

Ninth Circuit Clarifies ESA's "Cumulative Effects" Requirement

The Ninth Circuit Court of Appeals has confirmed two important points under the federal Endangered Species Act:

- A "cumulative effect" under the ESA is different from a "cumulative impact" under NEPA
- No "cumulative effects" analysis is required in informal ESA section 7 consultations.

[*Conservation Congress v. U.S. Forest Service*](#), No. 12-16452 (9th Cir. 2013). The Forest Service prepared a biological assessment under section 7 of the ESA, concluding that the Service's Mudflow Vegetation Management Project was not likely to adversely affect the Northern Spotted Owl and its 6.9-million acre critical habitat. The U.S. Fish and Wildlife Service (FWS) concurred. Conservation Congress sued FWS and the Forest Service claiming the biological assessment failed to adequately evaluate "cumulative effects" on critical habitat. The district court found that the plaintiff had failed to show likelihood of success on the merits, accordingly denied its motion for a preliminary injunction. In affirming, the Ninth Circuit rejected plaintiff's argument that the two agencies violated section 7(a)(2) of the ESA by failing to adequately assess "cumulative effects" in the biological assessment. The court noted that the ESA's "cumulative effects" has a regulatory meaning distinct from "environmental baseline" and narrower than NEPA's "cumulative impact." "Cumulative effects" encompass only effects of future state or private activities reasonably certain to occur within the project area, whereas NEPA requires assessment of past, present, and reasonably foreseeable future actions regardless of who takes the actions. Additionally, no cumulative effects assessment was necessary in this informal consultation because section 7 only expressly requires a cumulative effects assessment for formal consultations. The court declined to read into the statute a duty to assess cumulative effects during informal consultation. By distinguishing regulatory terms as used in the ESA and NEPA as well as informal and formal consultation requirements, the court's decision clarifies the "cumulative effects" requirement under section 7 of the ESA.

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