Gale Norton, the Secretary of the Interior, explains her approach to regulation as the “4 C’s”: communication, consultation, and cooperation, all in service of conservation. This research project will focus upon the “consultation” requirements of the Endangered Species Act. Under Section 7 of the ESA, the Secretary of the Interior, through the U.S. Fish and Wildlife Service (the “Service”) must work with federal agencies on any agency action that may affect a endangered species or its habitat to insure that the action will not jeopardize the survival or habitat of that species. Through the consultation process, the Service lends its expertise to the action agency, which must conduct a biological assessment of the project area. Then the Secretary must provide a “biological opinion” concerning how the agency’s action will affect the species or its habitat. If “jeopardy or adverse modification is found,” the Secretary must suggest reasonable and prudent alternatives which she believes may be taken by the agency that would not jeopardize the continued existence of an endangered species or adversely modify its habitat. The objective of the process is to gain knowledge to make informed decisions that are protective of endangered species.

While Section 7’s requirements apply only to the actions of federal agencies or their permittees, Secretary Norton has been working to expand the consultation provision to include private landowners. The ESA generally prohibits activities on private land that would harm an endangered species; however, the Act provides an exemption if the landowner develops a satisfactory conservation plan. Developing a conservation plan that would meet the Service’s requirements is often an expensive endeavor that is thought to be outside of the reach of many private landowners, particularly those with smaller holdings. Under Norton’s program, just as with federal agencies, the Service lends its expertise and resources to private landowners. Thus, the Service is working with private landowners to develop conservation plans that allow them to proceed with development in areas that provide habitat for endangered species.

At the same time that Secretary Norton is touting consultation with private landowners, however, the Service is working to eliminate consultation with agencies under certain circumstances, having recently promulgated two new regulations. Among the justifications for the new regulations were the needs to make decisions more quickly and efficiently, the complexity of the analyses, and the existence of the requisite expertise in other agencies. However, this devolution of authority of authority is troubling on many levels.

In December 2003, the Service along with the Bureau of Land Management, the National Park Service, the Bureau of Indian Affairs, and the Forest Service (“Action Agencies”) issued joint consultation regulations. These regulations provide an alternative to the existing consultation process for agency projects that support the National Fire Plan (“NFP”) under the
Healthy Forests Initiative. The alternative eliminates the need to conduct informal consultations and the requirement to obtain a written concurrence from the Service for those NFP actions that the Action Agency determines are “not likely to adversely affect” (“NLAA”) any endangered species or habitat.” These regulations are intended to accelerate the rate at which the Action Agencies may implement their responsibilities under the NFP. What is most significant about the alternative is that if the Action Agency has entered into an “Alternative Consultation Agreement”, it may make an NLAA determination without consultation with or concurrence of the Service.

There were many criticisms of the regulations when they were proposed, and they included three general categories of concerns: urgency, expertise, and capture. Commenters on the proposed rules expressed doubt about the need to accelerate the current process and suggested that rather than delegating authority to the agencies, the Service could shorten the timeline for formal consultations and biological opinions. Another critique of this delegation was that the Action Agencies lacked the requisite expertise. And finally opposition arose from the concern that the Action Agencies’ missions differ from that of the Service, and thus the Action Agencies would be less sensitive to protection of endangered species and critical habitat. Moreover, commenters speculated that the alternative would give industry free reign to increase timber sales on public lands in a manner that is not in the best interest of the public. The current consultation process was seen as part of the “checks and balances inherent in the Act.” These new regulations did not receive much media attention, though their ramifications could be significant.

Receiving more media attention, however, was the Service’s promulgation in August 2004 of regulations with the Environmental Protection Agency (“EPA”) and the Department of Agriculture with respect to pesticides for actions taken under the Federal Insecticide, Fungicide and Rodenticide Act. These regulations provide two alternatives. The first is similar to the December 2003 regulation in that it allows EPA to make NLAA determinations without consultation with or concurrence from the Service. Criticisms have been likewise similar. The second alternative is the “new optional formal consultation process.” In this optional process EPA decides whether to initiate formal consultation by submitting a written request along with an “effects determination” to the Service. In conducting this consultation, the Service may adopt EPA’s findings with respect to the ecological effects of pesticides without issuing its own independent biological opinion.

Paradoxically, despite these formal changes, it is unclear that the review of pesticides will be more or less protective of endangered species and their habitats because in the past EPA frequently failed to consult the Service with respect to new pesticides. The agencies completed only a dozen consultations in the last decade. The rationale for the failure to comply with the Act was that the consultations would have been too complex. Rather than comply with existing law, the Service justifies these regulations by stating that the process needs to be streamlined, the Action Agencies have the requisite expertise, and the Service will maintain oversight. Despite EPA’s expertise with respect to pesticides, critics challenge its expertise with respect to the
Endangered Species Act. Certainly one way to streamline the process could be to remove the Service’s experts from the equation, but the complexity of the analysis suggests that the Service should remain the central actor in these reviews and counsels in favor of more protection of endangered species and their habitats, not less protection.

The consultation process has played a crucial role in the regulation of agency action. Section 7 is the “institutionalization” of caution. Traditionally, the Service has relied upon the action agencies to notify them when an agency action might affect endangered species and their habitats and to notify them early in the process. Without informal consultation, the Service may be excluded from all but the major agency actions, and thus these new regulations have the potential to vitiate the prophylactic benefits of consultation. The regulations threaten to create a culture of willful ignorance in violation of the Act. Though the Service may intervene and seek injunctive relief, they would not be able to until later in the planning and implementation of the agency actions upon somehow learning of likely adverse effects. Thus there exists greater potential for adverse impacts to endangered species and their habitats.

A coalition of eight environmental groups filed a lawsuit in September 2004 alleging that the new pesticide regulations violate the Endangered Species Act. This article will analyze this litigation and explore this unlawful delegation. The ESA is unequivocal in its assignment of obligations to the Service to be the conscience of the other federal agencies. Despite the Service’s assurances that it will maintain oversight, its record suggests that the oversight will be anything but meaningful.