

# SECTION 7 OF THE ENDANGERED SPECIES ACT

## HOW AND WHY DO I CONSULT ??

### I. MANDATES & APPLICABILITY

Section 7(a)(1) of the Endangered Species Act (ESA) contains an **affirmative mandate**, expecting federal agencies to "do good things" for listed species. It states (in part) that "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." Such actions should be coordinated with the Service<sup>1</sup>.

Section 7(a)(2) contains a **prohibitive mandate**, exhorting federal agencies to avoid adversely affecting listed species. It states (in part) that "each federal agency shall . . . 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 which is determined by the Secretary . . . to be critical." Section 7(a)(2) also clearly indicates that consultation with the Service is required, that is, consultation is a **nondiscretionary** responsibility under the ESA.

Section 7 and its implementing regulations (50 CFR part 402) apply to all actions in which there is discretionary **federal** involvement or control (§402.03). An **action** means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (1) actions intended to conserve listed species or their habitat; (2) the promulgation of regulations; (3) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (4) actions directly or indirectly causing modifications to the land, water or air (§402.02).

### II. LIST REQUEST

- A. The **federal action agency** (*i.e.*, the federal agency proposing the action, as defined above) or its designated non-federal representative (*e.g.*, a state agency or consultant) requests from the Service a list of the federally listed and proposed species that may occur within the project area.
- B. The list request should include the following to facilitate review by the Service:
  1. A **map** (preferably a photocopy of that portion of the 7.5-minute USGS topographic map containing the project area) showing the extent of the project area; indicate both the county and USGS quadrangle name(s)
  2. A brief **project description** (*e.g.*, bridge demolition and new bridge construction at same location; fill 1.2 acres of forested wetland to construct parking lot; install sewer pipeline across 300 feet of emergent wetland; proposed state-wide mixing zone regulations; proposed state general permit allowing for the filling of up to 0.5 acre of wetland for home construction; etc.)

### III. RESPONSE TO LIST REQUEST

- A. Usually within 30 days of receiving the list request, the **Service** will provide a response letter and/or list of the listed and proposed species that may occur in the project area.
- B. Possible Responses from the Service
  - 1. Negative Response - listed or proposed species are not likely to occur within the project area and/or are not likely to be adversely affected by the proposed project; therefore, consultation is finished, unless additional information becomes available.
  - 2. Affirmative Response - listed or proposed species and/or potential impacts to these species are identified by the Service, therefore consultation must proceed. Potential Service comments may include:
    - \* listed or proposed species may or do occur in the project area;
    - \* the proposed action may impact listed or proposed species;
    - \* a species survey is recommended; and/or
    - \* additional project information is solicited.

### IV. EFFECTS OF THE ACTION ON THE SPECIES

The **federal action agency** shall determine whether and to what extent its proposed action "may affect" federally listed species and critical habitat. Consultation with the Service is **required** for any action that "**may affect**" federally listed species or critical habitat. The federal action agency may choose to do a biological assessment or biological evaluation to determine the effects of its action on the species/critical habitat.

The "**effects of the action**" refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration (see 50 CFR part 402.02).

### V. SEEK CONCURRENCE

- A. If the **federal action agency** makes a "no effect" determination, written concurrence from the Service may be sought, but the Service's concurrence is not required. The federal action agency should have a good understanding of the habitat requirements and life history of federally listed species, as well as the direct and indirect effects of a proposed action before making its "no effect" determination.
- B. If the **federal action agency** makes a "may affect" determination, additional consultation with the Service is **required** (go to VII)

## VI. CONCURRENCE / NONCONCURRENCE BY THE SERVICE

### A. Concurrence

The Service **concurs** that a proposed action is "**not likely to adversely affect**" listed species or result in the adverse modification of critical habitat. Note that certain recovery actions proposed to be undertaken by federal agencies for the benefit of listed species "may affect" those species; however, these actions may result in a "beneficial effect" determination.

### B. Nonconcurrence

The Service does **not concur** with the federal agency's "no effect" or "not likely to adversely affect" determination – that is, the Service concludes that the proposed project is "**likely to adversely affect**" listed species or critical habitat. In this case, consultation must proceed (go to VII).

## VII. INFORMAL CONSULTATION

### A. What is it?

"Informal consultation is an optional process that includes all discussions, correspondence, *etc.*, between the Service and the Federal agency or the designated non-federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required" (§402.13(a)).

### B. What is the Service's Role?

"During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to **avoid** the likelihood of adverse effects to listed species or critical habitat" (§402.13(b), emphasis added).

### C. What is the Objective of Informal Consultation?

The objective of informal consultation is to facilitate open and informal discussions between the Service and the federal agency in order to find ways for the proposed project, or some modification thereof, to proceed while at the same time **avoiding** adverse impacts to listed species and critical habitats.

## VIII. FORMAL CONSULTATION

A. **Trigger** - Formal consultation is **required** for any **federal** action that "**may affect**" listed species or critical habitat.

### B. Exemptions

1. A federal agency need not initiate formal consultation if, as a result of the preparation of a **biological assessment** or **biological evaluation** the federal agency determines, with the **written concurrence of the Service**, that the proposed action is "not likely to adversely affect" any listed species.

2. A federal agency need not initiate formal consultation if, as a result of **informal consultation** with the Service, the federal agency determines, and the **Service provides written concurrence**, that the proposed action is "not likely to adversely affect" any listed species.
- C. For additional information on formal consultation, see handout titled, *Pertinent Points Regarding Formal Section 7 Consultation Pursuant to the Endangered Species Act*.

<sup>1</sup> Throughout this document, "Service" refers to the U.S. Fish and Wildlife Service or National Marine Fisheries Service, depending upon the species in question.