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Memorandum

To: Martha Williams, Director, U.S. Fish and Wildlife Service

From: Sarah Krakoff, Deputy Solicitor for Parks and Wildlife
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Subject: Federal Agency Obligations under Section 7(a)(1) of the Endangered Species Act

The U.S. Fish and Wildlife Service (the "Service") requested legal guidance on the scope of Federal agencies' responsibilities under Section 7(a)(1) of the Endangered Species Act ("ESA" or "Act").[1] Section 7(a)(1) directs all Federal agencies to carry out "programs for the conservation of endangered and threatened species."[2] The provision provides an affirmative and broad mandate to all agencies to take action to conserve species. Unlike other key ESA provisions, section 7(a)(1) has remained relatively free of controversy or criticism. For this and other reasons, commentators have described section 7(a)(1) as having the greatest unrealized potential to achieve the ESA's conservation goals.[3] To encourage wider and more effective implementation of this provision, the Service requested our examination of the Act's text, legislative history, and case law to outline the scope of the Federal government's mandatory duty to conserve under ESA Section 7(a)(1).

I. ESA Section 7(a)(1) directs all Federal agencies (including the Service when implementing its authorities outside of the ESA) to carry out programs within their authorities to advance the recovery of endangered and threatened species.

ESA Section 7(a)(1) consists of two sentences to describe Federal agencies' responsibilities to conserve ESA-listed species:

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in

[1] 16 U.S.C. § 1536(a)(1).
[2] Id. As part of the 1966 law that was a precursor to the ESA, Section 7(a)(1) is one of the Act's oldest provisions. *See* 80 STAT 926, § 2(d) (repealed).
[3] *See* J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 Envt'l L. 1107, 1109 (1995) (describing section 7(a)(1) as "the sleeping giant of the ESA programs.")

> furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.[4]

This provision reflects ESA Section 2's purpose to "provide a program for the conservation of… endangered species and threatened species"[5] and gives effect to the policy that "all departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act."[6] Central to these provisions is the focus on "conservation." The ESA definition of conservation is: "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."[7] Conservation under the ESA is therefore synonymous with taking actions to recover a listed species.[8]

Unlike Section 7(a)(2), which prohibits agency actions that are likely to jeopardize a listed species, Section 7(a)(1)'s mandate is affirmative, requiring agencies to act for the recovery of threatened and endangered species.[9] The provision calls on Federal agencies to "utilize" and "carry out" their programs and authorities for the conservation of ESA-listed species.[10] Therefore under Section 7(a)(1), an agency's obligation to comply does not depend on any triggering actions, and the conservation duty technically begins for any threatened and endangered species as soon as it is listed.[11]

In addition, because Section 7(a)(1) calls for Federal agencies to carry out their recovery obligations through their respective authorities and programs, the provision contemplates that species recovery will be advanced within the relevant agency's jurisdiction or authority. The second sentence supports this notion by directing agencies to "utilize their authorities" for the recovery of listed species.[12] It is also supported by the requirement for the Secretary to "review

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[4] 16 U.S.C. § 1536(a)(1).
[5] 16 U.S.C. § 1531(b).
[6] 16 U.S.C. § 1531(c).
[7] 16 U.S.C. § 1532.
[8] *See Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 441-42 (5th Cir. 2001) ("The ESA's definition of 'conservation' speaks to the recovery of a threatened or endangered species.").
[9] Section 7(a)(2) requires each agency, in consultation with the Secretary, to "insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any [listed species] or result in the destruction or adverse modification of habitat of such species…." 16 U.S.C. § 1536(a)(2). *See Interagency Cooperation- Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification; Final Rule*, 81 Fed. Reg. 7214, 7224 (Feb. 11, 2016) (distinguishing Section 7(a)(2)'s prohibition against actions that jeopardize ESA-listed species from Section 7(a)(1)'s mandate to carry out affirmative conservation programs.); *see also Carson-Truckee Water Conservancy District v. Clark*, 741 F. 2d 257, 262 (9th Cir. 1984) ("Contrary to appellants' contention, ESA Section 7(a)(2) is inapplicable here because the Secretary has not undertaken a project that threatens an endangered species. Instead, following the mandate of [ESA Section 7(a)(1) and the findings, purposes and policy of ESA Section 2], the Secretary actively seeks to conserve endangered species.").
[10] 16 U.S.C. § 1536(a)(1).
[11] *See Sierra Club v. Glickman*, 156 F.3d 606, 616 (5th Cir. 1998) ("Given the plain language of the statute and its legislative history, we conclude that Congress intended to impose an affirmative duty on each federal agency to conserve each of the species listed pursuant to § 1533.").
[12] 16 U.S.C. § 1536(a)(1).

programs administered by him" and "utilize such programs in furtherance of the purposes of [the ESA]," which include the conservation of listed species.[13] The plain language of Section 7(a)(1) therefore indicates that new sources of authority are not necessary to comply with ESA Section 7(a)(1)'s directive. Section 7(a)(1)'s mandate does not, however, "expand the powers conferred on an agency by its enabling act."[14]

II. Federal agencies have non-discretionary obligations to develop and carry out programs to advance the recovery of ESA-listed species, but agencies have discretion about program design.

The ESA does not specify the kinds of conservation measures needed to fulfill ESA Section 7(a)(1)'s recovery duty and courts therefore agree that federal agencies have discretion to determine how best to fulfill that duty.[15] While Federal agencies have considerable discretion about which measures to undertake as part of their conservation programs, agencies' core obligation to comply with ESA Section 7(a)(1) is not discretionary.[16] Further, courts have confirmed that Section 7(a)(1) requires agencies' conservation programs to be meaningful; it is not sufficient if the program only has "'insignificant effects' on the conservation of ESA-listed species."[17]

Legislative history bolsters the interpretation that Section 7(a)(1) imposes meaningful, non-discretionary obligations on federal agencies. The evolution of ESA Section 7(a)(1) begins with Congress' adoption of a substantially similar provision in the Endangered Species Preservation Act of 1966.[18] The 1966 provision included the requirement to "review other programs" administered by the Secretary, but the Secretary was obliged to implement those programs only "to the extent practicable" in furthering the purposes of the 1966 Act.[19] Unlike the current obligations in the ESA, Federal agencies outside of DOI were not required to use their authorities in furtherance of the 1966 Act's purposes.[20] Rather, Federal agencies were only "encouraged" to do so "where practicable."[21]

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[13] *Id.*
[14] *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (rejecting the interpretation that Sections 7(a)(1) and 7(a)(2) oblige FERC to do "whatever it takes" to protect threatened and endangered species when imposition of the protective measure would be counter to the limitations contained in the agency's relevant authority).
[15] *See Defenders of Wildlife v. Babbitt,* 130 F. Supp. 2d 121, 135 (D.D.C. 2001); *Defenders of Wildlife v. FWS,* 797 F. Supp. 2d 949, 960 (D. Ariz. 2011); *Defenders of Wildlife v. DOI,* 354 F. Supp. 2d 1156, 1174 (D. Or. 2005); *see also Pyramid Lake Paiute Tribe of Indiana v. Navy,* 898 F.2d 1410, 1418 (9th Cir. 1990); *Strahan v. Linnon*, 967 F. Supp. 581, 596 (D. Mass. 1997), *aff'd*, 187 F.3d 623 (1st Cir. 1998).
[16] *Defenders of Wildlife v. FWS,* 797 F. Supp. 2d 949, 960 (D. Ariz. 2011); *see also Sierra Club v. Glickman*, 156 F.3d 606, 617-18 (5th Cir. 1998) (rejecting USDA's claim that its duties under ESA Section 7(a)(1) are not judicially reviewable because it has a substantial amount of discretion in developing its conservation program).
[17] *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1147 (11th Cir. 2008) (holding that FEMA's program to conserve was so insignificant as to amount to inaction).
[18] 80 STAT 926, § 2(d).
[19] *Id.*
[20] *Id.*
[21] *Id.*

In the 1970s, concerned with the continued declines of endangered species and the pace of extinction, Congress held extensive hearings and considered competing bills to take a more significant and expansive approach to the Nation's policy towards species conservation than that offered in the 1966 and 1969 predecessors to the ESA.[22] All of these bills, as originally proposed, required the Federal government to take steps to conserve species, but similar to the 1966 and 1969 statutes, qualified that duty.[23] For example, H.R. 4758, the bill supported by the Administration, would have required agencies to conserve species only "insofar as practicable and consistent with the[ir] primary purpose."[24]

Ultimately Congress rejected the qualifying language. The bill initially approved by the full Senate, S. 1983, would have merely required the Federal government to "carry out such programs as are practicable for the protection of species."[25] In contrast, H.R. 37, the bill initially passed by the full House, omitted all language that would have qualified the duty to conserve based on practicability.[26] In reconciling the differences between the House and Senate bills, the Conference Committee adopted S. 1983, but the language from H.R. 37 that omitted any qualification to the duty to conserve was substituted for the Section 7 language.[27]

In explaining H.R. 37's duty to conserve, Representative John Dingell, the bill's manager, emphasized the expectation that all agencies must take steps to conserve species:

> The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and *every agency of government is committed* to see that those purposes are carried out .... [T]he agencies of Government can no longer plead that they can do nothing about it. *They can, and they must. The law is clear.*[28]

In *TVA v. Hill*, the Supreme Court looked to the legislative history of Section 7(a)(1) to evaluate TVA's claim that the Act was not intended to stop operation of a project like Tellico Dam, which was near completion when the endangered snail darter was discovered in its path.[29] Although the Court's holding pertained to Section 7(a)(2)'s prohibition against jeopardy and adverse modification, the legislative history of Section 7(a)(1) helped justify that holding.[30] In light of the legislative history, the Court observed that the ESA's command to "carry[ ] out programs for

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[22] *See TVA v. Hill,* 437 U.S. 153, 176 (1973).
[23] For provisions in the House bills, see §§ 2(c) and 5(d) of H.R. 37, 470, 471, 1511, 2669, 3310, 3696, and 3795; § 3(d) of H.R. 1461 and 4755; § 5(d) of H.R. 2735; § 2(b) of H.R. 4758; one other House bill, H.R. 2169, imposed no requirements on Federal agencies. For provisions in the Senate bills, see § 2(b) of S. 1592; §§ 2(b) and 5(d) of S. 1983.
[24] H.R. 4758, 93d Cong., 1st Sess. § 2(b) (1973).
[25] S. 1983, 93d Cong., 1st Sess. § 7(a) (1973).
[26] H.R. 37, 93d Cong., 1st Sess. § 7(a) (1973).
[27] Conference Report on the Endangered Species Act of 1973, H.R. Rep. No. 740, 93d Cong., 1st Sess. (1973).
[28] 119 Cong. Rec. 42913 (1973) (emphasis added).
[29] *TVA v. Hill*, 437 U.S. 153, 184 (1973).
[30] *Id.* at 174-88. Note that ESA Section 7, as enacted in 1973, consisted of one paragraph that combined the two subsections currently found in the Act. *See Endangered Species Act of 1973,* P.L. 93-205, §7, 87 Stat. 884, 892 (1973). Thus, although the Supreme Court decision references Section 7 only and its holding pertains to the scope of the obligation to avoid jeopardy and adverse modification, the decision's examination of the ESA's legislative history is centered on Congress' development of the language now found in ESA Section 7(a)(1).

the conservation of endangered and threatened species" is "stringent, mandatory language."[31] Referring to Congress' "pointed omission of the type of qualifying language" to the recovery duty that was contained in the previous endangered species legislation, the Court further opined that the legislative history of Section 7(a)(1) reveals "an explicit Congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species."[32]

Since *TVA v. Hill*, courts agree that the plain language and legislative history of Section 7(a)(1) require the Federal government to carry out programs for the recovery of listed species.[33] In light of well-settled case law that Section 7(a)(1) affords discretion to Federal agencies to determine how to fulfill the conservation duty, however, no court has held that an agency must take specific actions or measures identified by plaintiffs to comply with Section 7(a)(1).[34]

Nonetheless, courts have reiterated that Congress intended agencies to interpret their authorities broadly to fulfill their conservation duties.[35] In *Pyramid Lake Paiute Tribe of Indians v. U.S. Navy*, the Ninth Circuit pointed to the same legislative history analyzed by the Supreme Court to reject Navy's claim that Section 7(a)(1) was not "intended to frustrate the agencies' accomplishment of their primary missions."[36] The Ninth Circuit concluded that the Supreme Court had already rejected a similar proposition in *TVA v. Hill*.[37] When Congress considered proposed ESA legislation, it expressly rejected all language that would extend the duty to Federal agencies only insofar as practical and consistent with their missions.[38]

The Fifth Circuit also relied on Section 7(a)(1)'s text and legislative history in upholding a district court decision that found the United States Department of Agriculture (USDA) violated Section 7(a)(1) by failing to develop programs to conserve certain endangered and threatened species that were dependent on water from an underground aquifer.[39] In finding that the Sierra

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[31] *Id.* at 185.
[32] *Id.*
[33] *See Sierra Club v. Glickman*, 156 F.3d 606, 616 (5th Cir. 1998) ("Given the plain language of the statute and its legislative history, we conclude that Congress intended to impose an affirmative duty on each federal agency to conserve each species listed pursuant to [Section 7(a)(1)]."); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1416-17 (9th Cir. 1990) ("[t]his court has recognized that agencies have affirmative obligations to conserve under section 7(a)(1)") (citing *Carson-Truckee Water Conservation District v. Clark,* 741 F. 2d 257, 262 n.5 (9th Cir. 1984)).
[34] *See Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (pointing out that ESA Section 7(a)(1) directs Federal agencies to "utilize their authorities" to carry out the ESA's objectives and *TVA v. Hill* is not authority for the proposition that Federal agencies may go beyond their enabling acts to carry out the purposes of the ESA); *Strahan v. Linnon*, 967 F. Supp. 581, 596 (D. Mass. 1997) (distinguishing its holding from *TVA v. Hill* on the basis that the Supreme Court's holding was premised on Section 7(a)(2) and requiring the Coast Guard to take a specific measure would divest the agency of virtually all discretion on deciding how to fulfill its duty to conserve), *aff'd*, 187 F.3d 623 (1st Cir. 1998).
[35] *See Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy,* 898 F.2d 1410, 1417-19 (9th Cir. 1990); *Sierra Club v. Glickman*, 156 F.3d 606, 615-18 (5th Cir. 1998).
[36] *Pyramid Lake Paiute Tribe of Indians,* 898 F.2d at 1417.
[37] *Id.*
[38] *Id.* at 1417-18. Ultimately, the Ninth Circuit held that Navy did not violate ESA Section 7(a)(1); among other reasons, the court held that the Petitioner's interpretation of the Navy's duty to conserve would divest the agency of its discretion under Section 7(a)(1). *Id.* at 1418-19.
[39] *Sierra Club v. Glickman*, 156 F.3d 606, 615-16 (5th Cir. 1998).

Club had standing to challenge USDA's actions with respect to the aquifer-dependent species, the Fifth Circuit held that Section 7(a)(1)'s conservation duty is species-specific, not a generalized duty to confer and develop programs for the benefit of endangered and threatened species.[40] After assessing other jurisdictional arguments, the Fifth Circuit examined the merits of USDA's arguments that it had complied with ESA Section 7(a)(1) because the particular species that were dependent on the aquifer experience "incidental benefits from national USDA programs designed and carried out for other purposes."[41] The Fifth Circuit rejected USDA's position, holding that Section 7(a)(1) instead requires species-specific measures developed in consultation with FWS.[42]

The upshot of this caselaw is that Section 7(a)(1) requires Federal agencies to develop programs for the conservation of specific species, and to exercise their authorities broadly to achieve the conservation goals of the ESA. Within that clear mandate, however, agencies have discretion about what actions and measures to take.

III. Federal agency discretion about how to fulfill Section 7(a)(1) obligations provides agencies with an opportunity to design their programs to meet their responsibilities under Section 7(a)(2).

Section 7(a)(1), more than any other provision of the ESA, embraces all elements of the Act's overarching purposes and policies. Its implementation therefore naturally overlaps with many other related statutory provisions including Section 7(a)(2). Although the substantive standards under Sections 7(a)(1) and 7(a)(2) are different, nothing in the Act or its regulations prohibits integrating implementation of the two standards to meet an agency's responsibilities to avoid jeopardy or adverse modification under Section 7(a)(2).[43]

Sections 7(a)(1) and 7(a)(2) both carry out the ESA's recovery purpose, although they express that purpose differently. For example, Section 7(a)(1) requires programs "in *furtherance* of the purposes of [the] Act," meaning affirmative actions that promote or advance recovery.[44] Section 7(a)(2), on the other hand, prohibits recovery from backsliding or being diminished.[45] Under the ESA's implementing regulations, Section 7(a)(2) precludes Federal actions that appreciably reduce the recovery of the species (i.e., jeopardize the continued existence of species) or reduce the ability of critical habitat as a whole to provide for recovery (i.e., adversely modify critical habitat).[46]

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[40] *Id.*
[41] *Id.* at 618.
[42] *Id.* ("The USDA simply cannot read out of existence § 7(a)(1)'s requirement that the USDA's substantive conservation programs for the Edwards-dependent species be carried out 'in consultation with and with the assistance of [FWS].'").
[43] In fact, conservation programs developed under Section 7(a)(1) are subject to some form of consultation under 7(a)(2).
[44] 16 U.S.C. § 1536(a)(1).
[45] 16 U.S.C. § 1536(a)(2).
[46] *See* 50 C.F.R. § 402.02 (containing the regulatory definitions of "jeopardize the continued existence of" and "destruction or adverse modification").

Notwithstanding the different standards, compliance with ESA Section 7(a)(1) may assist with a Federal agency's responsibilities under Section 7(a)(2).[47] For example, if an agency's compliance with ESA Section 7(a)(1) moves listed species closer to being recovered and then the agency's activities trigger the need to consult under Section 7(a)(2) with respect to that species, the likelihood the Service will find jeopardy or adverse modification is reduced. Similarly, Federal programs for the recovery of species may even preclude the need for formal consultation under Section 7(a)(2) altogether, either because the conservation measures taken pursuant to Section 7(a)(1) have avoided adverse impacts to the species or have resulted in the subject species no longer qualifying as an "endangered species" or "threatened species." Conservation programs under ESA Section 7(a)(1) assist Federal agencies in meeting their obligation to ensure against jeopardy or adverse modification under ESA Section 7(a)(2), and these programs also have the potential to streamline the consultation process.

Conclusion

Federal agencies have affirmative obligations to use their authorities to develop and carry out programs for the conservation of endangered and threatened species. This obligation is species-specific and is triggered when a species is listed under the ESA. Agencies have considerable discretion about what measures to take to meet the conservation obligation, but the duty to comply with Section 7(a)(1) is non-discretionary. Finally, Section 7(a)(1) programs that move species toward recovery may assist Federal agencies with their obligations under Section 7(a)(2) to ensure their actions do not jeopardize listed species. Robust Section 7(a)(1) programs therefore have the potential to streamline or, in highly successful cases, eliminate the need for consultation under Section 7(a)(2). For all of these reasons, Section 7(a)(1)'s front-end approach to species conservation holds a great deal of unrealized potential to achieve the ESA's goals of species protection and recovery.

[47] Note, however, that compliance under ESA Section 7(a)(2) is not equivalent to compliance under ESA Section 7(a)(1). *See CBD v. Vilsack*, 276 F. Supp. 3d 1015, 1032 (D. Nev. 2017) (holding that USDA complied with ESA Section 7(a)(2) when it consulted with the Service on termination of a program that adversely affected a listed species but violated ESA Section 7(a)(1) when it failed to establish a program that advanced recovery for the subject species).