



Aligning the FERC Licensing Process with Endangered Species Act Consultation

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Purposes of the ESA

“The purposes... are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a)...”

Section 2(b) of the Endangered Species Act



Purposes of the ESA

“It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”

Section 2(c) of the Endangered Species Act



ESA Section 7(a)(2) Requirements

- Requires that each federal agency insure that any action it authorizes, funds, or carries out is **not likely to jeopardize** the continued existence of any ESA-listed species **or result in the destruction or adverse modification** of designated critical habitat.





Licensing Standard (Federal Power Act)

- Equal Consideration – section 4(e)
 - Equal consideration to environmental and developmental values
- Comprehensive Development– section 10(a)
 - License project that best serves the public interest (best adapted to comprehensive plan for use of waterway)



What triggers a consultation?

Any federal action that “**may affect**” an ESA-listed or proposed species or designated or proposed critical habitat

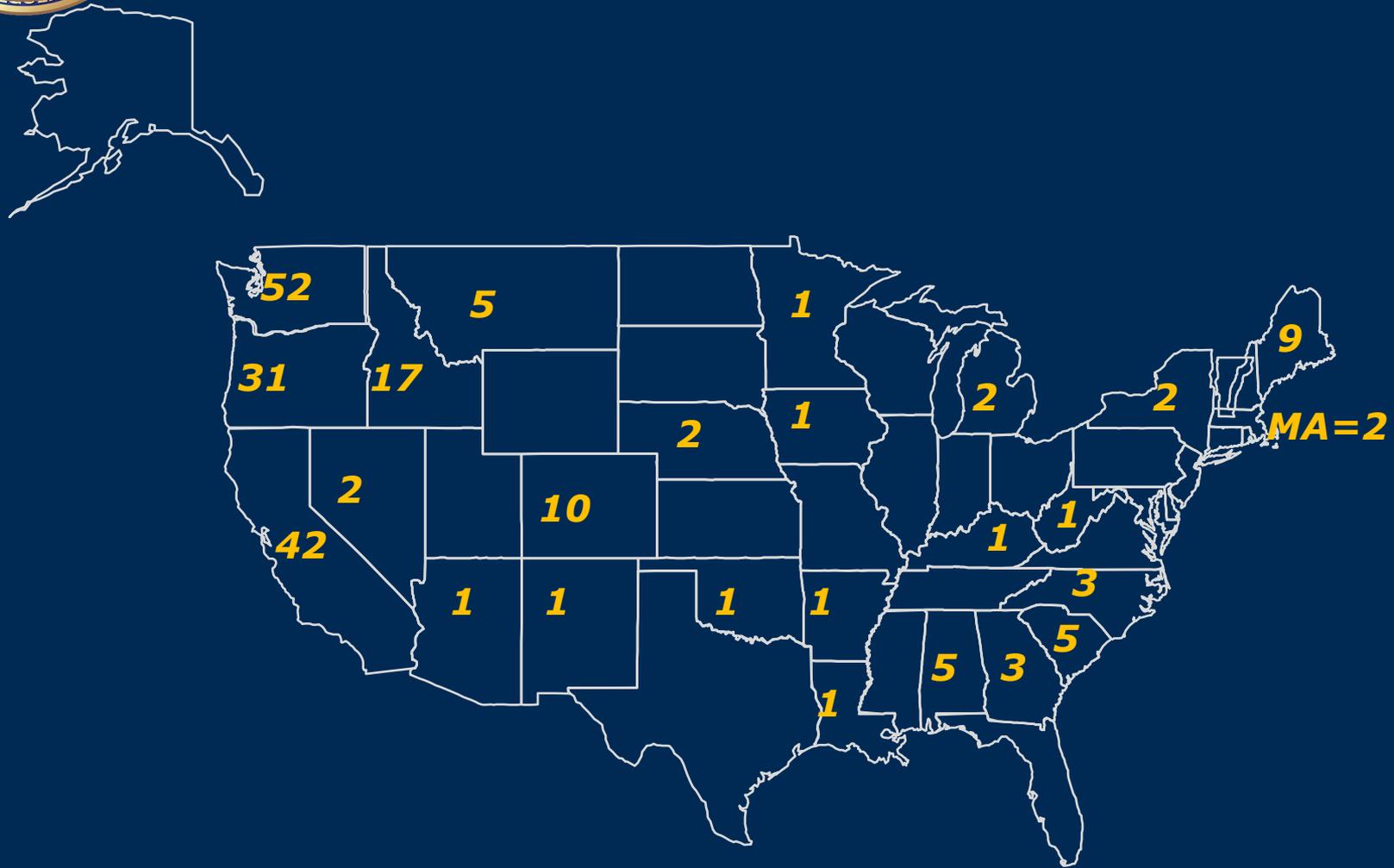


Effect Determination

- No Effect → No consultation required
- May Affect, Not Likely to Adversely Affect → Informal Consultation leading to a concurrence letter
- May Affect, Likely to Adversely Affect → Formal Consultation leading to a biological opinion



Formal Consultations on Hydropower Licenses (1979-2013)



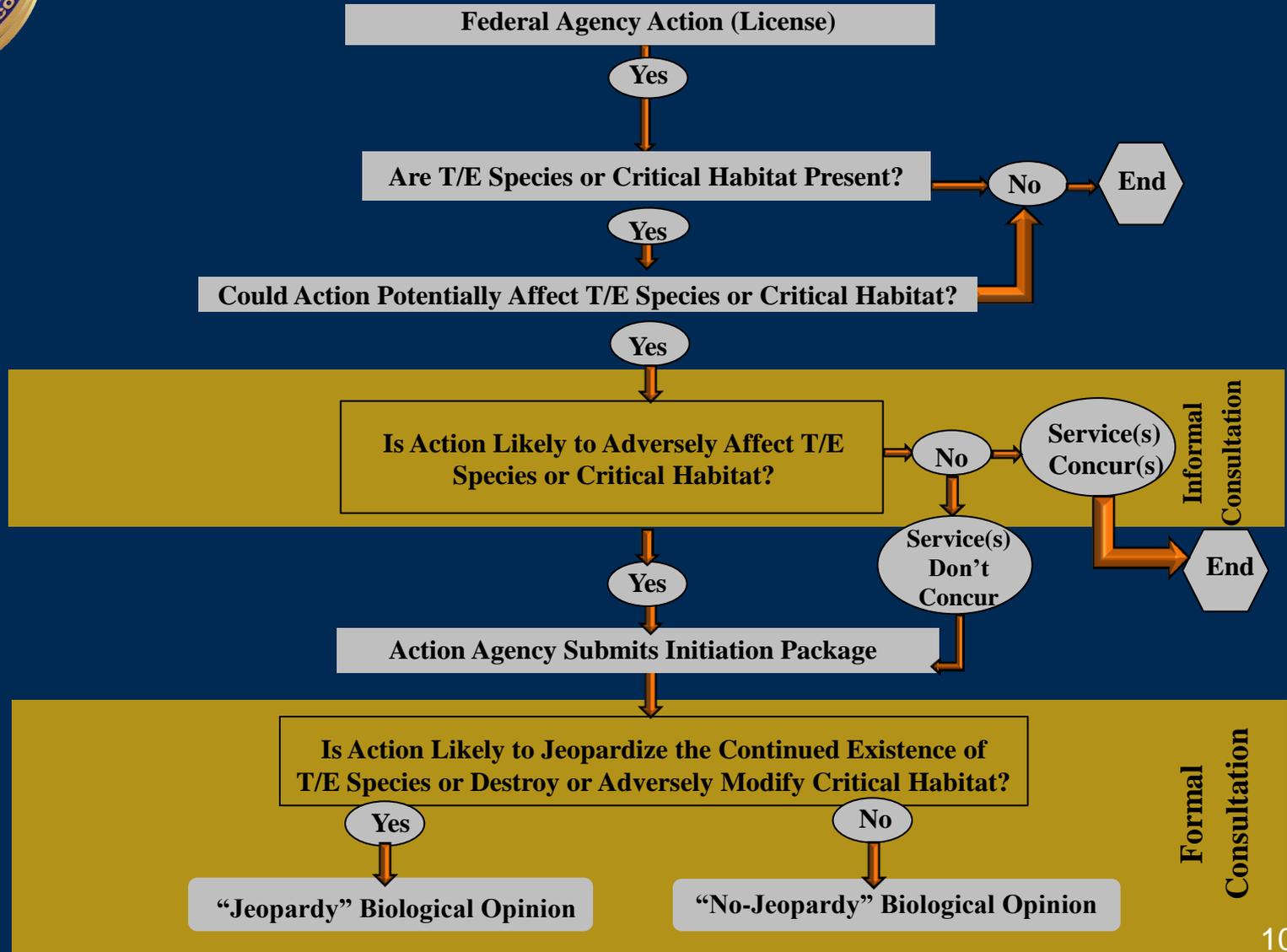


FERC Licensing Processes





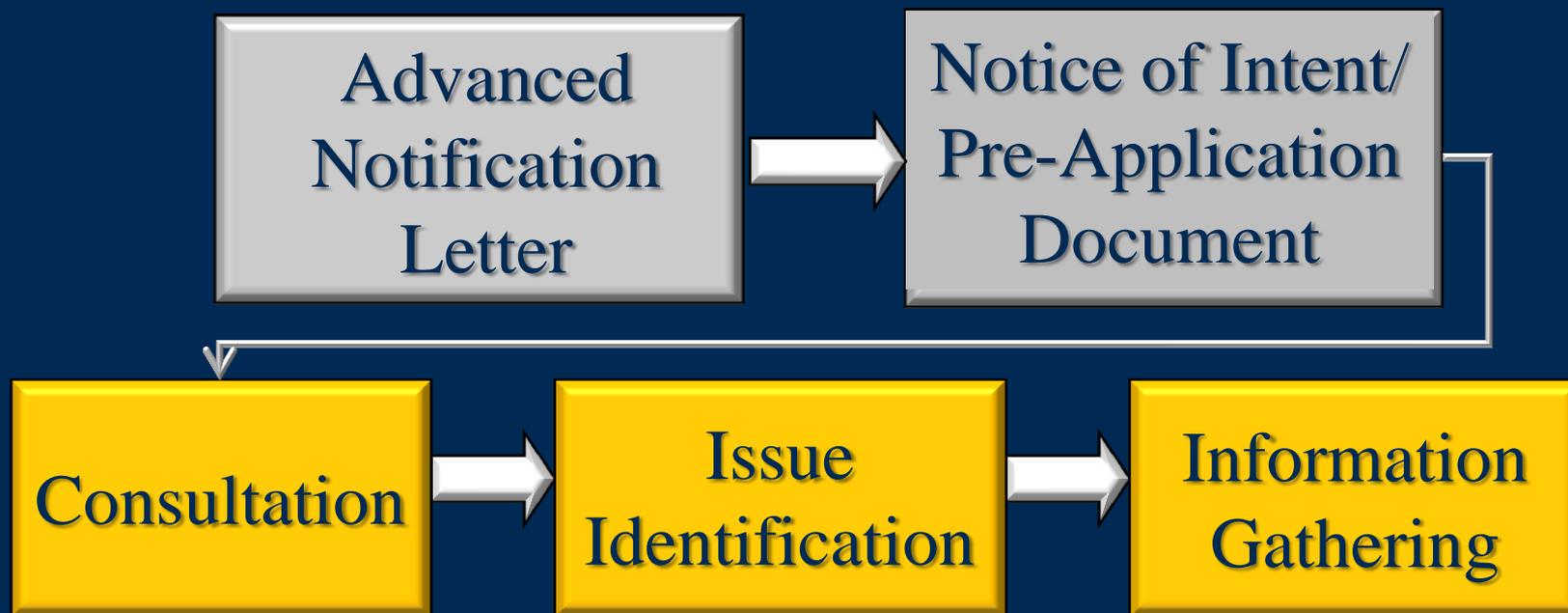
ESA Section 7 Consultation Process





Basic Licensing Steps

Pre-filing





Basic Licensing Steps

Post-filing





Initiation Package for Formal Consultation

- FERC must submit an initiation package containing:
 - Description of the action to be considered
 - Description of the specific area that may be affected
 - Description of any listed species or critical habitat that may be affected by the action
 - Description of the manner in which the action may affect any listed species or critical habitat and an analysis of cumulative effects
 - Relevant reports, including NEPA documents or biological assessment prepared
 - Any other relevant available information on the action, the affected listed species or critical habitat



Coordination with the Section 10(j) Process

- The Section 10(j) process includes consideration of conditions for protection, mitigation, and enhancement of fish and wildlife resources, based on recommendations of fish and wildlife agencies
- Attempt to resolve inconsistencies [10(j)(2)]
- Explain in the license order how any rejected recommendation conflicts with applicable law and how the license meets the 10(j)(1) standards



Conclusions to a Consultation

- No Effect Determination by the Action Agency
- Informal Consultation leading to a Concurrence Letter
- Formal Consultation leading to a No-Jeopardy Biological Opinion with an Incidental Take Statement
- Formal Consultation leading to a Jeopardy Biological Opinion with Reasonable and Prudent Alternative(s) (if identified) and an Incidental Take Statement



Incidental Take

- “Incidental Take” refers to take that is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity”
- Exempted if one of the following applies:
 - It is in compliance with the terms and conditions of an Incidental Take Statement included in a Biological Opinion pursuant to Section 7 of the ESA
 - It is covered under an Incidental Take Permit issued pursuant to Section 10 of the ESA



Incidental Take Statement and the License Order

- Incidental Take Statement (ITS):
 - Documents the anticipated incidental take (can be numbers of individuals or a surrogate)
 - Includes reasonable and prudent measures for minimizing take and terms and conditions for implementing those measures (often monitoring and reporting requirements)
 - Terms and conditions included in an ITS help inform conditions that are included in FERC's license order to address ESA concerns



Post-Licensing

- License Amendments are subject to NEPA and ESA Section 7 Consultation (if the action of amending the license may affect a listed or proposed species or designated critical habitat)
- Conducted by FERC's Division of Hydropower Administration and Compliance



Summary of the Services' Involvement

- Pre-Filing:
 - Comment on the PAD, attend public meeting and site visit to discuss ESA issues, comment on scoping document (if ILP), attend study plan meetings, comment on the study plan and initial study results, comment on the draft license application and draft BA
- Post-Filing:
 - Comment on the License application, attend scoping meeting (if TLP), submit comments under the 10(j) process, submit additional study requests (preferably early as possible), and comment on draft NEPA and final BA



Guidance

HYDROPOWER LICENSING AND ENDANGERED SPECIES

A Guide for Applicants, Contractors, and Staff



Federal Energy Regulatory Commission
Office of Energy Projects
Washington, DC
December 2001

http://www.ferc.gov/industries/hydropower/gen-info/guidelines/esa_guide.pdf



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