



File Code: 2670; 1950
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Date: OCT 12 2018

Subject: Significance under the Endangered Species Act and National Environmental Policy Act

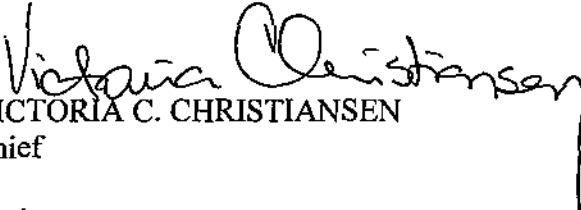
To: Regional Foresters, Station Directors, WO Directors

The Forest Service has embarked on a comprehensive national journey to becoming more efficient at implementing applicable laws and regulations through reforms in environmental analysis and decision making. Through these efforts, we have become aware there is inconsistent understanding regarding how Endangered Species Act (ESA) effects determinations influence significance determinations under the National Environmental Policy Act (NEPA). This confusion is causing some Agency personnel to conclude ESA effects determinations automatically prescribe the level of NEPA documentation. This can result in conducting more environmental analysis than is required by the NEPA.

Significance under the NEPA has a different legal standard than *significance* under the ESA. Each ESA and NEPA determination stands on its own. NEPA regulations define *significance* in terms of context and intensity. In relation to intensity, there are 10 factors to be evaluated, one of which addresses effects on listed species under the ESA. This factor does not, in and of itself, trigger significance under NEPA; it is one of several considerations. In other words, ESA significance determinations should not solely be used to determine the potential for significance under NEPA, or vice versa. They are legally separate determinations. Each informs and influences the other, but are not determinative of each other.

Enclosed to this clarification letter is a letter from the Acting Deputy Chief providing; (1) an in-depth explanation, as reviewed by the Office of General Counsel, of the different legal standards pertaining to significance determinations under the NEPA versus the ESA (Attachment-1), and (2) answers to frequently asked questions to assist line officers and specialists understand these differences (Attachment-2).

Please circulate this letter of clarification to regional directors, environmental coordinators, interdisciplinary team members, and line officers and discuss how it will apply within the context of their work. If there are questions pertaining to this information, please contact your Regional Planning Director or Christine Dawe, Director of Ecosystem Management.


VICTORIA C. CHRISTIANSEN
Chief

Enclosures





File Code: 1950; 2670
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Subject: Attachment - 1 to the Chief's Letter Dated October 12, 2018, Pertaining to Significance under the Endangered Species Act and National Environmental Policy Act

To: Regional Foresters, Station Directors, WO Directors

Use of the terms “significance,” “significant,” “insignificant,” and “significantly” have different meanings under NEPA and the ESA. This is because significance under NEPA has a different legal standard than significance under the ESA.

Section 7(a)(2) of the ESA (16 U.S.C. § 1536(a)(2)) outlines requirements for compliance with ESA. In addition, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, “Services”) jointly published implementing regulations at 50 CFR part 402 as well as the ESA Consultation Handbook (Services, 1998). Within these regulations there are three possible listed species effect determinations; No Effect, May Affect/Not Likely to Adversely Affect, and May Affect/Likely to Adversely Affect. The Consultation Handbook notes that if the adverse effects rise to the level of “take” then they are not “insignificant.” While “significant” effect is not expressly defined, it is the opposite of “insignificant” effects. When examining take, specialists assess impacts to the individual members of the species, not the species as a whole. Accordingly, if there is “take” of one individual, then there are significant effects under ESA, even if one could conclude the overall effect to the species is minimal.

Section 1505.27 of the NEPA regulations (40 CFR Parts 1500-1508) define significance in terms of context (i.e. scale, time period) and intensity (severity of impact). Context requires significance be evaluated in several settings (local, regional, national). Intensity has ten factors, one of which addresses effects on listed species: “The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.” 40 C.F.R. 1508.27(b)(9). This factor does not, in and of itself, trigger significance under NEPA; it is one of several considerations.

Relationship Between ESA and NEPA

If a project or action will likely result in the “take” of one individual of a listed species, for purposes of ESA the conclusion must be that there are significant adverse effects. Any resulting consultation necessary is the responsibility of the decision-maker. Effects determinations under ESA are the responsibility of journey-level biologists or botanists (FSM 2634.03).

If a project or action will likely result in the “take” of one individual of a listed species, for purposes of NEPA the conclusion must be that it may or may not be significant. The NEPA



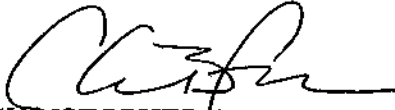
threshold for “significance” is different and more complex. Responsible Officials must consider the significance of the proposed action in context, and analyze the intensity of the effects in determining whether the action significantly affects the quality of the human environment. There are multiple factors to consider for intensity, no single factor determines whether the project will significantly affect the human environment. A determination of significance under NEPA is a Responsible Official’s decision (FSM 1950.41(12)).

The case law on this issue includes a mix of ESA determinations and NEPA findings. There may well be a May Affect/Likely to Adversely Affect (LAA) ESA determination with a categorical exclusion (CE), an Environmental Assessment (EA), or an Environmental Impact Statement (EIS) for NEPA compliance. Similarly, there may be a May Affect/Not Likely to Adversely Affect (NLAA) or No Effect (NE) ESA determination with a CE, an EA, or an EIS for NEPA compliance. Each ESA and NEPA determination stands on its own. Any combination of determinations is possible and does not follow any formula or contain any defaults.

Recommendations

- Do not assume that significance under the ESA automatically means there is significance for purposes of NEPA, or vice versa. They are legally separate outcomes. Each informs and influences the other, but are not determinative of each other.
- When determining significance under NEPA remember that the degree to which the project may adversely affect listed species and critical habitat is only one of the ten factors.
- Remember under the ESA, the focus on “take” involves the adverse impacts to individuals of the species, not to the species as a whole. If there is “take,” the Services will consider the impacts to be significant resulting in a LAA determination. Under NEPA, one looks at the species as a whole in determining intensity, 40 C.F.R. 1508.27(b)(9). Even where there are significant effects on individual members of a species for ESA purposes, it may be reasonable, depending on the circumstances, to conclude there would not be a significant effect on the human environment under NEPA.
- Case law shows there is nothing in the applicable regulations which specifies a May Affect finding (triggering consultation under Section 7 of the ESA) precludes use of a CE under NEPA. The test for determining the appropriateness of using a CE is distinct from the test for triggering consultation under Section 7 of the ESA. Therefore, the degree of the impact on the population or whether or not the action as a whole is a net benefit and/or is contributing to the conservation and recovery of the species is what should be used to determine the appropriateness of using a CE under NEPA.
- When making ESA and NEPA determinations, it is essential to explain the underlying rationale supporting those judgments, individually and in relationship to one another. Where there is a good rationale for the agency’s determinations and decisions, the courts are more likely to uphold the decision-maker’s judgments.

Thank you for your important part of this change effort that will help us achieve greater efficiencies in our environmental analysis and decision-making processes. Please see the ESA/NEPA frequently asked questions document enclosed here for more information. If you have further questions you may contact Rob Harper, Director of Water, Fish, Wildlife, Air & Rare Plants (202-205-1671 or rharp@fs.fed.us) and Christine Dawe, Director of EMC (703-605-5179 or cdawe@fs.fed.us).



CHRISTOPHER B. FRENCH
Acting Deputy Chief, National Forest System

Enclosure

Frequently Asked Questions (FAQs)

1. Can you have incidental take of an Endangered Species Act (ESA) listed species when doing a Categorical Exclusion (CE) for NEPA compliance?

Yes, in some cases you can have adverse effects to individuals of a listed species, including incidental take (take that results from, but is not the purpose of, carrying out an activity [50 C.F.R. 402.02]), when using a CE. Generally, though, incidental take should be low, and ideally the proposed action should contribute to the conservation and recovery of the species. A CE may be used only if no extraordinary circumstances exist. 36 C.F.R. 220.6(a). The degree of the potential effect of a proposed action on the listed species or designated critical habitat is what should be used to determine if extraordinary circumstances exist, not the mere presence of the species or critical habitat. [36 C.F.R. 220.6(b)(2)]

2. Does incidental take of listed species or habitat automatically result in extraordinary circumstances that preclude use of a Categorical Exclusion?

No. Factors that influence extraordinary circumstance determinations include the current condition or status of the species and designated critical habitat, overall effects of the proposed action to the population of the listed species or designated critical habitat; whether or not the proposed action results in a net benefit to the species and critical habitat; or if the proposed action implements recovery plan objectives and contributes to the conservation and recovery of the species. The greater the impact of the proposed action on listed species or critical habitat, the more likely extraordinary circumstances will exist. Consideration of the above factors will be needed in making a determination whether extraordinary circumstances exist on a case-by-case basis.

3. What is the difference between extraordinary circumstances and significance under NEPA?

“Extraordinary circumstances” are part of the threshold test for determining whether a categorical exclusion (CE) may be used for a proposed action’s NEPA compliance. CEs identify classes of actions the agency has determined normally will not individually or cumulatively have a significant effect on the human environment and therefore an environmental impact statement need not be prepared. To qualify for applying a CE, the Responsible Official will confirm that the activity fits within a designated category and that no extraordinary circumstances exist that preclude use of the CE. Extraordinary circumstances are further defined and explained in 36 C.F.R. 220.6.

“Significance” is a distinct threshold test for whether an environmental impact statement is required under NEPA. If a proposal may significantly affect the quality of the human environment, an EIS must be prepared 42 U.S.C. § 4332(C). Significance is defined in 40 C.F.R. 1508.27 and assessed in term of the context and intensity of potential environmental effects.

Attachment-2: ESA and NEPA Significance

4. What level of ESA adverse impacts would likely result in significant impacts in NEPA?

Because this will vary species to species, and depend on effects of a proposed action on other aspects of the environment, it is difficult to give a precise answer. The closer one gets to a jeopardy determination, the more likely it is that a proposed action will have significant effects on the human environment. Under the NEPA CEQ regulations, in assessing significance under NEPA, there are ten intensity factors to consider, only one of which is adverse impacts to listed species. If the proposed action meets some of the other intensity criteria, the adverse effects on listed species may tip the scales and the proposed action could significantly affect the quality of the human environment. However, if the other intensity factors are insignificant, then one could determine there are not significant effects on the human environment. Remember, the take of a single individual member of a listed species is enough to find significant effects for purposes of the ESA. However, that does not mean the effects are significant for NEPA. With adverse effects to a very small number of individuals, or very minor adverse effects, it may be possible to conclude that there is not a significant effect on the quality of the human environment for NEPA (The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. (ESA § 3(19); 16 U.S.C. 1532(19)).

6. May potential short-term negative effects to individuals of a listed species and long-term benefits expected be considered when evaluating extraordinary circumstance and significance determinations under NEPA? What role if any do the Services play in these USFS deliberations?

Yes. NEPA determinations are always made in terms of context and intensity of potential effects. Consultation with the Service(s) will inform deliberations concerning those effects, and results in finding ways to avoid or minimize effects to listed species and their habitat. NEPA determinations, however, are the official responsibility of the Forest Service.

7. Are there any existing agency or regional policies that mandate an EIS when adverse effects to a listed species are expected?

No. The Forest Service’s national NEPA Procedures are the exclusive source of substantive direction concerning NEPA compliance. FSM 1950.42a provides that Regional Foresters, Station Directors, the Area Director and Forest Supervisors may supplement FSM 1950 only to delegate authority or responsibility. Similarly they may supplement FSH 1909.15 for the purposes of issuing internal procedures, for preparing and processing environmental documents and records, assigning responsibilities, or adding reference materials. They may not supplement the Manual or Handbook to mandate the preparation of an EIS when a project will likely adversely affect listed species.

8. How do differences in terminology between the two laws relate to extraordinary circumstances under NEPA?

There are seven resource conditions that should be considered when evaluating extraordinary circumstances for a proposed action, only one of which is “Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species” (36 CFR 220.6(b)). It is not the

Attachment-2: ESA and NEPA Significance

mere presence of a resource condition that determines an extraordinary circumstance but the "...degree of the potential effects on the resources." that may determine an extraordinary circumstance," *ibid*. There is a range of possible outcomes in looking at the degree of potential effects. Adverse effects that are of longer duration and delay recovery of listed species are more likely to raise uncertainty over NEPA significance, resulting in extraordinary circumstances and precluding use of CEs. When this occurs, it is important to evaluate if adverse effects can be avoided or minimized. Conversely, if the adverse effects are of short duration and are likely to contribute to the recovery of listed species there may be less uncertainty, no extraordinary circumstances, and greater ability to use CEs.

9. Is there any circumstance where insignificant/discountable effects under ESA could be deemed significant under NEPA?

If the effects on listed species or designated critical habitat are insignificant/ discountable, it is very unlikely those effects would be one of the intensity factors considered for significance under NEPA. Significance under NEPA involves context and ten factors of intensity, only one of which relates to "The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973 (40 CFR 1508.27b(9)). It is the combination of the ten intensity factors and context that determines significance, not just the results of one intensity factor (The term discountable refers to effects that would not be able to be meaningfully measured, detected, or evaluated [ESA Consultation Handbook, 1998]).