

**Department of the Army
Charleston District, Corps of Engineers
Regulatory Division
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RD-SOP-2019-01
Regulatory Division Standard Operating Procedure

November 18, 2019

**Subject: Compliance with Section 7 of the Endangered Species Act of 1973, as amended;
Standard Local Operating Procedures for Endangered Species (SLOPES)**

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A. Purpose

The purpose of this SOP is to provide guidance on the step by step procedures to follow when complying with Section 7 of the Endangered Species Act (ESA) (16 USC 1536) and to formalize a protocol pursuant to satisfying Section 7 responsibilities for reviewing and processing applications for projects under the US Army Corps of Engineers (Corps) Individual Permit (IP) and General Permit (GP) programs pursuant to Section 404 of the Clean Water Act (33.U.S.C 1344 et seq) and Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403 et seq) for species under the jurisdiction of the US Fish and Wildlife Service. The Corps' GP program includes both nationwide permits (NWPs) and regional general permits (RGPs), both of which will be referred to in this document as GPs. As prescribed under Section 7(a)(2) of the Endangered Species Act (ESA) and its implementing regulations at 50 CFR Section 402, for every activity in which a federal action is involved, each federal agency carrying out the action, in our case the Corps, is required to evaluate the effects (make an effect determination) of each proposed action on federally listed threatened or endangered species or its designated critical habitat. The procedures set forth herein are a joint effort of the Corps' Charleston District Regulatory Division and the US Fish and Wildlife Service's (USFWS) Charleston Field Office.

Note: This SOP provides guidance on making effects determinations in order to comply with Section 7 of the ESA. While it discusses consultation procedures with USFWS, and measures that have been agreed upon to streamline coordination, it does not cover normal or expedited consultation procedures with the National Marine Fisheries Service (NMFS).

B. References

US Army Corps of Engineers Regulations (33 CFR 320-331); Endangered Species Act of 1973, as amended (16 U.S.C.1531-1543); Endangered and Threatened Wildlife and Plants (50 CFR Part 17); and the March 1998 Endangered Species Act Consultation Handbook, Procedures for Conducting Section 7 Consultations and Conferences (Section 7 Handbook).

C. Applicability

The guidance given herein is applicable to all Corps' Regulatory Division personnel who evaluate permit applications. By law, the Corps is required to evaluate the impact a proposed action may have on federally listed threatened or endangered species or *its* designated critical habitat.

D. Definitions

Corps' Regulatory Division Project Managers (PM) should familiarize themselves with the following terms, which are used throughout this document. (Refer to 50 CFR 402.02)

Action Area: all areas to be affected directly or indirectly by the Federal action, not merely the immediate area involved in the action.

Biological Assessment (BA): the information prepared by the Federal agency or by a consultant on behalf of an applicant under the direction of the Federal agency, concerning listed and proposed species and designated or proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitats.

Biological Opinion (BO): the document that states the opinion of the USFWS as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Cumulative Effects: those effects of future State or private activities, not involving Federal activities that are reasonably certain to occur within the action area of the Federal action subject to consultation. (Note: this is different from either the National Environmental Policy Act (NEPA) or 404(b)(1) Guidelines definitions.)

Designated Critical Habitat: for federally listed species consists of: (1) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Act, on which are found those physical or biological features (constituent elements) (a) essential to the conservation of the species and (b) which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. Designated critical habitats are described in 50 CFR §17 and 226.

Direct Effects: are those effects that are an immediate result of the agency action.

Effects of the Action: refers to the direct and indirect effects of an action on the species, together with the effects of other activities that are interrelated or interdependent with that action that will be added to the environmental baseline.

Environmental Baseline: includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed

Federal projects in the action area that have already undergone formal or early Section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.

Formal Consultation: a process between the USFWS and the Federal agency that is initiated with the Federal agency's written request for consultation under section 7(a)(2) of the ESA and concludes with the USFWS' issuance of the biological opinion under section 7(b)(3) of the ESA. Time limits for the BO do not commence until the USFWS receives all relevant information.

Incidental Take: refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

Indirect Effects: are those effects that are caused by the proposed action and are later in time, but still are reasonably certain to occur.

Interrelated Actions: are those actions that are part of a larger action and depend on the larger action for their justification.

Interdependent Actions: are those actions that have no independent utility apart from the action under consultation.

Informal Consultation: an optional process that includes all discussions, correspondence, etc., between a consulting agency and the Federal action agency or the designated non-federal representative prior to formal consultation, if required.

Major Construction Activity: a construction project (or other undertaking having similar physical impacts) that is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

Take: means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct of listed species of fish or wildlife.

E. Procedures for Complying with Section 7 of ESA

Upon receipt of any application involving impacts to "waters of the United States", regardless of a GP or IP, the Project Manager must make a determination of effect for the proposed project on federally protected species and/or designated habitat. The project manager will review all applications in accordance with the Section 7 Regulations (50 CFR Part 402) and the Section 7 Handbook. When the project Manager reviews a proposed project for authorization, they must reach a decision on whether the proposed project may affect a federally protected species and/or designated critical habitat. Our review and determination of a proposed project's impacts will consider both direct and indirect effects to the federally listed and proposed species and/or critical habitat together with the effects of interrelated and interdependent actions (see definitions) associated with the permit action. The following procedures, consistent with Federal action agency responsibilities, should be followed to assist in the determination. Further information to assist in reaching the determination can be found in the Section 7 Regulations and Handbook.

1. Determine the proposed action area for the proposed project.
2. Determine whether any federally protected species and/or designated critical habitat is present within the action area. Be cognizant that if critical habitat is present, then the potential for suitable habitat to occur in the action area or within the vicinity of the action area is also likely.

- a. The following resources can assist with determining the presence of federally listed species or designated critical and suitable habitat:
- Check the USFWS specific county or State species list
<https://www.fws.gov/southeast/charleston/endangered-species/>
for species and habitat information regarding the presence of federally listed species in the proposed action area.
 - USFWS Information for Planning and Conservation (IPaC) website
(<https://ecos.fws.gov/ipac>) is a project planning tool that streamlines the USFWS review process. The website provides resource maps, impact analysis, and site- specific information such as initial project scoping to identify listed species or other natural resources that may be impacted by a project.
 - Species and habitat information can also be obtained from the publication entitled *Endangered and Threatened Species of the Southeast United States* or the USFWS website at <http://www.fws.gov/endangered>.
 - The S.C. Department of Natural Resources has provided the following Natural Heritage Trust website for additional information regarding state and federal species:
<https://schtpportal.dnr.sc.gov/portal/apps/webappviewer/index.html?id=8d5cd582e00341129a05097f78ef4b75>
 - Whether a jurisdictional determination (JD) been completed for the site in question. A JD may contain pertinent habitat information documented during field review of the site.
 - The applicant can conduct a survey for federally listed species if there is evidence that such action should be required (e.g., presence of suitable habitat).
 - When necessary, the USFWS can provide technical assistance about the presence of federally listed or proposed species and/or designated critical habitat.
- b. The Project Manager may request that the applicant conduct a survey for federally protected species to aid in the determination of effect if there is evidence that such action is required (i.e. suitable habitat for a species is determined to occur in the action area).

F. Effect Determination and Consultation^{*1}

Depending on the results of the steps above, the following determinations may ensue:

1. If the PM determined that federally listed species and designated critical habitat are **not** present in the appropriate action area (to include suitable habitat within a species' range), then there is **no effect** to federally protected species and/or no adverse modification to designated critical habitat. No consultation or concurrence with the USFWS is required. If a **no effect** or no adverse modification determination is made prior to issuance of a public notice, it should be included in the notice that no federally listed species or designated critical habitat is present within the proposed project area. In this situation, the PM should also document the rationale for this determination in writing and incorporate it into the administrative record.

^{*1} See Section G. Species Specific Dichotomous Keys & Programmatic Consultation for making determinations on West Indian manatee (*Trichechus manatus*), Wood stork (*Mycteria americana*), Carolina heelsplitter (*Lasmigona decorata*), and Northern long-eared bat (*Myotis septentrionalis*).

2. If it is determined that a federally listed species, suitable habitat, or its designated critical habitat **is** present within the proposed project area, the PM must consider all direct, indirect, and cumulative effects the proposed project may create, as well as consider any associated effects of interrelated and interdependent actions in order to make a correct effect determination. Subsequently, the PM will need to determine whether the proposed project: (a) will have **no effect**, (b) **may affect, not likely to adversely affect**, or (c) is **likely to adversely affect** federally protected species, suitable habitat, and/or designated critical habitat.

- a. **No effect** - Even though the federally protected species and/or critical habitat is present in the action area, it is determined the proposed action will have **no effect**. If a **no effect** determination is made prior to issuance of a public notice, it should be included in the notice that no federally listed species, suitable habitat, or designated critical habitat is present within the proposed project area. In this situation, or if the effect determination is for a GP, the PM should document the rationale for this determination in writing and incorporate into the administrative record.
- b. **May affect, not likely to adversely affect (MANLAA)** - This is the appropriate conclusion when impact to a species, suitable habitat, and critical habitat are expected to be discountable, wholly beneficial, or insignificant. Discountable impacts are those extremely unlikely to occur. Beneficial effects have contemporaneous positive effects without any adverse effects to the species or habitat. Insignificant effects relate to the size of the impact and should never reach the scale where "take" occurs. Based on best professional judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant impacts; or (2) expect discountable impacts to occur. Examples of beneficial, insignificant and discountable impacts may be found in the Section 7 Handbook. For **MANLAA** determinations, initiation of informal consultation with the USFWS is required, unless the **MANLAA** determination is made for one of the species where dichotomous keys or a concurrence letter has been developed (see Section G below). For these species, follow the key/letter to determine if any additional coordination or consultation is required. For other species, the following actions apply:
 1. For GPs which require a pre-construction notification (PCN), provide the USFWS with a copy of the PCN and all supplemental information included with the application.
 2. For both GPs and IPs, provide the USFWS with a written assessment that supports the Corps' rationale for the **MANLAA** determination; and
 3. For both GPs and IPs, provide the USFWS with a written effect determination for any proposed modifications to a permitted project (whether a new determination or re-evaluation) which would require written USFWS concurrence.

The informal consultation process is concluded with the USFWS issuing written concurrence. If concurrence with an effect determination cannot be agreed upon with the USFWS due to insufficient information, inability to adequately incorporate project modifications, or because the nature of the effects cannot be determined, the Corps will (1) notify the permit applicant in writing that the proposed project may adversely affect federally protected species and/or critical habitat and, therefore, will need to be evaluated via the formal consultation process; and, (2) utilize discretionary authority and, in the case of a GP, review the project instead as an IP action to include a detailed alternatives analysis.

Note: When concurrence depends upon implementation of modifications to a proposed project, the concurrence letter will clearly state those modifications agreed to during the informal consultation process. The USFWS believes that informal consultation is extremely useful and may resolve potential conflicts (adverse effects) and eliminate the need for formal consultation.

- c. **Likely to adversely affect** - This is the appropriate conclusion if any adverse effect to federally protected species and/or adverse modification to critical habitat may occur as a direct or indirect result of the proposed action or it is interrelated or interdependent actions. Indirect effects are caused by or result from the proposed action, may be later in time, and are "reasonably certain to occur." Tests or indicators for "reasonably certain to occur" may include, but are not limited to the development of construction plans for the site or submission of building permits and local zoning requests. This determination requires initiation of formal consultation process with the USFWS. For this determination, the following actions apply:
1. For all such determinations involving a GP, the Project Manager will notify the applicant in writing that the proposed project is ***likely to adversely affect*** federally protected species and/or adversely modify its critical habitat and the project will not qualify under a GP, unless the GP provides alternative coordination/consultation requirements.
 2. For all such determinations involving a GP, the Project Manager will consult with the Branch Chief and Discretionary Authority should be utilized to review the project as an IP action, therefore requiring a detailed alternatives analysis.
 3. For both GPs and IPs, the Project Manager will recommend options to the applicant in order to eliminate adverse impacts to federally protected species and/or its critical habitat.
 4. For both GPs and IPs, the majority of activities occurring on beaches with a potential for sea turtle nesting and with suitable habitat for shorebirds may require formal consultation to address potential adverse impacts. This may occur both during and outside of sea turtle nesting season. (see Section G.)

The formal consultation process is initiated on the date the USFWS receives the written request, provided all relevant data required by 50 CFR 402.14(c) is submitted. Formal consultation concludes within 90 days after its initiation unless extended as provided in 50 CFR 402.14(e). Within 45 days after concluding formal consultation, the USFWS shall deliver a Biological Opinion to the Federal agency and the applicant; concluding the formal consultation process.

Note: When applicable, a biological assessment (BA) may be necessary for a major construction activity (see definitions - Section II) and shall be completed prior to a request to initiate formal consultation with the USFWS. The BA is to be completed within 180 days after it is initiated and, once submitted, the USFWS has 145 days (60 days if informal consultation) to review the document and provide concurrence/non-concurrence with the Corps' assessment and associated effect determination(s).

G. Species Specific Dichotomous Keys & Programmatic Consultation

1. West Indian manatee (*Trichechus manatus*), Wood stork (*Mycteria americana*), and Carolina heelsplitter (*Lasmigona decorata*): If any of the aforementioned species or associated critical or suitable habitat is present within the proposed project area, then refer to the appropriate

dichotomous "key" (attached) to make the appropriate effect determination. A "key" may be used during the review of applications for all Department of Army (DA) permits (i.e. standard and general/nationwide permits). The following effect determinations and associated consultation actions apply:

- a. Projects that key to a ***may affect, not likely to adversely affect or no effect*** determination have programmatic concurrence from the USFWS; no further consultation is necessary. (see attached concurrence letter)
- b. Projects that key to a ***likely to adversely affect*** determination require formal consultation with the USFWS.

Note: Additional keys may be added to this SOP at a later date as species get listed and associated keys are developed. Corps PMs should ensure that consideration of the proposed project's effects on any other listed species and/or species under the jurisdiction of the National Marine Fisheries Service is performed independently.

2. Northern long-eared bat (*Myotis septentrionalis*): On May 4, 2015, the USFWS listed the northern long-eared bat as a threatened species under the Endangered Species Act, primarily due to the threat posed by the lethal fungal disease known as white-nose syndrome. Per the USFWS Programmatic Biological Opinion (issued January 5, 2016) and the Final 4(d) Rule (published January 14, 2016), that within the White-Nose Syndrome (WNS) Zone, incidental take of a Northern long-eared bat (NLEB) is prohibited within one quarter-mile from known hibernacula or within 150 feet from a known maternity roost tree during the months of June 1 to July 31. For South Carolina, the WNS zone includes the ten northwestern counties of Oconee, Pickens, Greenville, Spartanburg, Cherokee, York, Anderson, Abbeville, Laurens, and Union. In addition, the following coastal plain counties are currently included in the WNS zone: Horry, Marion, Florence, Williamsburg, Georgetown, Berkeley, Charleston, Dorchester, Colleton, Hampton, Jasper, and Beaufort. The WNS zone is subject to change if NLEB captures in additional counties occur. (See the attached map of the NLEB range and WNS zone and can also be found at <https://www.fws.gov/midwest/nleeb>.)

Outside of an area of prohibited incidental take, the PM may rely upon the Programmatic Biological Opinion and 4(d) rule for the NLEB to make a ***may affect, but not likely to adversely affect*** determination or a ***likely to adversely affect*** determination. The streamlined consultation provides the Service 60 days to review the Corps' conclusions and provide comments. The 60-day review period is suitable for the administration of Corps Individual Permits due to their inherent processing times. Unless otherwise notified, the Corps would be authorized to proceed with the action at the end of the proposed project's public notice period.

In order to prevent unnecessary delays for GP verifications and to fulfill the Corps' Section 7 responsibilities for the NLEB, the USFWS has issued a blanket authorization/concurrence letter (attached) if the Corps determines that a GP activity ***may affect, but is not likely to adversely affect*** the NLEB in Greenville, Spartanburg, Cherokee, York, Anderson, Abbeville, Laurens, Union, Horry, Marion, Florence, Williamsburg, Georgetown, Berkeley, Charleston, Dorchester, Colleton, Hampton, Jasper, and Beaufort Counties. For GP activities in Oconee and Pickens Counties, the USFWS authorization letter provides a blanket concurrence for a Corps determination of ***may affect, but is not likely to adversely affect***, if the proposed work occurs more than one quarter mile from known hibernacula or is further than 150 feet from a known maternity roost tree. If a GP activity falls within one-quarter mile of hibernacula or within 150 feet of a maternity roost tree additional consultation with the Service will be required.

H. Technical Assistance

The USFWS will provide technical assistance when requested and, generally, will respond within 60 days of the request. Technical assistance is usually generated via telephone, email, or written request in regard to the presence or absence of federally protected species and/or critical habitat in a project action area and *initiates informal consultation*. The USFWS is also available, as necessary, for technical assistance with habitat requirements of federally protected species.

As part of providing technical assistance, the USFWS may suggest the following, but is not limited to, meetings and on-site visits to further determine project impacts; that the Corps conduct additional studies on the species' distribution within the proposed action area; or that the Corps include special conditions in the permit or DA authorization to require monitoring impacts of the action on the species' life cycle when incidental take is not anticipated but may possibly occur; thus, triggering the need for project changes or formal consultation. The Corps has no legal obligation to conduct or pay for the additional studies, but the results of the studies may be such that formal consultation would be unnecessary.

Furthermore, the USFWS Charleston Field Office has volunteered to conduct periodic interagency training sessions to aid Corps Regulatory Division personnel in meeting Section 7 responsibilities.

I. Conflict Resolution Procedures

If the USFWS and the Corps cannot agree with a determination of indirect effects or scope of analysis (e.g., action area determination) on a GP or IP, the Conflict Resolution Process for Determination of Indirect Effects/Scope of Analysis will be initiated. This process is described in the September 29, 1999, final Biological Opinion for NWP-29 and in the November 18, 1999, *Memorandum for Major Subordinate Commands and District Commands* signed by Charles M. Hess, Headquarters, Corps of Engineers (copy attached).

J. Points of Contact

As of the date of this document, the following persons are the principal points of contact for the affected agencies in the coordination of matters related to this SOP. This designation may change at any time, at the discretion of each agency.

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K. Authorizing Signature

This SOP is effective as of the date of this document and will remain in effect unless modified in coordination with the U.S. Fish and Wildlife Service or superseded by the action of higher authority. This SOP is intended to serve as Standard Local Operating Procedures for Endangered Species and has been developed in coordination with the U.S. Fish and Wildlife Service, Charleston Field Office.



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18 November 2019

Travis G. Hughes
Division Chief, Regulatory
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Date