



# PACIFIC LEGAL FOUNDATION

## Testimony Regarding: “ESA Consultation Impediments to Economic and Infrastructure Development”

Before the U.S. House of Representatives  
Committee on Natural Resources  
Subcommittee on Oversight and Investigations

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The Endangered Species Act is known as the “pit bull” of environmental law.<sup>1</sup> For good reason. As many economic-development and infrastructure project proponents have learned the hard way, once the Endangered Species Act sinks its teeth into you, it does not let go easily.

The ESA consultation process, which applies to any project requiring federal agency approval or funding and that “may affect” a listed species, is no exception.<sup>2</sup> The burdens of this process rise in lockstep with the growth of the federal government. As the number of activities the federal government regulates, permits, and funds increases, more projects must undergo consultation, straining agency resources, and slowing everything down. The statute and regulations forbid the commitment of resources until consultation concludes, meaning delays in the consultation process are delays for the project.<sup>3</sup>

Consequently, consultation is a significant obstacle to economic development and much-needed public-safety projects, imposing both delays and additional costs. By putting off projects, consultation can undermine public safety and ultimately harm species dependent on proactive conservation efforts or threatened by crumbling infrastructure.

Last month, for example, we all watched as Oroville Dam’s main spillway failed during a period of extreme flooding in Northern California. It looked like the emergency spillway would fail too, threatening the lives and property of nearly 200,000 people living below the dam.<sup>4</sup> Thankfully, the emergency spillway held and that crisis was averted. But the experience should have brought home the importance of infrastructure maintenance and upgrades.

After the flood receded, California announced plans to repair and improve the aging dam. Immediately, federal bureaucrats raised the specter of consultation, threatening to slow the repairs down, increase their costs, or block them entirely.<sup>5</sup> However, the environmental damage caused by the spillway failure shows that delaying infrastructure projects does not necessarily protect species. Delaying

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<sup>1</sup> See Timothy Egan, *Strongest U.S. Environment Law May Become Endangered Species*, N.Y. Times (May 26, 1992), <http://www.nytimes.com/1992/05/26/us/strongest-us-environment-law-may-become-endangered-species.html?pagewanted=all> (quoting Donald Barry of the World Wildlife Fund describing the ESA as “the pit bull of environmental laws” because “[i]t’s short, compact and has a hell of a set of teeth”).

<sup>2</sup> 16 U.S.C. 1536(a)(2).

<sup>3</sup> 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09.

<sup>4</sup> See Samantha Schmidt, Derek Hawkins, & Kristine Phillips, *188,000 evacuated as California’s massive Oroville Dam threatens catastrophic floods*, Wash. Post. (Feb. 13, 2017), available at <https://www.washingtonpost.com/news/morning-mix/wp/2017/02/13/not-a-drill-thousands-evacuated-in-calif-as-oroville-dam-threatens-to-flood/>.

<sup>5</sup> Letter from Rep. LaMalfa to President Trump re: Oroville Dam (Mar. 15, 2017), reproduced at <http://www.gridleyherald.com/article/20170315/NEWS/170319778> (criticizing the demand for consultation and work restrictions because they “would delay repairs immeasurably and place workers at risk”).

maintenance and upgrades can also threaten species and the environment by increasing the risk of serious infrastructure failure.<sup>6</sup>

As the Oroville Dam situation demonstrates, the intuition that species always benefit from stopping or shrinking human activity is wrong. When small towns put off maintenance of a dam, bridge, or road because the ESA would substantially increase costs and delay completion by several years, the environment can suffer more damage when that infrastructure fails than from the work it would have taken to fix it.

## **I. The burdens of the consultation process grow along with the size of the federal government**

As demonstrated below, consultation delays much-needed projects and increases their costs, often in cases where potential impacts on a listed species are minimal. But, before getting to that issue, it is helpful to identify the most significant cause of the problem: the ever-growing size of the federal government.

Section 7(a)(2) of the ESA requires consultation for every “action authorized, funded, or carried out by” a federal agency that may affect a listed species.<sup>7</sup> Therefore, the impact of the consultation process inevitably increases along with the number of state and private projects that require some type of federal permit or funding assistance. The agencies that administer the ESA cite their limited resources as a cause of consultation delays.<sup>8</sup> However, delays are not simply a question of agency resources but also what demands are placed on those resources. Those demands increase as ever more projects are subject to consultation based on minor federal involvement.

Today, a wide variety of private and state projects undergo consultation for precisely this reason. Even environmental groups acknowledge that the number of relatively harmless projects undergoing consultation delays the process for more significant projects.<sup>9</sup> The only long-term solution to this problem is to reduce the

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<sup>6</sup> See Peter Fimrite, *Measures save young salmon after failure of Oroville Dam spillway*, SF Gate (Mar. 21, 2017), available at <http://www.sfgate.com/science/article/Measures-save-young-salmon-after-failure-of-11015659.php> (the Oroville Dam spillway catastrophe threatened nearly a billion endangered salmon); Kurtis Alexander & Tara Duggan, *Riverbanks collapse after Oroville Dam spillway shut off*, San Fran. Chron. (Mar. 4, 2017), available at <http://www.sfchronicle.com/bayarea/article/Riverbanks-collapse-after-Oroville-Dam-spillway-10976144.php> (describing the environmental damage in the wake of the near-collapse of the Oroville Dam).

<sup>7</sup> 16 U.S.C. 1536(a)(2).

<sup>8</sup> See Presentation by Kay Davy, NMFS, *Endangered Species Act Section 7 Consultation Process* (2017), available at <http://asbpa.org/wpv2/wp-content/uploads/2017/01/Kay-Davy-NMFS-Protected-Resource-Division.pdf> (explaining that backlog of informal consultations prevents NMFS from timely reviewing significant, formal consultation requests).

<sup>9</sup> See Wildlife Society, *Practical Solutions to Improve the Effectiveness of the Endangered Species Act for Wildlife Conservation*, Technical Review 05-1, 7-8 (2005), available at <http://wildlife.org/wp->

size of government or the types of activities subject to consultation, so that the agencies can focus on and quickly review those major federal projects that most significantly affect species.

Unfortunately, the trend is going in the opposite direction. Both the agencies that administer the ESA and other federal agencies have expanded their regulatory reach, increasing the number of projects subject to consultation. For instance, the U.S. Fish and Wildlife Service recently adopted a regulation that significantly increases the number of areas designated as critical habitat.<sup>10</sup> That regulation makes it even easier to designate lands that are unoccupied by a species and unsuitable to it as “critical habitat.”<sup>11</sup> Since any project that may affect habitat undergoes consultation, this regulation threatens to increase further the number of projects that subject to consultation.

Other recent innovations (some would say power-grabs) by the Service threaten to expand the burdens of consultation even more. For instance, the recent spate of listings of healthy species based on potential impacts of climate change has led environmentalists to call for consultation for any project that affects emissions.<sup>12</sup> The ESA is poorly suited to address climate change risk. Nevertheless, they want projects to undergo the “apparently pointless and paralyzing duty to consult on emissions with a federal nexus” because it would be so burdensome that it might further other political ends.<sup>13</sup> Something has gone terribly awry when consultation has become a political chip to be played precisely because it burdens projects without benefitting species.

The Fish and Wildlife Service is not alone in extending its reach and thereby increasing the burdens of consultation. Anytime any other agency expands its power over private activity, it spills over into more projects undergoing consultation. For instance, the Waters of the United States (WOTUS) rule interpreting the reach of the Clean Water Act would increase the number of activities subject to permitting under Section 404 of that statute, which applies to any activity in areas deemed wetlands.<sup>14</sup> Already, many private development projects are substantially delayed

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[content/uploads/2014/05/ESA05-11.pdf](#) (explaining that delays are largely due to the increase in the number of projects that must undergo consultation, despite very minor impacts).

<sup>10</sup> See 81 Fed. Reg. 7,214 (Feb. 11, 2016). A coalition of 18 states have challenged this regulation under the ESA. See Dennis Pillion, *Alabama, other states challenge Endangered Species Act critical habitat rules*, AL.com (Nov. 30, 2016), available at [http://www.al.com/news/index.ssf/2016/11/alabama\\_challenges\\_endangered.html](http://www.al.com/news/index.ssf/2016/11/alabama_challenges_endangered.html).

<sup>11</sup> Six judges from the Fifth Circuit recently criticized the practice of designating unoccupied, unsuitable lands as “critical habitat,” observing that these lands could not properly even be considered habitat. See *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, No. 14-31008 (Feb. 13, 2017) (Jones, J., dissenting).

<sup>12</sup> See Holly Doremus, *Polar Bears in Limbo*, Slate.com (May 20, 2008), available at [http://www.slate.com/articles/health\\_and\\_science/green\\_room/2008/05/polar\\_bears\\_in\\_limbo.html](http://www.slate.com/articles/health_and_science/green_room/2008/05/polar_bears_in_limbo.html).

<sup>13</sup> See *id.*

<sup>14</sup> The President recently issued an executive order calling for the reconsideration of this rule, so these impacts are presently only theoretical. See President Trump, *Executive Order on Restoring the*

because they require a federal 404 permit, which triggers consultation.<sup>15</sup> This problem could be avoided if it were easier for states to take over this permitting authority, eliminating the need for federal involvement any time a property owner builds a home, a farmer plows his field or builds a pond.<sup>16</sup> But in the 45 years since the Clean Water Act was enacted, only 2 states have successfully navigated the process to take over this authority.<sup>17</sup>

Similarly, the increased federal role in funding local projects expands the burdens of consultation. Although federalizing the funding of local roads, local bridges, and other local public-safety projects raises substantial federalism concerns, the Supreme Court has generally upheld it from constitutional attack.<sup>18</sup> However, Congress should consider carefully whether it wants to subject every local infrastructure project to consultation based on this funding arrangement.

## **II. Consultation imposes delays and higher costs on economic development and public-safety projects**

The ESA requires consultation to be completed within 135 days.<sup>19</sup> Even if that deadline were always met, consultation would still be a significant barrier for economic development and infrastructure projects. In a world where time is money, 5-month delays in construction are no small cost.

But consultation often takes more time than Congress intended, affecting a wide range of economic activity and public-safety projects. In a survey of Interstate Natural Gas Association of America members, nearly 70% cited the “timing or length of consultation process” as the biggest area of concern for ESA application and administration.<sup>20</sup> A few examples highlight the scope of the problem.

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*Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule* (Feb. 28, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>.

<sup>15</sup> *Builders caught in crossfire of gnatcatcher habitat listing – Needless plan could delay or kill new housing and imperil species protection*, Nossaman.com (June 1, 2000), available at <http://www.nossaman.com/builders-caught-crossfire-gnatcatcher-habitat-listing-needless>.

<sup>16</sup> See Jonathan Wood, *How to promote federalism and reduce Clean Water Act abuse*, LibertarianEnvironmentalism.com (Mar. 13, 2017), available at <https://libertarianenvironmentalism.com/2017/03/13/404-federalism/>.

<sup>17</sup> See VA Department of Env'tl. Quality Report, *Study of the Costs and Benefits of State Assumption of the Federal § 404 Clean Water Act Permitting Program* (Dec. 2012), available at [http://www.deq.virginia.gov/Portals/0/DEQ/LawsAndRegulations/GeneralAssemblyReports/404\\_Feasibility\\_Study\\_2012.pdf](http://www.deq.virginia.gov/Portals/0/DEQ/LawsAndRegulations/GeneralAssemblyReports/404_Feasibility_Study_2012.pdf) (citing uncertainty over whether federal agencies would approve state assumption as an obstacle).

<sup>18</sup> *But see Nat'l Fed. Of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601-08 (2012) (striking down provisions of Obamacare as too coercive)

<sup>19</sup> See 16 U.S.C. 1536(b), (c).

<sup>20</sup> See *Suggestions on How to Improve the Endangered Species Act*, INGAA Foundation 15 (2007), available at <http://www.ingaa.org/File.aspx?id=5691>.

In Oklahoma, the consultation process held up a project between Muskogee County and the Cherokee Nation to straighten and improve a windy, dangerous road. The reason for the hold up: a single American burying beetle was found in the 50-acre project area.<sup>21</sup> The consultation is expected to add \$1,000,000 to the project's price tag and delay construction for a year, during which time the county's residents and the tribe's members will be stuck with the road's current, dangerous layout. The beetle is threatening human health in other ways too, since it has obstructed another Oklahoma project to build a road to a hospital.<sup>22</sup>

In California, the Valley elderberry longhorn beetle obstructed the Sutter Butte Flood Control Agency's efforts to upgrade 41 miles of levees along the Feather River. Because elderberry bushes grew along the river's edge, consultation had to be completed before the repairs could be made. Through consultation, the agency was required to undertake mitigation that cost \$4,250,000—enough to fund an entire mile of levee improvements.<sup>23</sup> These costs were imposed even though the U.S. Fish and Wildlife Service determined in 2006 that the beetle had recovered and should no longer be listed.<sup>24</sup> Yet, 10 years and several lawsuits later, the Valley elderberry longhorn beetle remains on the list and continues to obstruct flood control projects and increase their costs.<sup>25</sup>

Consultation has also interfered with scientific research aimed at increasing public safety. In 2012, an expedition to map a major earthquake fault line off the Pacific Coast was delayed and had to be scaled back because of consultation.<sup>26</sup> The goal of that project was to increase our knowledge of the fault line and thereby better predict tsunami risks. Although NOAA initially approved the project, the agency withdrew its permission at the last minute to require consultation based on potential impacts to whales.

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<sup>21</sup> See *Endangered American Burying Beetle delays \$6.5 million road project in Muskogee County, Oklahoma*, KJRH.com (Aug. 24, 2016), available at <http://www.kjrh.com/news/state/endangered-american-burying-beetle-delays-65-million-road-project-in-muskogee-county-oklahoma>; D.E. Smoot, *Road project delayed after endangered beetle found*, Muskogee Phoenix (Aug. 7, 2016), available at [http://www.muskogeephoenix.com/news/road-project-delayed-after-endangered-beetle-found/article\\_22ec52ca-aebb-50d0-bdf5-192cb4874d78.html](http://www.muskogeephoenix.com/news/road-project-delayed-after-endangered-beetle-found/article_22ec52ca-aebb-50d0-bdf5-192cb4874d78.html).

<sup>22</sup> See Darren DeLaune, *After beetles are accommodated, road to hospital begins*, MvskokeMedia.com (Mar. 3, 2017), available at <http://mvskokemedia.com/after-beetles-are-accommodated-road-to-hospital-begins/>.

<sup>23</sup> See <http://www.regulations.gov/#!documentDetail:D=FWS-R8-ES-2011-0063-0037>.

<sup>24</sup> See [http://ecos.fws.gov/docs/five\\_year\\_review/doc779.pdf](http://ecos.fws.gov/docs/five_year_review/doc779.pdf).

<sup>25</sup> The Valley elderberry longhorn beetle is not unique in this regard. The Service routinely ignores its scientists' determinations that species no longer merit listing. Forcing affected businesses and property owners to sue the agency as many as 3 or 4 times over many years to get the agency to finally act. See Jonathan Wood, *PLF files suit over caribou petition, the sequel*, PLF Liberty Blog (Mar. 14, 2014), available at <http://blog.pacificlegal.org/plf-files-suit-caribou-petition-sequel/>.

<sup>26</sup> See Keith Seinfeld, *Endangered orcas cause delays for major earthquake research*, KNKX.org (June 15, 2012), available at <http://knkx.org/post/endangered-orcas-cause-delays-major-earthquake-research>.

Consultation for projects in which the action agency has no direct interest can raise unique problems. Take, for instance, the experience of Liberty Mining.<sup>27</sup> In 1989, the company submitted a mining development plan to the Forest Service, which required consultation. In 1990, the Fish and Wildlife Service completed that consultation and informed the Forest Service that the project would not jeopardize the northern spotted owl. However, the Forest Service (which had no stake in the project) did not inform the company of this for two years, at which point consultation had to be reinitiated because of changes to the owl's habitat. The second consultation took another two years, again concluding that the mining project would not jeopardize the owl. The four-year delay cost the company \$22.5 million, which it was unable to recover from the agencies.

Although the ESA imposes deadlines for consultation, the Congressional Research Service has identified one of the ways that federal agencies skirt this requirement.<sup>28</sup> According to U.S. Fish and Wildlife Service practice, the deadline only begins to run when the agency determines a submission is complete. If the Service wants more information, it can demand it and thereby put off the statutory deadlines indefinitely. As the CRS Report found, "Repeated requests for additional data have led to great frustration among Action Agencies and the non-federal parties relying on them for permits, loans, sales, licenses, etc."

A recent report from the University of Texas at Austin's Kay Bailey Hutchison Center for Energy, Law, & Business found that this "pre-consultation" process entails significant delays.<sup>29</sup> In interviews for that study, Fish and Wildlife Service staff self-reported that pre-consultation lasts 18 months or more, depending on the project (well in excess of the statute's outer limit of 180 days).<sup>30</sup> Despite this lengthy process, the Service chooses not to count this time towards the consultation deadline.<sup>31</sup> The report identifies several projects that were tied-up in pre-consultation for extended periods.

Take, for instance, the Tule Wind Project in Southern California, a renewable energy project intended to power 60,000 homes. The pre-consultation period lasted 10 months, during which the Fish and Wildlife Service requested a survey of the area for Quino checkerspot butterflies. But that was only the beginning of the project's delays. Once the Service deemed the submission complete, formal

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<sup>27</sup> *Aloisi v. United States*, 85 Fed. Cl. 84 (2008).

<sup>28</sup> Kristina Alexander & M. Lynne Corn, *Proposed Changes to Regulations Governing Consultation Under the Endangered Species Act (ESA)*, Congressional Research Service Report RL34641 (Sept. 23, 2008), available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL34641.pdf>.

<sup>29</sup> See Taylor, et al., *Protecting Species or Endangering Development? How Consultation Under the Endangered Species Act Affects Energy Products on Public Lands*, Kay Bailey Hutchison Center for Energy, Law & Business Paper NO. 2016-03 (Aug. 2016), available at [https://repositories.lib.utexas.edu/bitstream/handle/2152/40956/2016\\_08\\_03\\_Protecting\\_Species\\_Endangering.pdf?sequence=2&isAllowed=y](https://repositories.lib.utexas.edu/bitstream/handle/2152/40956/2016_08_03_Protecting_Species_Endangering.pdf?sequence=2&isAllowed=y).

<sup>30</sup> See *id.* at 8.

<sup>31</sup> See *id.* at 36 (conceding that the Service's calculations "underestimate the total length of the consultation process").

consultation took another 335 days. At the end of that protracted process, the Service determined the project was not likely to jeopardize the species.<sup>32</sup>

Or consider the Black Hills Western Properties Master Development Plan, an oil and gas development project. Although the Service reports that consultation officially took only 106 days, including the pre-consultation period shows that the actual delay was more than 250 days.<sup>33</sup>

The full extent of pre-consultation delays is unknown. This is because the Service declined a Government Accountability Office recommendation to develop data on pre-consultation.<sup>34</sup> But the problem is widely acknowledged.

In practice, the demands for evermore information during pre-consultation reflects how the agency uses the “best scientific and commercial information available” standard inconsistently. This is the same standard used to make decisions whether to list a species under the ESA. Yet, at that step, the Service does not consider lingering uncertainty an obstacle to asserting regulatory authority over a species. But when the same standard is used for consultation or delisting a species, the Service relies on uncertainty to delay its response or avoid giving up regulatory control.<sup>35</sup>

The evidence that consultation results in substantial delays and expense is clear. However, in 2015, two Defenders of Wildlife employees released a paper claiming to debunk the argument that consultation burdens economic development and infrastructure projects.<sup>36</sup> The headline from that report was that **zero** of the 88,290 consultations over the previous seven years resulted in a project being denied, which the authors interpreted as evidence that consultation is no big deal.<sup>37</sup> The paper also acknowledged that **1 out of every 5** formal consultations exceed the deadlines set by Congress.<sup>38</sup>

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<sup>32</sup> See *id.* at 65.

<sup>33</sup> See *id.* at 71.

<sup>34</sup> GAO, *Endangered Species Act: Many GAO Recommendations Have Been Implemented, but Some Issues Remain Unresolved* 3 (2008), available at <http://www.gao.gov/new.items/d09225r.pdf> (reporting that FWS & NMFS have not tracked the delays caused by “preconsultation” despite GAO recommendation).

<sup>35</sup> See 81 Fed. Reg. 59,962 (Aug. 31, 2016) (declining to delist the California gnatcatcher despite two scientific studies supporting delisting, which were prepared at the Service’s suggestion, because of lingering uncertainty).

<sup>36</sup> See Jacob W. Malcom & Ya-Wei Li, *Data contradict common perceptions about a controversial provision of the US Endangered Species Act*, 112 Proceedings of the National Academy of Sciences 15844 (Dec. 29, 2015), available at [www.pnas.org/content/112/52/15844.full](http://www.pnas.org/content/112/52/15844.full).

<sup>37</sup> This finding is similar to previous studies, which have consistently found that the vast majority of projects delayed by consultation are ultimately found not to be a threat to the species. See James Salzman, *Evolution and application of critical habitat under the Endangered Species Act*, 14 Harv. Envtl. L. Rev. 311 (1990) (reporting that ESA consultations only find that a project could jeopardize a species in 0.7% of the time).

<sup>38</sup> See Malcolm & Li, *supra* note 36

Although the press touted the paper as proving consultation is not burdensome, the study omits a great deal, giving an incomplete picture of the issue.<sup>39</sup> First, it omits delays during pre-consultation, a point which the authors implicitly conceded.<sup>40</sup> This is a significant defect because, as a published criticism explains, “the Service has unilateral authority to determine when a consultation package is complete, and therefore when formal consultation commences.” The authors of that criticism, who are experienced ESA lawyers, explained “in our experience, substantial time and resources frequently are expended before the Service agrees to initiate formal consultation.”<sup>41</sup> Second, the Defenders of Wildlife paper looks only at projects rejected at the end of consultation and additional costs imposed at that late stage. However, this myopic focus ignores the projects that are preemptively abandoned or made more expensive by conditions imposed earlier, including in pre-consultation.<sup>42</sup>

The Defenders of Wildlife paper’s limitations aside, the conclusion its authors draw is largely a matter of perspective rather than evidence. Another way to interpret the results is that, during the first seven years of the Obama administration, nearly **100,000 projects** had to undergo time-consuming and expensive consultation even though **none** of them would likely jeopardize a listed species or its habitat. Making matters worse, nearly **1,300** major projects were delayed for more time than the law permits, even though they too would not likely jeopardize a species or its habitat. Looking at it from this perspective, the results reported in the paper hardly seem worth celebrating.

### **III. The impacts of delays are compounded because consultation must be reinitiated if anything changes**

Delays resulting from consultation are doubly harmful to project proponents because they increase the risk that consultation must be reinitiated. Anytime there is a change in the project area, because a new species has been listed, habitat designated, or information about a species discovered, consultation must be redone. As the example above of Liberty Mining demonstrates, reinitiated consultation can be just as burdensome and time-consuming as the original consultation.

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<sup>39</sup> See Douglas Main, *Study erases misconceptions about Endangered Species Act, raises questions about enforcement*, Newsweek (Dec. 17, 2015), available at <http://www.newsweek.com/study-erases-misconceptions-about-endangered-species-act-raises-questions-406553> (criticizing the Defenders of Wildlife study for failing to take account of the delays caused by consultation and the costs tied to changes that are made in response to consultation).

<sup>40</sup> See Weiland, et al., *Analysis of data on endangered species consultation reveals nothing regarding their economic impacts*, 113 Proceedings of the National Academy of Sciences E1593 (Mar. 22, 2016), available at <http://www.pnas.org/content/113/12/E1593.full.pdf> (pointing out this problem with the paper); Malcolm & Li, *Reply to Weiland et al.: The point is to bring data to inform policy, not to rely solely on anecdotes*, 113 Proceedings of the National Academy of Sciences E1594 (Mar. 22, 2016), available at <http://www.pnas.org/content/113/12/E1594.extract> (failing to respond to the point).

<sup>41</sup> Weiland, et al., *supra* note 36.

<sup>42</sup> See Taylor, et al., *supra* note 2529 at 36 (explaining that most project modifications are imposed during “pre-consultation”).

Many projects, particularly timber harvesting, are repeatedly held up by reinitiated consultation..<sup>43</sup> For example, Lone Rock Timber Company was unable to exercise a timber contract for three years because consultation had to be reinitiated three separate times.<sup>44</sup> Another timber project was delayed nearly a year and a half because of reinitiated consultation based on a new listing.<sup>45</sup>

The prospect of delaying projects by forcing consultation to be reinitiated creates bad incentives that encourage frequent change to the ESA species lists and critical habitats, as well as litigation from groups who oppose development projects. Unfortunately, the courts have largely sided with those bringing these lawsuits. In 2015, the Ninth Circuit ruled against the Obama administration in *Cottonwood Environmental Law Center v. USFS*,<sup>46</sup> and ordered reinitiation of consultation based on new developments where an agency action was already complete. The result: the Forest Service had to redo its comprehensive programmatic consultation, complicating all timber projects related to it. The group that brought the lawsuit, on the other hand, will likely turn a tidy profit, as it will be entitled to seek its attorney's fees.

#### **IV. Consultation also holds up projects that benefit the environment**

As costly as delays from consultation are, many people intuitively assume that those delays benefit listed species. However, the intuition that preventing activity always helps species is wrong. Consultation also delays environmental regulation<sup>47</sup> and projects that would benefit species, depletes agency resources that could be better put to proactive recovery efforts, and saps economic growth that could unleash even more resources for conservation.

For instance, consultation has frustrated PLF client Save Crystal River's efforts to restore manatee habitat in Florida. Save Crystal River is spending \$50 million dollars to restore 80 acres of habitat that have been harmed by invasive algae growth, which crowds out the sea grass on which the manatee feeds. Consultation delayed this environmentally friendly project by months and imposed conditions that forbid Save Crystal River from working during much of the year, which unduly raises the project's costs.

Save Crystal River's experience is no anomaly. Several years ago, I attended a presentation by a U.C. Davis Ph.D. student who was pursuing an experiment to

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<sup>43</sup> See Jeremy Brian Root, *Limiting the Scope of Reinitiation: Reforming Section 7 of the Endangered Species Act*, 10 Geo. Mason. L. Rev. 1035 (2002).

<sup>44</sup> See *Lone Rock Timber Co. v. U.S. Dep't of Interior*, 842 F. Supp. 433 (D. Or. 1994).

<sup>45</sup> See *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817 (Fed. Cir. 2010).

<sup>46</sup> 789 F.3d 1075 (9th Cir. 2015).

<sup>47</sup> Jesse Greenspan, *FWS, NMFS Sued for ESA Consultation Delays*, Law360.com (Aug. 3, 2010), available at <https://www.law360.com/articles/184967/fws-nmfs-sued-for-esa-consultation-delays> (environmentalists challenging consultation delays in approving water quality standards).

recover California's endangered salmon. That project encourages rice farmers to permit salmon to occupy their flooded fields for crucial months during the species' migration to the ocean.<sup>48</sup> By giving young salmon access to more food at a crucial time in their development, the project led to much healthier salmon populations. When asked whether it was difficult to get farmers to cooperate, for fear that it might subject them to ESA regulation, the student responded "no." Instead, the biggest hurdle for the project was navigating the ESA regulatory process, including consultation.

Even infrastructure projects can be environmentally friendly if you compare them to what would happen if infrastructure were not properly maintained.<sup>49</sup> I began my remarks with the near-collapse of the Oroville Dam. In the weeks following the flood, the environmental impacts continued to mount. These impacts include substantial bank erosion downstream and stranded endangered salmon.<sup>50</sup> If the dam had burst, these impacts would have been even more significant.

Across the country, we have many dams, bridges, and roads that are approaching the end of their engineered life. If the slow, burdensome consultation process causes communities to delay necessary upgrades and improvements, then the environment and endangered species could ultimately pay the price when that infrastructure fails.<sup>51</sup>

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<sup>48</sup> See Jacques Leslie, *The Sushi Project: Farming Fish and Rice in California's Fields*, E360.com (Oct. 29, 2015), available at

[http://e360.yale.edu/features/the\\_sushi\\_project\\_farming\\_fish\\_and\\_rice\\_in\\_californias\\_fields](http://e360.yale.edu/features/the_sushi_project_farming_fish_and_rice_in_californias_fields)

<sup>49</sup> See John Siciliano, *House tees up fight to limit endangered species rules*, Wash. Examiner (Mar. 1, 2017), available at <http://www.washingtonexaminer.com/house-tees-up-fight-to-limit-endangered-species-rules/article/2616049>;

Jamie Johansson, *Oroville shows need for flood-control projects*, Monterey Herald (Mar. 4, 2017), available at

<http://www.montereyherald.com/article/NF/20170304/LOCAL1/170309920>.

<sup>50</sup> See Peter Fimrite, *Measures save young salmon after failure of Oroville Dam spillway*, SF Gate (Mar. 21, 2017), available at <http://www.sfgate.com/science/article/Measures-save-young-salmon-after-failure-of-11015659.php>

(the Oroville Dam spillway catastrophe threatened nearly a billion endangered salmon); Kurtis Alexander & Tara Duggan, *Riverbanks collapse after Oroville Dam spillway shut off*, San Fran. Chron. (Mar. 4, 2017), available at

<http://www.sfchronicle.com/bayarea/article/Riverbanks-collapse-after-Oroville-Dam-spillway-10976144.php> (describing the environmental damage in the wake of the near-collapse of the Oroville Dam).

<sup>51</sup> See Nicola Ulibarri, *Oroville Dam's close call shows regulatory need to account for climate change*, Sac. Bee (Mar. 5, 2017), available at <http://www.sacbee.com/opinion/op-ed/soapbox/article136339743.html>

(acknowledging that the 10-year delay in reauthorizing and repairing Oroville Dam is due in part to the consultation process).

## Conclusion

We all want to see endangered species recover. The question, really, is how effective and efficient is consultation at contributing to that recovery. The evidence shows that consultation is a significant strain on economic development and public-safety projects, even though all or nearly all the projects do not jeopardize species. That suggests too many projects, particularly state and private projects with a *de minimis* federal nexus, undergo consultation, sapping the resources of the agencies that administer the ESA. Because those resources cannot keep up with demand, consultation for major federal infrastructure projects takes more time than Congress intended, much of that time hidden in so-called “pre-consultation.”

When necessary infrastructure maintenance and upgrades are put-off because of these delays and costs, that can significantly harm species and the environment. The damage from infrastructure crumbling and failing can be far higher than the modest impacts of repairs and upgrades.

Ultimately, we need to rethink some of our assumptions about protecting species. The intuition that stopping human activity always benefits species is wrong. On the contrary, economic growth unleashes more resources for proactive conservation and recovery efforts. Regulations and consultations that restrict that growth without benefitting species are therefore doubly harmful.