Ryan Kim
ESM 325

ESA Section 7 Analysis

ESA Section 7 refers to the legislation in place that safeguards the existence of endangered or threatened species, as well as the ecosystems that they inhabit. Whenever a federal action is carried out, funded, or authorized, if it has even the possibility of adversely affecting a species on the endangered or threatened list, the agency carrying out the action must consult with the U.S Fish and Wildlife Service. Informal consultation is usually the first step, with the agencies communicating with experts of the USFWS to determine the basic logistics of what species and habitats may be affected in what ways. If there is no risk to be found, the informal process ends and federal action may be taken by the agency.

If, however, there is determined to be the potential for harm to any species or ecosystem housing said species that is listed as endangered or threatened, a formal consultation will take place. The Service and Agency will share information regarding their project, and the cumulative negative effects of the action will be reviewed for a final determination. If there is found to be any jeopardy, which is defined as actions that are "reasonably expected, directly or indirectly, to diminish a species' numbers, reproduction, or distribution so that the likelihood of survival and recovery in the wild is appreciably reduced." (ESA Section 7(a)(4)) then the agency must make alterations to their existing plans to accommodate for the ESA. The agency may then modify their proposal and consult once more with the service, abandon the project, or apply for exemption. In some cases, the USFWS may find that while adversely affecting a species, certain actions may not actively jeopardize their continued existence. In such cases, small amounts of "take" are allowed by the USFWS, which is essentially the harming or harassing of a listed species.

The prompt asks us whether or not the EPA's revocation of California's waiver to set its own fuel efficiency standards would trigger this Section 7 Consultation. The first step would be to determine what sort of agency is attempting this action. In this case, it is the EPA, which is a federal agency, and therefore subject to the restrictions of the ESA. It is more than reasonable to argue that this additional output of greenhouse gasses has the potential to adversely impact the

natural habitat of the Humpback Whale. There have already been studies documenting and studying this phenomenon, concrete evidence of the adverse effect on habitat that the changing climate is producing. Due to the mere existence of risk, at the very least an informal process would begin, with the EPA requesting that the NMSF make a statement of concurrence or not when consulting the ESA.

With the current political climate and the somewhat shaky arguments that have been made about the inability to trace in detail the link between greenhouse gasses and climate change fueled habitat destruction, it is plausible that the NMFS makes the determination that this change would not be great enough to warrant formal consultation. Regardless of such inability to act decisively amidst overwhelming evidence, the EPA has a duty to stick to the provisions that congress intended during the creation of this bill. A consultation over how the habitat of the endangered Humpback Whale could be threatened if the revocation of this waiver is to proceed would be the next logical step. Experts should be called in from the NMFS to determine how much more adverse effect the revocation would produce in the already endangered whale population.

With the way the climate is currently trending, it can be reasonably assumed that any additional stress on our already overworked planetary ecosystem has great potential to irreparably damage the habitat of these creatures, exacerbating their vulnerability to hazards existing independently of climate change. The argument that the One National Program Rule is being violated does not make sense when considering the intent of the legislation, which is to protect the environment. The stricter standards of California would naturally be fulfilling the spirit of the legislation, making it difficult to argue that the revocation of the waiver is being done with any sort of legislatively justifiable reasoning.

It is my opinion that the NMFS should make the determination that the EPA's revoking of California's fuel efficiency standard waiver will not just adversely affect, but actively jeopardize the whales present and future wellbeing, and that therefore the action must either be altered to remove the determined risk, abandoned due to respect of the law, carried out regardless, or exempted via application. On a related note, the Trump administration has recently altered the language of the ESA to state that the actions requiring consultation must "appreciably diminish[es] the value of critical habitat as a whole." (ESA), instead of just the part that is

predicted to be afflicted. Under the revised rules, the burden of proof is increased to prove the potential consequences of the revocation, since the area of habitat, and therefore the time required to properly study it, would be so much larger.

California's incremental and meaningful utilization of the waiver program has allowed its emission standards to be stricter than that of the nation, which in turn lead to increased preservation of the habitat of endangered species. The only viable alternative to the revocation of the waiver that does not lead to a regression of this progress made is an abandonment of the project, allowed to continue under the review process legislated by Section 7 of the ESA.

The Supreme Court determined that the EPA must regulate carbon dioxide emissions, due to the adverse effects it had on the well-being of the population of the state. The Supreme Court stated that this suit must call into light the capacity of states to be sovereign, reiterating that the state has an independent interest in the well-being of its land and air. The Court held that the CAA provides authority to the EPA to regulate tailpipe emissions, but specifically for pollutants that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." (CAA, 7521(a)(1)). The revocation of this waiver seems to be done with intent that is clearly contrary to the language used in the CAA, as well as the determination of the Supreme Court. This lends justification to the conclusion that the EPA's actions warrant a consultation from the NMFS, if only to acknowledge the intentions of congress are not being undermined.