Secondary and Cumulative Impacts Analysis and the Endangered Species Act

In the July 2012 issue of the JOURNAL, the reach of the secondary and cumulative impacts analyses under the Clean Water Act (CWA) were discussed and contrasted with their treatment under the National Environmental Policy Act (NEPA). This article will address the same secondary and cumulative impacts analyses, but under the Endangered Species Act (ESA). It also highlights important principles under the statutes most commonly encountered (ESA, NEPA, CWA) in the federal program of natural resource protection.

The ESA is a substantive statute that was enacted with the express purpose of conserving endangered and threatened species (16 U.S.C. §1531(b)). The US Department of the Interior satisfies the purpose of the ESA by implementing protection mechanisms authorized by the ESA, including section 7 consultations. In that section, the ESA requires that all federal agencies must consult with the secretary to ensure that any action “authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. . . .” (16 U.S.C. §1536(a)(2)). The impact analysis under the ESA is intended to ensure the agencies do not act in a manner that could result in the extinction of a listed species.

CUMULATIVE IMPACTS

Cumulative effects are defined in 50 CFR 402.02 as “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” The key difference from this definition and the term’s meaning under NEPA is that under ESA, cumulative effects do not include federal activities. Under NEPA, however, the acting agency must consider the cumulative effect of past, present, and future federal projects. Under ESA, only private and state actions are considered. The logic is that the effects of any future agency action (i.e., permitting) will be evaluated at the time that action goes through the permitting process. Future activities (that are reviewable as cumulative impacts) are further limited compared with
NEPA by the requirement that the effects must be "reasonably certain to occur" (50 CFR 402.02). The inclusion of the qualifier "certain" means that there is more than a mere possibility that the action may proceed (Federal Register, 1986).

Generally, future unpermitted federal activities are not included in the assessment of cumulative impacts. However, the US Fish and Wildlife Service accounts for some federal activities not yet permitted when establishing the environmental baseline. When evaluating the potential effects of a project on protected species, the US Fish and Wildlife Service assesses "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline" (50 CFR 402.02). "The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation process" (50 CFR 402.02, emphasis added). Therefore, although NEPA considers future federal activities in the cumulative impacts analysis, implementing ESA regulations provides for consideration of some future federal activities that have not yet been permitted in the environmental baseline assessment. In short, ESA may consider activities that are planned but have not yet been executed.

SECONDARY AND INDIRECT IMPACTS

Under ESA, the reviewing agency (i.e., the US Fish and Wildlife Service) determines the baseline conditions for the action area. The baseline is determined so that the project’s effects can have context; that is, "effects on what?" The baseline is: "The environmental baseline includes the past and present impacts of all federal, state, or private actions and other human activities in the action area, the anticipated impacts of all proposed federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation process" (50 CFR 4C2.02).

The inclusion of federal activities that have already undergone consultation creates a "first come, first served" problem. Here the most recent agency/applicant runs a higher risk that no further degradation can occur without jeopardizing a listed species or adversely modifying critical habitat.

Once the baseline is determined, the US Fish and Wildlife Service analyzes "the effect of the action." This term refers to the direct and indirect effects of an action
on the species or critical habitat. (Indirect effects are those that are caused by the proposed action and are later in time but are still reasonably certain to occur [50 CFR 402.02].) This is added with the effects of other activities that are interrelated or interdependent with that action that will be added to the environmental baseline (50 CFR 402.02).

Therefore, the effects review includes both direct and indirect effects. Direct effects are commonly defined as those effects that are caused by the action and that occur at the same time and place (USFWS & NMFS, 1998). “Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur” (USFWS & NMFS, 1998). The key difference between the scoping of indirect impacts under the ESA versus NEPA is that the effects included in the analysis cannot be merely “reasonably foreseeable” but must be “reasonably certain to occur.” ESA requires a greater level of certainty than does NEPA for an effect to be included in the indirect impacts analysis. However, similar to the NEPA analysis, the scoping of indirect impacts under ESA may include other federal actions so long as those actions have not undergone section 7 consultation (i.e., are not a part of the baseline) but would result from the action under consideration (USFWS & NMFS, 1998).

In addition to indirect and direct impacts, the US Fish and Wildlife Service is required to review interrelated and interdependent actions. “Interrelated actions are those that are part of a larger action and depend on the larger action for their justification” (50 CFR 402.02). “Interdependent actions are those that have no independent utility apart from the action under consideration” (50 CFR 402.02). The scoping of interrelated and interdependent actions is conducted by applying a “but for” test (USFWS & NMFS, 1998). Thus the US Fish and Wildlife Service would ask whether “another activity in question would occur ‘but for’ the proposed action under consultation.” If the activity in question would occur regardless of the proposed action under consultation, then the activity is not interrelated or interdependent. The interrelated or interdependent activities are measured against the proposed action and vice versa. For example, if the Army Corps of Engineers requests consultation for construction of a dam that will provide water to private irrigation canals that will come on line once the dam is completed, then the irrigation canals are interrelated to the proposed dam and must be considered in the biological opinion. Similarly, a power turbine to be constructed concurrently with the dam would be interdependent with the dam and any impacts on fish passage would be considered. If however, the Army Corps of Engineers is requesting to add a second turbine to an already existing dam, the new turbine would be the “larger action” against which the “but for” test is applied. That is to say, the existing dam has independent utility and therefore is not interrelated to or interdependent with the proposed action of constructing a second turbine. Simply stated, the existing dam is included in the baseline. In the case of the first turbine being constructed in conjunction with the construction of the dam, both are not part of the baseline (USFWS & NMFS, 1998).

CONCLUSION

The scoping of the cumulative and secondary/direct impacts analyses under NEPA, ESA, and CWA are distinct to each statute. The scoping of the impacts analysis is directly related to the given statute’s overall purpose. Therefore, the scoping under NEPA is the broadest since it is simply designed to ensure informed decision-making. The scoping under the ESA and the CWA is narrower in application. Under the ESA the focus is primarily on private and state actions and impacts above the baseline. Under the CWA, the focus is primarily on the effects caused by construction of a project and not by the operation. The ESA’s implementing regulations enumerate standards/parameters for the impacts analysis that are not found in the CWA’s implementing regulations. There are few cases that address the distinctions between the impacts analysis under these three statutes.

—Michelle Diffenderfer is the executive shareholder for the West Palm Beach, Fla., office of Lewis, Longman & Walker and holds an AV preeminent rating by Martindale-Hubbell. Her practice focuses on environmental, water, natural resources, and land use law, specifically, permitting and enforcement. She can be reached at mdiffenderfer@llw-law.com or at (561) 640-0820. Robert Diffenderfer is a shareholder at the West Palm Beach office of Lewis, Longman & Walker and also holds an AV preeminent rating by Martindale-Hubbell. He can be reached at rdiffenderfer@llw-law.com or at (561) 640-0820.

REFERENCES


http://dx.doi.org/10.5942/jawwa.2012.104.0139