

SECTION 7 OF THE FEDERAL ENDANGERED SPECIES ACT

I. Introduction

One of the most innovative and important provisions of the 1973 Act was Section 7, which enlists all Federal agencies in support of conserving endangered species. It directs agencies to carry out programs for the conservation of endangered and threatened species [7(a)(1)], and requires them to ensure that the actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species or to destroy or adversely modify critical habitat [7(a)(2)]. Because of the wide range of Federal authorities and the vast amount of land administered by Federal agencies, these provisions have been extraordinarily important in promoting conservation. To ensure compliance with these standards, agencies must consult with the Fish and Wildlife Service or National Marine Fisheries Service on actions that may affect listed species or critical habitat.

II. Components of Consultation

A. Conferences

Conferences are required for Federal actions that are likely to jeopardize the continued existence of a species proposed for listing. Conferences are also required for Federal actions that are likely to result in destruction or adverse modification of proposed critical habitat. This threshold is different from other forms of consultation that are conducted for actions that may affect listed species or critical habitat.

B. Early Consultation

Early consultations are intended to reduce the likelihood of conflicts between listed species or critical habitat and proposed actions. Early consultation is an optional process that occurs before an applicant files an application for a Federal permit or license. To qualify for an early consultation, an applicant must meet the following two criteria:

- There must be a definite proposal outlining the action and its effects; and
- The applicant must certify that he or she intends to implement their proposal if it is authorized.

If the applicant provides the action agency with this information in writing, the Act requires the action agency to initiate early consultation with the Service. Action agencies conducting an early consultation have the same procedures and responsibilities as in formal consultations. If an action agency determines that the proposed project is likely to adversely affect listed species, they initiate early consultation by a written request to the Service.

C. Emergency Consultation

The emergency consultation procedures allow action agencies to incorporate endangered species concerns during an emergency. For the purposes of the Act, an emergency is a situation involving an act of God, a disaster, a casualty, national defense or security

emergencies, etc.

As soon as the emergency is under control, the action agency is required to initiate formal consultation with the Service. Although the formal consultation occurs after the response to the emergency has occurred, it is treated like any other formal consultation. However, an action agency has to provide additional information to initiate a formal consultation following an emergency:

- A description of the nature of the emergency.
- A justification for the expedited consultation.
- An evaluation of the emergency or the response to the emergency on affected species and their habitats.

D. Biological Assessments

The initial responsibility for determining whether the action will affect a listed or proposed species lies with the action agency. The Service then concurs or does not concur with that finding. One of the tools for assisting the action agency in making that determination is the "biological assessment." By regulation, a biological assessment is prepared for "major construction activities," which can be further defined as construction projects (or other undertakings having similar physical impacts) which are major Federal actions significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) (NEPA).

The contents of a biological assessment are discretionary, but generally include the results of onsite inspections to determine the presence of a listed or proposed species, and an analysis of the likely effects of the action on the species or habitat based on biological studies, review of the literature and the views of species experts. The assessment also should describe any known unrelated future non-Federal activities ("cumulative effects") in the action area that are likely to impact the species. Bear in mind, the sequence of events is not always the same because the level of Section 7 awareness varies markedly between and within agencies. Some agencies will submit an assessment early; some will need advising to do so.

E. Informal Consultation

Informal consultations may be conducted with the Federal agency, the applicant, or a designated non-Federal representative. The purposes of these informal proceedings may be:

- to clarify whether and what listed species may be in the action area;
- to determine what effect the action may have on these species;
- to see whether there are ways in which the action can be modified so that it will not adversely affect the species; and
- to determine whether there is a need to enter into formal consultation.

Service biologists can use informal consultations to encourage additional work to further document the status of the species in the action area. This may preclude or provide the

basis for initiating formal consultation. The informal process is used as long as adverse impacts can be completely avoided. There is no timetable for informal consultation. Dialogue should continue for as long as progress is being made.

F. Formal Consultation

Formal consultations determine whether a project is likely to jeopardize the continued existence of a listed species (jeopardy) or destroy or adversely modify critical habitat (adverse modification). Biological opinions perform several other functions: (1) they identify the nature and extent of the effects of Federal (agency) actions on listed species and critical habitat; (2) they identify reasonable and prudent alternatives, if any, when an action is likely to result in jeopardy or adverse modification; (3) they can eliminate the liability of action agencies to "take" under Section 9 of the Act; (4) they can identify ways the action agencies can help conserve listed species or critical habitat when they undertake an action; and (5) they provide an administrative record of impacts to the species which will be used to establish the species' environmental baseline in future biological opinions.

III. Elements of a Formal Biological Opinion and Steps Along the Way

A. Initiation

Formal consultation is initiated by a written request from an action agency to the Service. To comply with the current Section 7 regulations, this request must include all of the following information:

a description of the action being considered; a description of the specific area that may be affected by the action; a description of any listed species or critical habitat that may be affected by the action; a description of the manner in which the action may affect any listed species or critical habitat; relevant reports, including any environmental impact statements, environmental assessments, or biological assessment prepared on the proposal pursuant to Section 7(c) of the Act; and any other relevant information available on the action, the affected listed species, or critical habitat.

B. Evaluating Initiation Packages

When an action agency sends an initiation package, it should be reviewed immediately to determine if the action agency has provided all of the information required of them, and to determine if the information provided represents the best scientific and commercial data available.

C. Timeframes for Consultation

The Section 7 regulations require that formal consultation be concluded within 90 days of initiation, and the biological opinion be delivered to the action agency promptly thereafter (within 45 days). Formal consultation is considered to be initiated on the date the request is received by the Service if the action agency provides all relevant data. The Service will advise the action agency of any data deficiencies and request either the

missing data or a written statement that the data are not available.

The Regional Director is responsible for ensuring that the consultation is prepared and delivered within 135 days of initiation, unless the action agency and the applicant agree to an extension. The consultation cannot be "suspended." If more time is needed by the Service to analyze the data or prepare the final opinion, or by the action agency to provide data or review a draft opinion, an extension can be requested by either party.

When the action agency asks to review the draft biological opinion, these timeframes continue to apply. However, no final opinion will be issued before the 135th day while the action agency is reviewing the draft. Once comments on the draft are received by the Service, the biological opinion is finalized and delivered to the action agency and applicant if any. If comments on the draft opinion result in major changes or clarifications, a time extension can be sought by the Service from the action agency. When the Service has not received those comments by the 125th day, the Service checks with the action agency (a telephone call, recorded in the record, will do) to negotiate an extension. If the Service receives the comments of the action agency less than 10 days before the end of the established deadline (135 days or as established by an agreed upon extension), the Service is automatically entitled to a ten day extension of the deadline to deliver the opinion.

D. Biological Opinion

A formal biological opinion consists of the following parts:

1. Consultation History

This section outlines the history of the consultation request, including any informal consultation, prior formal consultations on the action, documentation of the date consultation was initiated and a chronology of subsequent requests for additional data, extensions, and other applicable past or current actions.

2. Description of the Proposed Action

This section includes (1) a description of the proposed action, and (2) a description of the action area. The information presented in this section does not have to be exhaustive or comprehensive. Details of the action can be referenced to the NEPA documents or other descriptions provided. This section summarizes only enough information for the reader to understand and evaluate the Service's logic in the biological opinion. The description of the proposed action also includes any conservation activities proposed as part of the action. When used in Section 7, conservation activities represent actions pledged in the project description that are to be implemented by the action agency or the applicant that contribute to the recovery of the species under review.

3. Status of the Species

This section describes the current status of the species and critical habitat (if designated) at the time of the consultation. This section identifies only those

species adversely affected by the proposed action (i.e., for which the agency or the Service has made a finding of likely to adversely effect).

This section presents the biological or ecological (including habitat) information on the species that is relevant to formulating the biological opinion. This analysis documents the effects of all past human and natural activities or events that have led to the current status of the species and the ecosystems upon which the species depends.

4. Environmental Baseline

The environmental baseline is an analysis of the collective effects of past and ongoing human and natural factors that have lead to the current status of the species or its critical habitat within the proposed action area.

5. Effects of the Action

This section describes all direct and indirect effects on the species or critical habitat from the proposed action.

- a. Direct Effects which encompass the direct or immediate impact of the project on the species or its habitat.
- b. Indirect Effects which include the indirect impacts anticipated later from the action.

6. Cumulative Effects

The Section 7 regulations require the Service to consider cumulative effects in formulating its biological opinions. The concept of cumulative effects as it relates to formal consultations and its application in determining jeopardy or adverse modification is frequently misunderstood. Cumulative effects include the effects of future State, local, or private actions, not involving a Federal action, that are reasonably certain to occur within the action area being considered in the biological opinion.

The cumulative effects analysis is the last step or factor to be considered in formulating the biological opinion. The evaluation sequence requires the Service to determine the status of the species, the environmental baseline, and the effects of the action before determining cumulative effects. Cumulative effects may be the deciding factor in determining the likelihood of jeopardy or adverse modification, however, the cumulative effects section is frequently the least documented part of the biological opinions, primarily due to the lack of definitive information on future State, local, or private actions.

7. Biological Opinion

This states the conclusion of the Service as to the severity of adverse affects on

the species or critical habitat in question. The conclusion is based on information in the preceding sections and may be either:

- a. "is likely to jeopardize" or "result in adverse modification of critical habitat"
- b. "is not likely to jeopardize" or "result in adverse modification"

8. Reasonable and Prudent Alternatives

This section lays out reasonable and prudent alternative actions, if any, that the Service believes must be taken by the agency or the applicant to avoid the likelihood of jeopardy to the species or destruction or adverse modification of critical habitat.

All reasonable and prudent alternatives must represent lawful options available to the action agency or its applicant.

The Section 7 regulations limit reasonable and prudent alternatives to:

- Alternatives that the Service believes will avoid the likelihood of jeopardy;
- Alternatives that can be implemented in a manner consistent with the intended purpose of the action;
- Alternatives that can be implemented consistent with the scope of the action agency's legal authority and jurisdiction; and
- Alternatives that are economically and technologically feasible.

9. Incidental Take

Section 7(b)(4) of the Act recognizes that an action may result in the taking of some individuals of listed species incidental to the action, although such incidental taking cannot be to the extent that it jeopardizes the continued existence of the species. The term "take" is defined by the Act to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or attempt to engage in any such conduct." "Harm" is further defined as an act that "may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering."

Every biological opinion must contain an incidental take statement, even if that statement establishes incidental take at "0." If incidental take is a possibility, the incidental take statement in a biological opinion needs to contain:

- a definition of incidental take;
- the amount or extent of incidental taking of the species;
- reasonable and prudent measures considered necessary or appropriate to minimize incidental take;

- terms and conditions for the implementation of reasonable and prudent measures, including monitoring and reporting requirements;
- instructions for handling and disposition of dead, injured, or sick listed species; and
- a statement to the effect that reinitiation of consultation must occur if the incidental take limits are exceeded.

Incidental take statements can establish limits of amount or extent in a number of different ways, including extent of habitat, amount of kill, or type or degree of harassment. Units of take can vary from number of individuals or acres of habitat to any other logical criteria for a particular species.

Reasonable and prudent measures are measures considered necessary or appropriate to minimize the amount or extent of the anticipated incidental take of the species. Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action, and may involve only minor changes. The terms and conditions must be complied with by the Federal agency or any applicant in order to implement the specified reasonable and prudent measures. Terms and conditions include, but are not limited to, monitoring and reporting requirements, which are tailored to the nature of the action and the particular needs of the species involved.

10. Conservation recommendations

Conservation recommendations are not a requirement of Section 7(a)(2). However, when the Service identifies discretionary actions the agency can implement, relevant to the proposed action and consistent with their Section 7(a)(1) authority, those recommendations may be included as a separate item in the consultation package. Conservation recommendations serve several purposes. They can be suggestions on how an action agency can assist species' conservation in furtherance of their responsibilities under Section 7(a)(1) of the Act. They can be intended to further minimize or avoid the adverse effects of a proposed action on listed species or critical habitat after the terms and conditions of the incidental take statement are implemented. They also can be recommendations for studies that will improve our understanding of a species biology or ecology. Wherever possible, these actions should be tied to tasks identified in recovery plans. Conservation recommendations may be provided separately or at the end of the consultation package but are not to be incorporated anywhere in the biological opinion where they can be confused with the opinion itself. These recommendations are not to be made a precondition for a subsequent finding of "no jeopardy" or no anticipated incidental take.

11. Reinitiation Notice

Any of four conditions are necessary for reinitiating formal consultation: (a) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent that was not previously considered; (b)

the action is modified in a manner that causes adverse effects to listed species or critical habitat that were not previously considered; (c) a new species is listed or critical habitat designated that may be affected by the action; or (d) the amount or extent of incidental take is exceeded.

12. Literature Cited

Section 7(a)(2) of the Act requires the Service to base its biological opinions on "the best scientific and commercial data available." This section should identify the scientific and commercial data that were used in developing the biological opinion to assure compliance with this requirement.

IV. Federal Agency's Options After Issuance of a Formal Opinion

- A. Accept the biological opinion.
- B. If the biological opinion finds jeopardy the Federal agency must notify the Service as to how it will proceed.
- C. The Federal agency may request an exemption to the biological opinion.