

# Section 7 of the Endangered Species Act

U.S. Fish and Wildlife Service  
Caribbean Ecological Services Field Office



# Section 7: Legal Basis

- Statutory Authority - 16 U.S.C. Section 1531 Endangered Species Act of 1973, as amended
- Regulation - 50 CFR Part 402 Interagency Cooperation Regulation

# What Section 7 is?

- Affirmative Conservation Mandate
  - Section 7(a)(1) directs Federal agencies to utilize their authorities to carry out programs for the conservation of endangered and threatened species.
- Prohibition
  - Section 7 (a)(2) states that each Federal agencies shall, **in consultation with and with the assistance of the Secretary**, insure that any action they authorize, fund, or carry out is not likely to **jeopardize** the continued existence of a listed species or result in the **destruction or adverse modification** of designated critical habitat.

# When Section 7 applies?

- Actions or Projects with Federal Nexus

# Federal Nexus Means

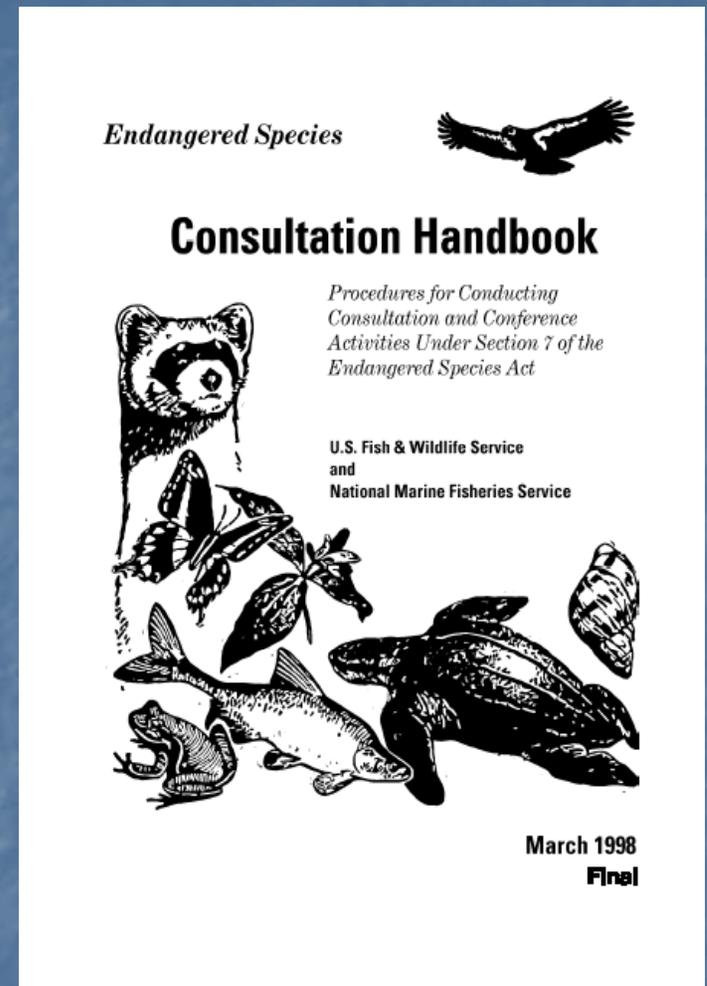
- Actions funded
- Actions authorized
- Actions carried out

**By a Federal Action Agency**

Actions may include: projects, activities, programs, plans, and regulations, among others.

# Consultation Tools

- Consultation Handbook:
  - March 1998 (R4 provided additional information and references in 2004)
  - FWS and NMFS
  - Provides guidance, policy, procedures, formats, examples, and references.
  - Establishes roles and responsibilities (FWS, NMFS, Federal Agencies, Lead Agency, Applicants)
  - [www.fws.gov/caribbean/es](http://www.fws.gov/caribbean/es)



# Consultation Procedures

- Conference on Proposed Species or Proposed Critical Habitat
- Early Consultation
- Informal Consultation
- Formal Consultation

# Informal Consultation: Purposes

- Clarify species presence/absence within the action area
- Determine effects of the action
- Explore ways to reduce or remove adverse effects
- Determine the need to enter into formal consultation or conference
- Explore benefit the species

# Informal Consultation

- Unstructured approach to meet section 7 conservation responsibilities (7(a)(1))
- Represents the great majority of the consultations (#)
- Conducted with the Federal action agency or a designated non-Federal representative
- No overall time-frames (30 day concurrence letters)
- Documentation is essential

# Informal Consultation Involves...

- Discussions (meetings, calls)
- Site visits
- Negotiations
- Technical Assistance, expertise
- Documentation of the process in writing

# Informal Consultation: Four Main Steps

- Determination of Species/Habitat Presence
- Determination of Effects
- Identify conservation measures to possible avoid adverse effects
- Ending Consultation :
  - Informally – No effect / Not Likely to Adversely Affect - Concurrence
  - Formally - Productive 90 days consultation process and a Biological Opinion written and negotiated in 45 days.

# A NLAA determination is appropriate when the effects are:

- Discountable - extremely unlikely to occur
- Insignificant - relate to the size of the impact and should never reach the scale where take occurs
- Completely beneficial - contemporaneous positive effects without any adverse effect
- Conservation measures may be needed to avoid possible adverse effects

# Biological Assessment (BA):

- Required for Major Construction Activities
- BA Completion Time - 180 days from receipt of, or concurrence on, species list
- BA Review Time - 30 days for the Service to respond on whether they agree with the findings of the BA

# BA: Minimum Required Information

- Results from on-site inspections
- View of recognized experts
- Review of literature or other information
- Analysis of effects, including cumulative
- Analysis of alternative actions

## OUTLINE EXAMPLE FOR A BIOLOGICAL ASSESSMENT OR A BIOLOGICAL EVALUATION

- A. Cover letter - Include purpose of consultation, project title, and consultation number (if available). A determination needs to be made for each listed species and designated critical habitat. There are three options: 1) making a "no effect" determination and not requesting or requesting Service concurrence, 2) requesting Service concurrence with a "may affect, is not likely to adversely affect" determination, or 3) requesting formal consultation with the Service for a "may affect, is likely to adversely affect" determination. If proposed species or critical habitat are included, state whether the project "is likely to jeopardize the continued existence of" proposed species or "adversely modify" proposed critical habitat.
- B. Project description - Describe the proposed action, including interrelated and interdependent actions, and the project area. Be specific and quantify whenever possible. Include maps, drawings, photographs, and any other materials that may help reviewer understand project.
- C. Species and suitable habitat and critical habitat description(s)  
For each species:
  1. Describe the affected environment (quantify whenever possible)
  2. Describe the species biology
  3. Describe current conditions for each species
    - a. Rangeland
    - b. In the project area
    - c. Cumulative effects of State and private actions in the project area
    - d. Other consultations of Federal actions in the area to date
  4. Describe critical habitat (if applicable)
- D. Effects of the proposed action - Describe effects of the proposed action on each species and/or designated critical habitat, including:
  - a. Direct effects
  - b. Indirect effects
  - c. Effects of interrelated and interdependent actions
  - d. Cumulative effects
  - d. Quantity of incidental take
- E. Conservation measures - Describe conservation measures, actions, that are committed to be completed, taken to benefit or promote the recovery of listed species that are included as an integral part of the proposed action (protective measures to minimize or compensate for effects to each species). (Can include this under project description, see A. above.)
- F. Conclusion(s) - Provide effect determinations for each species and/or critical habitat.
- G. Literature Cited - Provide a list of literature cited or data referenced.
- H. List of Preparers - Provide a list of preparers and contacts, as well as their affiliations and qualifications.

# BA: Suggested Content

- Project description
- Species and suitable habitat and critical habitat description(s)
- Effects of the action (direct, indirect, effects of interrelated and interdependent actions, cumulative effects, quantity of incidental take)
- Conservation measures
- Conclusions
- Literature Cited
- List of Preparers

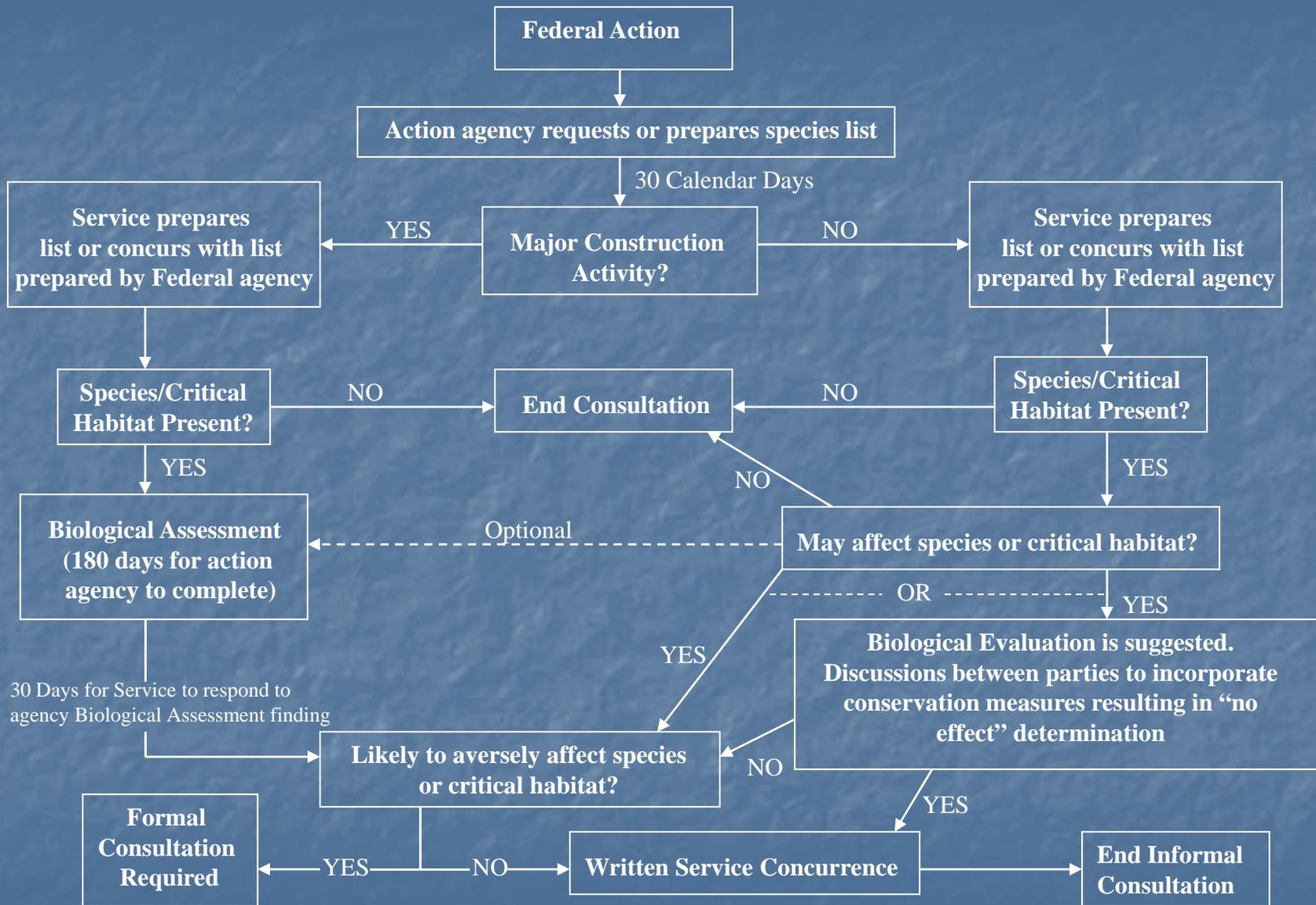
If the Service does not concur  
with a NLAA determination....

- Informal consultation continues to remove the adverse effects

OR

- Recommend formal consultation

# Informal Consultation Process under the Endangered Species Act



# Formal Consultation

- Triggered when a Federal action may affect and is likely to adversely affect listed species/critical habitat
- Required by Law and Regulation
- ESA requires the action agency to provide the best scientific and commercial data available

# May affect and Is Likely to Adversely Affect (LAA)

- Appropriate conclusion if any adverse effect to listed species may occur as a direct or indirect result of the proposed action or its interrelated or independent action, and the effect is not:
  - Discountable
  - Insignificant
  - Beneficial

# Formal Consultation: Major Components

- Well documented Informal Consultation
- Determination of adverse effects with FWS concurrence letter
- Complete Initiation Package
  - Initiation letter
  - 90 days consultation process
  - Biological opinion (45 additional days)
  - Implementation letter

# Initiation Package (BA/other)

- Description of the action
- Description of the specific area affected by the action
- Description of the listed species/critical habitat that may be affected
- Description of the manner in which they may be affected
- Relevant reports prepared on the proposal
- Other relevant studies or available information
- If major construction activity, BA is required

# Initiation Package: Service evaluation

- Have the components been provided?
- If so, the consultation was initiated on the date received by the Service.
- Within 30 working days, the Service provides written acknowledgement of the consultation request and advise the action agency of any data deficiencies.
- Service can provide advise regarding 7(d) - ALERT

# Section 7(d)

- Irreversible and Irretrievable Commitment of Resources
  - Action Agency makes the determination
  - FWS can provide advise
  - FWS policy is not to provide concurrence

# Formal Consultation Package

- Biological Opinion (Effect Analysis)
- Incidental Take Statement (Exemption under Section 9 of the ESA)

# Biological Opinion : Major Components

- Introductory Paragraphs, Consultation History/Species table
- Biological Opinion
  - Description of the proposed action
  - Status of the species/CH
  - Environmental Baseline (action area)
  - Effects of the action (effects and species response )
  - Cumulative effects
  - Conclusion (jeopardy, no jeopardy, adverse modification / not adverse modification to CH)
  - Reasonable and Prudent Alternatives, if Jeopardy

# Major Components Continue

- Incidental Take Statement
  - Amount or Extent of Take Anticipated
  - Effects of the Take
  - Reasonable and Prudent Measures
  - Terms and Conditions - non discretionary.
- Coordination of ITS with other laws, regulations, and policies
- Conservation Recommendations
- Reinitiation Notice
- Signature Block
- Literature Cited

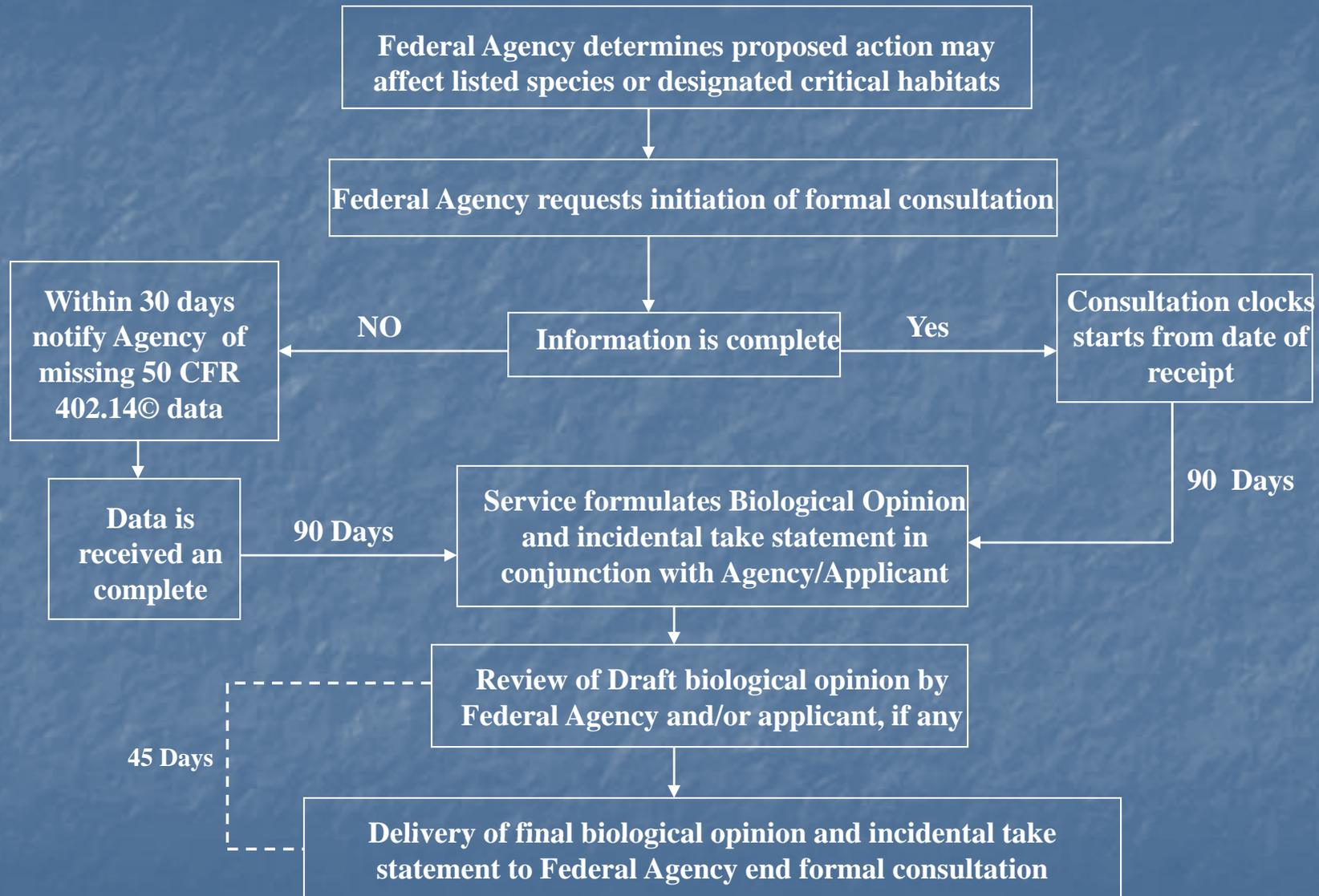
# Statutory Time

- Formal Consultation begins when complete information is received
- Concludes 90 days after initiation, may be extended if mutually agree
- Cannot be extended more than 60 days without consent of applicant
- Biological Opinion issued within 45 days after ending formal consultation

# Statutory Time Continue

- Extension of the 45-days post-consultation period
  - only if Federal agency gets consent of the applicant
  - may be extended 10 days if the Federal agency returns a draft biological opinion within 10 days of issuance deadline

# Formal consultation process under the Endangered Species Act



# **Roles and Responsibilities during Consultation Processes**

# FWS Responsibilities (Informal)

- Updated list
- Provide biological information
- Discuss project options to eliminate any adverse effects
- Determine the need to enter into formal consultation
- Explore to benefit the species
- Review NLAA for concurrence
  - If concurs, provide a written response
  - If does not concur, provide a written response indicating that formal consultation is required
- Respond in writing to a formal consultation request
- Identify information necessary for a “complete initiation package”

# FWS Responsibilities (Formal)

- Work for 90 days to understand and discuss the proposed project, its potential effects, conservation measures to minimize effects, anticipated incidental take, and conditions to minimize possible take
- Within 45 days after the 90-day period, complete the biological opinion and provide draft for action agency review
- Review comments from the action agency
- Finalize the biological opinion
- Monitor implementation of the biological opinion
- Maintain an Administrative Record

# Federal Action Agency Responsibilities (Informal)

- Determine presence/absence
- Make a determination of effects
- For a “may affect, not likely to adversely affect”, contact the Service for concurrence
- For a “may affect, likely to adversely affect” determination, work with the applicant to modify the proposed action to eliminate adverse effects when possible

# Federal Action Agency Responsibilities (Formal)

- If the “may affect” determination cannot be changed,
  - prepare a BE/BA in accordance with 50 CFR 402.12.
  - contact the Service to initiate formal consultation (Initiation Package)
- Work during formal consultation to eliminate or minimize any adverse effects
- Review draft BO and provide comments/concerns
- Review BO to determine what action will be taken
- Notify what action was implemented
- Monitor compliance

# Applicant

- Identified by Federal action agency
- Opportunity to submit information
- Must be informed of any extension
- Entitled to review draft BO through Federal action agency, and to provide comments
- If jeopardy, Service will discuss the basis of determination
- Service provides copy of the final BO

# DEFINITIONS RELEVANT TO SECTION 7 CONSULTATION

- **Jeopardize the continued existence of** – to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.
- **Incidental take** – take of listed fish or wildlife species that result from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or applicant.