). In addition, "action" is further defined under section 402.02 of the joint regulations as "all activities or programs of any kind authorized, funded or carried out, in whole or in part, by [federal agencies]. Examples include the granting of licenses." The Coast Guard's licensing activities clearly fall within this definition. The court in Strahan, therefore, should have concluded that section 7(a)(2) does apply to the Coast Guard's licensing and certification actions.

This does not mean that the Strahan court should have simply ignored the limitations placed upon the Coast Guard under its operative statute. Rather, instead of looking to the discretionary nature of the Coast Guard's actions, the court should have analyzed the problem under the doctrines governing the implicit repeal of congressional acts. Where Congress has explicitly repealed a statute's mandate, there is no question that repeal is final. However, in the case where Congress has not provided an explicit repeal and two congressional enactments prove to be irreconcilable, repeal by implication may be present. If two statutes are irreconcilable, the congressional act that is later in time will override the prior congressional act. However, it is a "cardinal rule that repeals by implication are not favored." In order for a court to find repeal by implication, there must be a clear and manifest showing of congressional intent to repeal. In addition, "when two statutes are

204. See Mancari, 417 U.S. at 551.
205. See id.; Rodriguez, 480 U.S. at 524; Watt, 451 U.S. at 266.
206. Mancari, 417 U.S. at 549 (quoting Posadas v National City Bank, 296 U.S. 497, 503 (1936)).
207. See Rodriguez, 480 U.S. at 524 (holding that repeals by implication will not be found unless an intent
To the contrary, to regard each as capable of co-existence, it is the duty of the Spring
the ESA contains directives that may be vide a mechanism for obtaining an exemption that sections 7(e) through 7(h) of the requirements, however, a repeal of the operation of any salvage timber sale for the Congress has shown such intent can be found in the enactment of the ESA was to direct congressional intent to repeal the mandates of Congress has expressed a clear and manifest enactment of the ESA, a clear expression of ESA will be repealed by implication because Congress has expressed a clear and manifest intention to do so. For statutes passed after the enactment of the ESA, a clear expression of congressional intent to repeal the mandates of the ESA must be shown in order to find an implicit repeal of the ESA. An example where Congress has shown such intent can be found in the Salvage Logging Law, exempting the preparation, advertisement, offer, award and operation of any salvage timber sale for the period between July 27, 1995 to September 30, 1997 Absent an express repeal of the ESA's requirements, however, a repeal of the ESA by implication may not be possible due to the fact that sections 7(e) through 7(h) of the ESA provide a mechanism for obtaining an exemption from section 7(a)(2)'s mandates by way of petition to the Endangered Species Committee Even where a statute enacted subsequent to the ESA contains directives that may be deemed irreconcilable with the ESA, Congress has explicitly provided a means for solving such conflicts in the form of the Endangered Species Committee. Thus, an operative statute containing specific directives that leave the agency with no authority to consider species protection is irreconcilable with the ESA and should not operate to repeal the ESA by implication. Moreover, this reading is consistent with the purposes of the ESA in directing agencies to give species protection the highest of priorities. In addition, courts have a duty to read two conflicting statutes in a manner that will give them both effect In Strahan, whether the Coast Guard's operative statute was enacted prior to or after the passage of the ESA, the court had a duty to hold the Coast Guard to the mandates of section 7(a)(2). In this respect, the Strahan court reached the wrong result.

In Sierra Club, the Ninth Circuit was faced with a similar situation as in Strahan in that the BLM's authority to grant a right-of-way was limited The court found that the BLM's authority was limited not by its operative statute but under contract with a private entity. For this reason, the doctrine of repeal by implication would not have been applicable. The Sierra Club court erred in its analysis by exempting the BLM's right-of-way grant from section 7(a)(2) as nondiscretionary agency action Instead, the court should have concluded that the right-of-way was an "agency action" under section 7(a)(2) because it was an action "approved" by the BLM. Also, section 402.02 of the Service's joint regulations specifically includes "the granting of rights-of-way" as an example of an "action" under section 7(a)(2). Thus, the court should have held that the BLM's granting of a right-of-way was subject to section 7(a)(2) and that the BLM was required to consult with the FWS concerning the grants.

In addition, the court could have settled the issue concerning the conflict between the right-of-way agreements and the ESA by look-
ing to the sovereign acts doctrine. When the United States enters into a contract, it will be bound like any other private party. As such, "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." For this reason, the United States, as a party to a contract, is excused from contractual performance when that performance is precluded by a public and general act of the sovereign. This is the "sovereign acts doctrine" and it "is part of every contract with the government, whether the contract explicitly provides for it or not." Even though it can be said that all government action is enacted for the good of the public, however, not every act of the government qualifies as a sovereign act within the meaning of this doctrine. Rather, only those "public and general acts as a sovereign" qualify. "Goverment action whose principle effect is to abrogate specific contractual rights does not immunize the government from contractual liability under the doctrine." The ESAs principle effect is not to abrogate specific contractual rights, but rather, to protect the public's general interest in conserving threatened and endangered species. The BLM, therefore, should have been held to its mandate under the ESA, and any obligations the BLM had under the right-of-way agreement should have been excused to the extent that they conflicted with its legal obligations under the ESA.

The Marbled Murrelet cases pose an interesting situation. In those cases, the Ninth Circuit found actions taken by the FWS to be outside the scope of section 7(a)(2) because they were nondiscretionary actions of an advisory nature and the FWS had no authority to influence the actions of the private parties. By relying on section 402.03 to find the FWS's actions outside of the scope of "agency action" subject to section 7(a)(2), the court erred in its analysis. Instead the court should have analyzed whether the actions taken by the FWS constituted "agency action" as defined under section 7(a)(2). Under this definition, the court could have easily concluded that the FWS's on-site inspections, advisory letters and concrence letters were "actions carried out" by a federal agency and thus subject to section 7(a)(2). The court, however, concluded that since the FWS had no authority to enforce the conditions set forth in the letters or to directly influence the private or state entities' actions through the assertion of its authority, the FWS had no discretionary authority and was therefore exempt from sect on 7(a)(2)'s mandates. Because the court relied on section 402.03 to reach its holdings, its conclusions are analytically flawed.

It must be pointed out, however, that a number of compelling policy concerns underlying the Ninth Circuit's position lend toward concluding that the decisions reached practical results despite the flawed analysis. The district court that denied the Marbled Murrelet plaintiffs' motion for a TRO pointed out these policy concerns in describing the relationship between the FWS and the state agencies:

These facts depict three cash-strapped agencies, in an era of streamlining and budget cutting, working together to avoid wasting valuable time and endeavoring to gain optimum use of scarce resources as they try to protect a threatened species from commercial logging activity on thousands of acres of private property. Such federal-state

218. See Horowitz, 267 U.S. at 461.
220. Winstar Corp. v. United States, 64 F.3d 1531, 1548 (Fed. Cir. 1995) (citing Everett Plywood Corp v. United States, 651 F.2d 723, 731-32 (Ct. Cl. 1981)). See also Sun Oil Co. v. United States, 572 F.2d 786, 817 (Ct. Cl. 1978).
221. 16 U.S.C. § 1531(a)(3) (1994) (providing that species threatened with extinction "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people")
222. See supra text accompanying notes 116-21.
cooperation should be encouraged. Service officials must be able to furnish to their California counterparts information, guidance, and technical and legal advice. This assistance must be permitted to flow among the agencies freely, fully, and without fear that their good faith efforts to protect endangered or threatened species will be the subject of litigation.

In addition, if the FWS was required to consult on every action it takes in advising private parties or states concerning the effects a project may have on endangered species, the ability of the FWS to aid others in identifying measures that could be employed for protecting species would be inhibited. This concern is, of course, an important one, not only for efficiency reasons but also for the effective protection of threatened or endangered species.

While the lower court's analysis should have excluded any consideration of the discretionary character of the FWS's actions, the ultimate dismissal of the plaintiff's claims may have occurred anyway. In March 1997, after the Ninth Circuit's decision in Marbled Murrelet I but before the court's decision in Marbled Murrelet II, the United States Supreme Court handed down its decision in Bennett v. Spear. In this decision, the Supreme Court held that section 11(g)(1)(A) of the ESA, which authorizes any person to bring suit to enjoin any person, (including government agencies), alleged to be in violation of any provision of the ESA, does not apply to alleged violations committed by the FWS or the NMFS. The Court pointed out, however, that a suit could be brought under the APA to review the actions of the Service and that if those actions are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, they will be set aside. The Court also pointed out that review under the APA can only be obtained where there is "final agency action," which is determined by asking whether the agency action consummates the agency's decisionmaking process and whether "'rights or obligations have been determined' or from which 'legal consequences will flow.'"

Given the Supreme Court's holding in Bennett, the claims brought against the FWS in the Marbled Murrelet cases alleging that the FWS was in violation of section 7(a)(2) for failing to initiate internal consultation should not have proceeded under the ESA's citizen suit provision, but rather under the APA. If they had been brought under the APA, the relevant question would have been whether the FWS's actions were final agency actions. It is clear that the FWS did not consummate any decisionmaking process when it offered advice to the lumber companies on how they could avoid a take. Even if these advisory actions were deemed to consummate the agency's decisionmaking process, there are no rights or obligations created by them and no legal consequences will flow from them. With respect to the FWS's concurrence letters provided to the lumber companies, however, the issue may not be so clear. It could be argued that the concurrence letters consummated a decisionmaking process aimed at determining what conditions should be imposed to avoid a take. Furthermore, the lumber companies submitted these concurrence letters to the California Department of Forestry and Fire Prevention (CDF) who, in turn, considered them sufficient to comply with California law. Thus, a legal consequence flowed from the concurrence letters in that they constituted compliance with a state law.

An interesting aspect of the Supreme Court's holding in Bennett is that by forcing review of the Service's actions under the APA, the Supreme Court has limited review of the Service's compliance with section 7(a)(2) to final agency actions only. In this sense, the policy concerns of the Ninth Circuit and the lower court policy concerns about forcing the Service into internal consultation for an abundance of

225. See id. at 172-73.
226. See id. at 175
227. Id. at 178 (quoting Port of Boston Marine Terminal Ass n v Rederaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970))
ministerial actions would be satisfied without having to rely on the exception for nondiscretionary agency action provided by section 402.03. The policy concerns favoring federal-state agency cooperation and sharing of information and advice would also be met.

In addition to the implications presented with respect to the above cases, the invalidity of section 402.03 has future implications as well. Agencies are still mandated to insure its actions are not likely to jeopardize listed species or their habitats. In order to meet this mandate, agencies are also required to enter into consultation if it is determined that their actions may jeopardize a species. If an agency has relied on the exemption provided by section 402.03 to decide that a given action is outside of the mandate of section 7(a)(2), it may be subject to liability under the general take prohibition of section 9 if that action results in a take of a listed species. The agency will be without the "safe harbor" provided by the incidental take statement that follows from the consultation process. In addition, an agency that has incorrectly determined that its action is exempt may be subject to a citizen suit action enjoining its project for failure to satisfy its obligations under section 7(a)(2). Agencies relying on section 402.03 will need to reevaluate their responsibilities under the ESA and insure that all their actions meet the stringent mandate of section 7(a)(2), regardless of whether those actions are discretionary or nondiscretionary.

VII. Conclusion

Section 402.03 of the joint regulations, promulgated by the Service in 1986, excuses nondiscretionary agency actions from the mandate of section 7(a)(2) of the ESA. It is absolutely clear that this regulation was promulgated in direct violation of the APA. At no time was the public or any other interested person given an opportunity to comment on the possibility of exempting nondiscretionary actions. It is also clear from the legislative history that Congress did not intend to exclude nondiscretionary actions from section 7(a)(2)'s mandate and that any exception must come about through the exemption process. Furthermore, by excluding certain actions, section 402.03 runs contrary to the underlying purposes of the ESA to conserve threatened and endangered species.

The cases that have applied section 402.03 are limited, and section 402.03's impact has not been felt in a large degree. If, however, section 402.03 becomes rooted in the law, the result will be an increase in litigation over whether or not an agency action is nondiscretionary and exceeding the scope of "agency action" found to be exempt from section 7(a)(2)'s protective measures. This latter result may have grave consequences for those species whose existence depends on the ESA's protective measures. On the other hand, if section 402.03 is invalidated, these species will receive the protection they need. In addition, an invalidation of section 402.03 may subject agencies that have relied on it in the past to find their actions exempt from section 7(a)(2) to future litigation over the matter. On this same point, agencies currently evaluating their responsibilities under the ESA should be aware that reliance on section 402.03 might leave them in a vulnerable position.