



DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECW-OR

11 8 NOV 1999

MEMORANDUM FOR MAJOR SUBORDINATE COMMANDS AND DISTRICT
COMMANDS

SUBJECT: Endangered Species Act Compliance

1. The current revised version of the Standard Operating Procedure (SOP) does not contain any discussion on determining the scope of analysis for Endangered Species Act (ESA) compliance. The discussion concerning using the National Environmental Policy Act or National Historic Preservation Act language/criteria for determining ESA scope of analysis was specifically removed and should no longer be cited. The following guidance will be use for ensuring compliance with section 7 of the ESA, including consideration of direct and indirect effects (formally identified as ESA scope of analysis).
2. The Corps of Engineers Regulatory Program will use the Endangered Species Act Interagency Consultation Regulations at 50 CFR Part 402, when determining compliance with Section 7 of the ESA. Further, the Section 7 Consultation Handbook generally provides useful guidance for compliance with the consultation requirements of the ESA and the ESA regulations. The Corps and the Services agree that the handbook should be used to govern the application of the consultation regulations to specific permit actions.
3. Nevertheless, we anticipate that in a small percentage of cases there may continue to be differences in agency interpretation regarding application of the consultation handbook and its examples to specific circumstances. To facilitate agreement in such cases, we have agreed with the Services to initiate a conflict resolution process for addressing disagreements on how to apply the regulations in a specific case regarding indirect effects/scope of analysis. The enclosed conflict resolution process is designed to resolve issues and to identify and document those situations where we and the Services are unable to reach agreement. The conflict resolution process will apply to all pending permit actions, as of the date of this letter. We plan to use this process for one year and then use that record to develop additional national guidance, if necessary.

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4. Any questions regarding this guidance may be directed to Sam Collinson, at 202-761-1782.

FOR THE COMMANDER

Encl

DISRIBUTION
(SEE PG 3)



CHARLES M. HESS
Chief, Operations Division
Directorate of Civil Works

Conflict Resolution Process for Determination of Indirect Effects/Scope of Analysis

The U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Services) will work cooperatively to achieve mutually shared objectives of ensuring that listed species will not be jeopardized nor designated critical habitat destroyed. The Corps and the Services staff working at the local level will discuss any disagreement concerning case-specific determinations of the indirect effects/scope of analysis for that case, with an attempt to resolve them without elevation. The Services will notify the Corps of any disagreement concerning indirect effects/scope of analysis during the appropriate comment period. If those differences among the local staff cannot be resolved within 60 days for individual permits or 30 days for nationwide or regional general permits of the receipt of notification of the disagreement by the Corps, they will be raised to the level I review team. Local staff will prepare a written statement summarizing the issues to be resolved and agency positions, then notifying level I personnel of their intent to initiate elevation within 10 days of the close of the 60 day period. To ensure timely resolution of any differences that may occur, the following tiered elevation procedure and timeframes will be used.

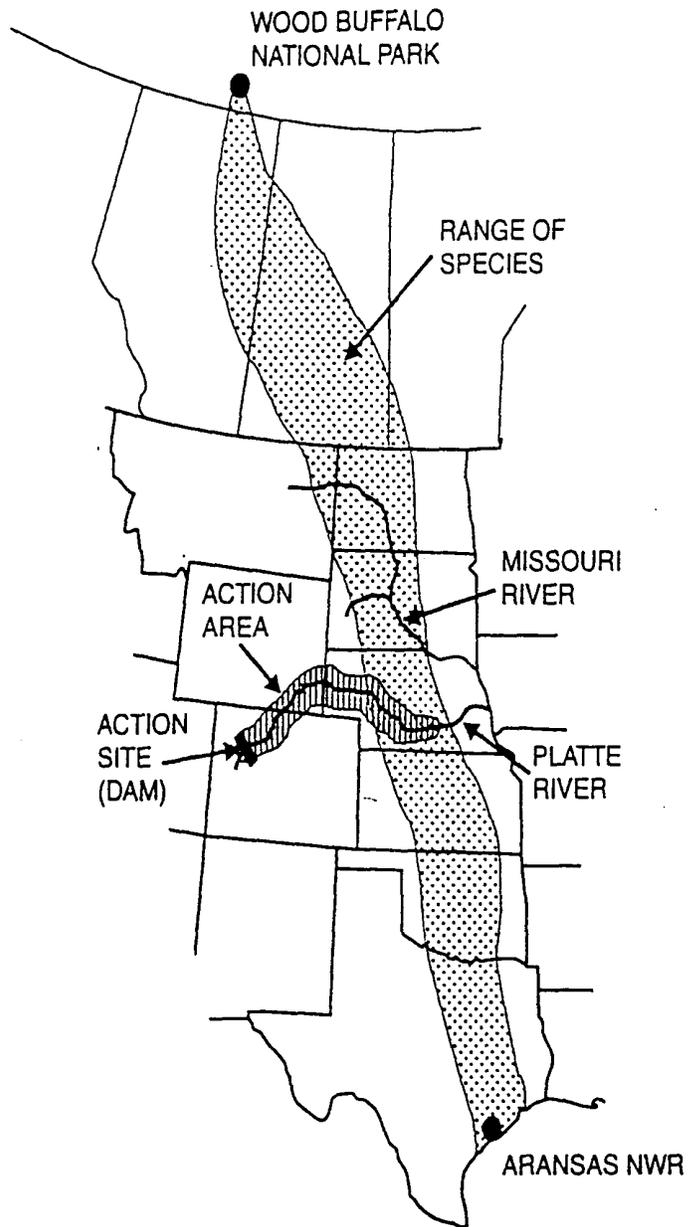
Level I: Level I personnel will consist of FWS field office supervisor, NMFS branch/division chief, and the Corps District branch chief. Level I personnel will review the summary to ensure staff have adequately attempted resolution and the elevation is appropriate. Level I will attempt to resolve the differences. If no resolution can be reached at level I within 20 days of having received notification from staff, it shall be elevated to level II. Level I personnel will provide a written description of the differences and each agencies' position within 10 days of the close of the 20 day period.

Level II: Level II personnel will consist of the FWS Regional Director or designee, the NMFS Regional administrator or designee, and the Corps District Engineer or designee. They will review the material submitted and attempt to resolve the differences within 30 days of receiving the elevation. If they cannot reach resolution, the issues will be elevated to level III. Level II personnel will provide a written description of the differences and each agencies' position within 10 days of the close of the 30 day period.

Level III: Level III personnel will be the Director of the FWS, the Assistant Administrator for Fisheries, NOAA (NMFS), and the Deputy Commander for Civil Works. After review and full consideration of all comments and each agency's position, the Deputy Commander for Civil Works will make a final decision on the Corps position within 30 days. However, the Services may determine the final decision is not in compliance with section 7 of the ESA and would complete the consultation process according to the ESA regulation and the Section 7 Consultation Handbook.

Figure 4-5. Example of an action area involving an effect not at the project site.

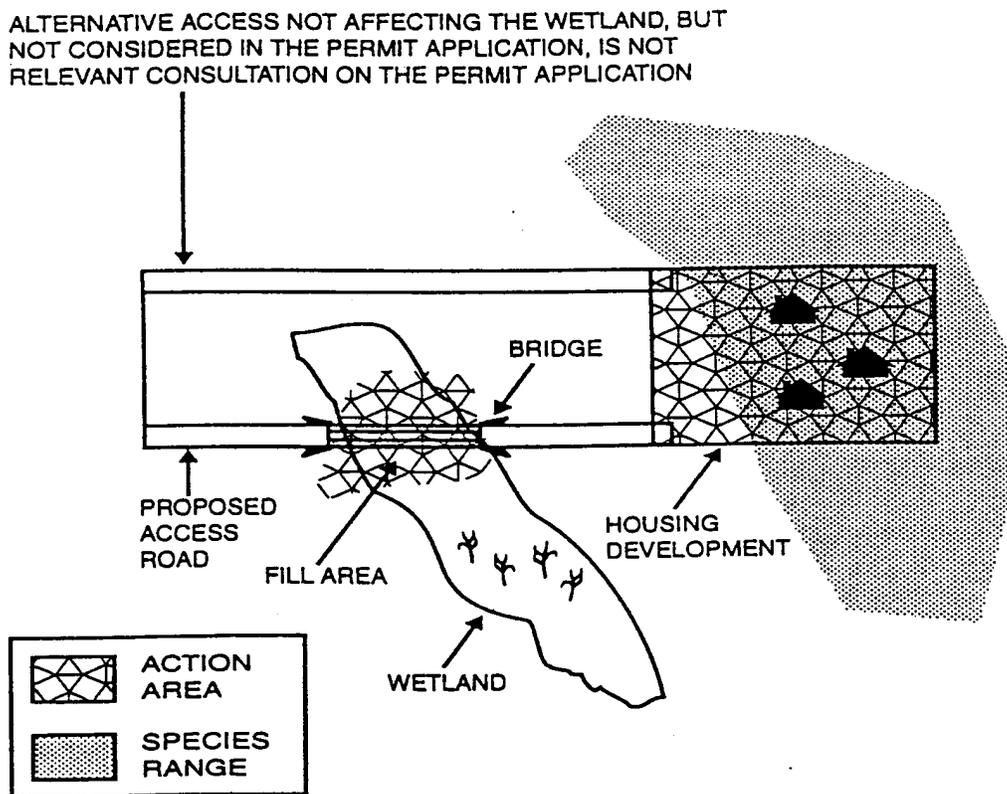
A dam on the Platte River in Colorado (project site) also may affect the water regime for whooping crane critical habitat (action area) 150 miles downstream in Nebraska.



Description of the proposed action (cont'd)

Determining the action area relates only to the action proposed by the action agency. Even if the applicant has an alternative not requiring Federal permits or funding, this does not enter into the Services' analyses. Such alternatives can be discussed in the reasonable and prudent alternatives or conservation recommendations if the alternative is within the agency's jurisdiction. The action area should be determined based on consideration of all direct and indirect effects of the proposed agency action [50 CFR 402.02 and 402.14(h)(2)]. For example (Figure 4-6), if the proposed action is a wetland fill (requiring a federal permit) to accommodate access to a proposed development (the actual area of impact to the species), then the development is included in the action area. Whether or not the applicant can build a road that does not impact the wetland, the analysis of effects of the action still encompasses the proposed development. If the applicant is seriously considering the alternative with no Federal nexus, the applicant should be advised of the need for acquiring a section 10(a)(1)(B) permit before proceeding with development for actions that will result in a taking.

Figure 4-6. Determining the action area.



Corps of Engineers Scope of Analysis: Situation Examples

Factual Assumptions:

1. Indirect effects are those effects that are caused by the proposed action and are later in time, but still reasonably certain to occur. The "but for" test is one of the tests used to determine whether an activity is an indirect effect for the purposes of section 7. For example, if Corps of Engineers authorization for a project is withheld and the applicant can be reasonably expected to complete the project via a second alternative that does not require Corps authorization, the "but for" test is not met. However, if the applicant is limited by funding and/or time constraints and would not complete the project via the second alternative, the "but for" test is met.
2. The focus of this paper is to define, through use of several examples, the Service's position on the scope of effects. These scenarios do not attempt to define an action agency's scope of authority. Limits of authority are addressed in other parts of the consultation; i.e., in the context of reasonable and prudent alternatives or reasonable and prudent measures.

Project Type: Residential Development

Example #1: A 500-acre housing development is proposed for construction in a pristine, predominantly upland area with scattered streams and riparian wetlands.

- Regulated activities are limited to filling 100 linear feet of wetlands for a roadway and installing a culverted stream crossing.
- The regulated activities are concentrated in one location.
- The total jurisdictional area affected is 2000 square feet.

Additional Facts – The project is in a coastal area of old ridge and swale sand dune habitat. A listed terrestrial species is present on one end of and adjacent to the 500-acre tract and would be adversely affected by the development. The landowner can access the property via non-wetland routes.

Scope of Analysis – Considering that purely upland access routes are available and practicable and no other regulated activities are involved, the development could occur without the Corps authorization. Therefore, the impacts to the listed species would not meet the "but for" test and would thus not be indirect effects of the Corps permit action. However, if the 500-acre tract were surrounded by wetlands such that any access route required Corps authorization, the "but for" test would be met and the Corps would need to take the indirect impacts to the listed species into account during their analysis of the project.