

Module 3

Consultation, Conferencing, HCPs

What's the overall goal?

Consultation, Conferencing, HCPs

Goal-

- *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 and threatened species...*

Project Screening

- Goal- avoid and/or minimize adverse impacts and include beneficial measures
- Federal agency action – Section 7
 - Agencies have some specific obligations
- No federal agency action – Section 10
- Initial steps are the same



What is Section 7 of the ESA?

Interagency Cooperation

Interagency Cooperation

Section 7(a)(1) –

“Federal agencies shall... utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species....”

Do good things!

Interagency Cooperation

Section 7(a)(2) –

“ Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure 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 . . . ”

Don't do bad things!

Federal Action

One that a federal agency . . .

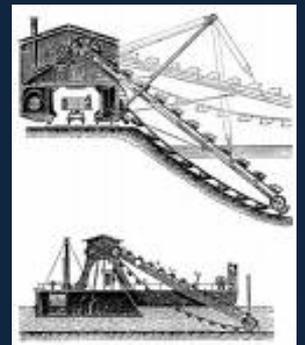
authorizes . .



funds . .



carries out . .



Section 7

Federal Agency's Role

- determine whether to designate non-federal representative (NFR)
- evaluate the proposed action
- provide determination (in most cases) with justification to USFWS
- avoid jeopardy or adverse modification of critical habitat and 7(a)(1)

USFWS' Role

- provide technical assistance regarding the species, effects, and Section 7 process
- review the Action Agency's determination
- close the loop

Section 7

What if multiple federal agencies are involved?

- 50 CFR 402.07
- 1 federal agency is the lead
- Need lead agency designation in writing

NY Examples -

- Army at Fort Drum
- FHWA

For S7 (or S10)

No Effect = No Effect

- No listed species occurrences **and** no suitable habitat (for any life stage)

OR

- Listed species in vicinity but **no** potential for **any** kind of effect

What happens if a project is likely to impact a federally-listed species?

- USFWS works with project sponsors/agencies to see if measures can be included to avoid the adverse impacts
- If not, there are 2 processes to provide incidental take coverage (if appropriate)
 - S7 or S10 depending on whether federal funding/permits/actions are involved or not

May Affect = Informal Consultation

- Presence of listed species **and/or**
- Presence of suitable habitat (therefore, in many cases conduct surveys or in some cases assume presence of the species – NOT always a good idea)
- Objective: **AVOID** adverse effects (work with the USFWS on avoidance measures)
- Regulatory time frame: **NONE** (strive for 30 days)
- If adverse effects **cannot be AVOIDED**, formal consultation is **REQUIRED**

Types of Effects

- Effects of the action- refers to direct and indirect effects... together with effects of other activities that are interrelated or interdependent with that action....

(50 CFR 402.02)

- Direct effects- caused by proposed action **at the time of the action** (*e.g.*, noise at the construction site during construction)
- Indirect effects- those that are caused by the proposed action and **are later in time**, but still are reasonable certain to occur (*e.g.*, sediment flowing off the project site downstream to eventually reach a mussel bed)

Types of Effects

- Interrelated- part of a larger action
- Interdependent- actions with no independent utility from the proposed action

*Don't get too hung up on these terms....
Just make sure all potential effects are
addressed!!*

What are the various forms of effects analyses (BA/BE)?

Biological assessments are *required* for all federal actions that are “**major construction activities**” (as defined under NEPA) = a project which is a major federal action significantly affecting the quality of the human environment; includes dams, roads, pipelines, channel improvements, etc., (i.e., projects that modify the physical environment). 50 CFR 402.12(b)

Biological evaluations- basically the same thing. Done for ANY project.....

Doesn't really matter what we call these...

BA/BE

Purpose

- to evaluate the potential effects on listed/ proposed species and designated/proposed critical habitat
- assists in determining the type of consultation required – informal or formal?

BA/BE

What should be in a BA/BE?

- at the *discretion* of the federal action agency
- regulations *suggest* the following:
 - result of on-site inspections
 - view of recognized experts
 - review of literature or other information
 - analysis of effects, including cumulative
 - analysis of alternate actions

BA/BE

- Length/detail of BA/BE should be commensurate with the project complexity/impacts (anywhere from 1 page to 100+ pages)
 - Shorter
 - Simple project (few actions involved – replace existing dock)
 - Good understanding of species response to the action(s)
 - Longer
 - Complex project with multiple actions (new road alignment)
 - New project type being analyzed for the species of interest
 - Don't have a good understanding of species response to the action(s)
 - Range of reasonable responses to the action(s)

Connect the dots!

- Not helpful to just summarize project, summarize species biology and then have a one sentence determination
- Final determination should **connect** the species biology and the project
- What parts of the project may impact the species, how, what conservation measures will avoid or minimize that impact?
- Someone unfamiliar with the species should be able to understand the conclusion

BA/BE

What materials/references are available to assist with development and review of a BA/BE?

- Habitat/species survey reports
- When evaluating consider:
 - Are there standard Service protocols for this species?
 - Bog turtle, Indiana bat, Karner blue butterfly
 - Were those protocols followed?
 - Timing, Methods
 - Do we agree with the conclusions?

BA/BE

What materials/references are available to assist with development and review of a BA/BE?

- Recovery plan
 - 5-year review
 - Species fact sheets
 - Literature
 - Prior effects analyses (*e.g.*, BA/BO) – use caution
- **No need to send us these documents**

BA/BE

Who prepares?

- Fed agency, applicant, consultant, NFR
- But **final** cover letter/determination **must come from federal agency or NFR**

What is a NFR?

- Non-federal Representative
- 50 CFR 402.08
- A federal agency may designate a NFR to conduct informal consultation or prepare a BA by giving written notice to the USFWS.

More about NFRs....

Examples in New York of NFR?

- Programmatic
 - All companies and their consultants working on cell towers for FCC
 - All companies and their consultants working on natural gas “blanket clearance” projects for FERC

More about NFRs...

Where can I find more information about NFRs?

- Ask Robyn 😊

Why does it matter?

- The USFWS cannot complete S7 with a consultant in most cases.
- The USFWS provides technical assistance and finishes consultation with the federal agency.
- This means the USFWS doesn't use S7 concurrence language with consultants in most cases.



United States Department of the Interior



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<http://www.fws.gov/northeast/nyfo>

To: Date:

USFWS File No:

Regarding your: Letter FAX Email Dated:

For project:

Located:

In Town/County:

Pursuant to the Endangered Species Act of 1973 (ESA) (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*), the U.S. Fish and Wildlife Service:

- Acknowledges receipt of your "no effect" and/or no impact determination. No further ESA coordination or consultation is required.
- Acknowledges receipt of your determination. Please provide a copy of your determination and supporting materials to any involved Federal agency for their final ESA determination.
- Is taking no action pursuant to ESA or any other legislation at this time but would like to be kept informed of project developments.

As a reminder, until the proposed project is complete, we recommend that you check our website (<http://www.fws.gov/northeast/nyfo/es/section7.htm>) every 90 days from the date of this letter to ensure that listed species presence/absence information for the proposed project area is current. Should project plans change or if additional information on listed or proposed species or critical habitat becomes available, this determination may be reconsidered.

USFWS Contact(s): _____

Supervisor: _____ Date: _____

BA/BE Determination –

Is the project likely to adversely affect a listed species?

(Action Agency Responsibility!)

No → “not likely to adversely affect” or NLTAA

If the USFWS concurs in writing, informal consultation is concluded (effects are insignificant, discountable, or wholly beneficial).

NOTE: Make sure to include a determination and rationale for each species

Not Likely to Adversely Affect

(Section 7 Handbook)

- ➔ Insignificant – can not meaningfully measure, detect, or evaluate effects (really tiny)
- ➔ Discountable – extremely unlikely to occur
- ➔ Beneficial – wholly positive effects without any adverse effects

BA/BE Determination –

Is the project likely to adversely affect a listed species?

(Action Agency Responsibility!)

Yes → “likely to adversely affect” or LTAA

Formal consultation is REQUIRED, unless the action is modified to AVOID adverse effects.

NOTE: Make sure to include a determination and rationale for each species

Formal Consultation

- Begins with written request for initiation of formal consultation from the federal action agency
 - NFRs **cannot** initiate or complete formal consultation
- Time clock – 135 days from receipt of complete initiation package
- Don't fear the formal! We can get through it!
- References:
 - Consultation Handbook, pages 1-6 through 1-7 and Chapter 4
 - 50 CFR 402.14

Jeopardize

. . . 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.

Jeopardize

- **NOT** a threshold over which a species goes
- Action agency needs ensure this is not likely to occur
- Is the action moving the species towards or away from a recovered state?
- Does the action appreciably impair or preclude recovery?

Types of Consultations

Formal and/or Informal

- Single project
- Batched (detailed information on multiple projects – consult on all at the same time)
- Programmatic
 - Tiered
 - Single consultation with strict sideboards and monitoring/reporting

Example Programmatic/Batched Consultations in NY?

- Multiple actions at a specific location
 - Fort Drum (US Army)
 - formal and informal (every 3 years) (Ibat)
 - Saratoga County Airport (FAA)
 - formal (KBB)
- Similar actions at multiple locations
 - Formals and informals for bog turtle restoration projects
 - Intra-Service (USFWS actions)
 - NRCS
 - FHWA range wide (Ibat and NLEB)

Consultation Recap

- **ALL** federal agencies have responsibilities to do good things for listed species
- Consult early and often
- Don't fear the formal
- There are streamlining opportunities
 - lots of upfront work
 - can be helpful in the long-term

Where can you find final BOs?

- http://www.fws.gov/northeast/endangered/TEBO/tebo_%20index.html
- <http://www.fws.gov/midwest/endangered/mammals/inba/inbaBOs.html>

What if a listed species may be impacted and there is no federal agency involvement?

Habitat Conservation Plans
(for wildlife)

What if a species may be impacted and there is no federal agency involvement?

- Section 10(a)(1)(B)
- Determine if “take” is likely and cannot be avoided
- Work with USFWS to develop a HCP
- There are specific issuance criteria that must be met for the USFWS to issue a permit
- No regulatory timeframes

Final Permitted HCPs in NY

NiSource

- 3 USFWS regions
- 17 States
- ~43 covered species, 10 “take” species
- bog turtle, Indiana bat

National Grid

- 4 counties in northeastern NY plus Oneida County
- Karner blue butterfly and frosted elfin

Conferencing

What is required if a proposed species may be impacted and there is no federal agency involvement?

What is required if a proposed species may be impacted and there is no federal agency involvement?

NOTHING!

No requirements for non-federal landowners if no federal action (funding, permit)

USFWS can provide measures that landowners can voluntarily implement to avoid or minimize impacts

So what is required for a proposed species or proposed critical habitat?

So what is required for a proposed species or proposed critical habitat?

- **No** “take” prohibitions for proposed species
- ESA Process for projects involving federal agencies - conference
- Goals:
 - Identify and resolve conflicts between a proposed action and proposed species or proposed critical habitat at an early planning stage
 - Increase agency awareness of species needs
 - Minimize further degrading the status of the species

When are federal agencies required to
conference?

When are federal agencies required to conference?

Conference is only required if agency determines action is **“likely to jeopardize”** a proposed species or is **“likely to result in adverse modification”** of proposed critical habitat

S7(a)(4) - “Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence ...”

How will you know this?

Where can you find more about conference procedures?

- Endangered Species Act – Section 7(a)(4)
- 50 CFR 402.10
- Section 7 Handbook – Chapter 6
- NLEB conference guidance