

Section 7 FAQ's

Section 7 of the ESA directs all Federal agencies to participate in conserving endangered and threatened species. Section 7(a)(1) of the ESA charges Federal agencies to aid in the conservation of listed species. Section 7(a)(2) of the ESA requires Federal agencies to consult with the U.S. Fish and Wildlife Service (Service) to ensure that actions they fund, authorize, permit, or otherwise carry out will not jeopardize the continued existence of any listed species or adversely modify designated critical habitats. Federal agencies are not required to contact the Service if a proposed action will have no effect on listed species, or if no species are present in the project area. However, Federal agencies must initiate consultation with the Service if a proposed action may affect one or more listed species. Please visit the Service's national page for more details on section 7: <https://www.fws.gov/service/section-7-consultations>.

What are the appropriate determinations with respect to whether my project will or will not have an effect on listed species?

1. *No effect* – the appropriate determination when a project, as proposed, is anticipated to have no effects to listed species or designated critical habitat. A “no effect” determination does not require section 7 consultation; however, the Federal action agency should maintain a complete record of their evaluation, including the steps leading to the determination of the effect, the qualified personnel conducting the evaluation, habitat conditions, site photographs, and any other related information.

Service concurrence with a no effect determination is not required under the ESA and will not be provided by the Austin Field Office.

2. *May affect, but is not likely to adversely affect* – the appropriate determination when a proposed action's anticipated effects are insignificant, discountable, or completely beneficial.
 - Insignificant effects relate to the size of the impact and should never reach the scale where "take" of a listed species occurs.
 - Discountable effects are those extremely unlikely to occur. Based on best judgment, a person would not be able to meaningfully measure, detect, or evaluate insignificant effects, or expect discountable effects to occur.

The discountable and insignificant thresholds are usually reached through avoidance and minimization measures implemented as part of the project. If a “may affect, not likely to adversely affect” determination is made, a biological assessment or other supporting information justifying this determination must be submitted, along with a letter requesting written concurrence for the determination.

Please note that the Austin Office will not provide written concurrence on projects that use this determination when their project should in fact be a no effect determination. While meeting this standard does not rise to the level of take, there must be a clear connection made between a listed species and the potential for at least some impacts from the proposed project.

3. *May affect, is likely to adversely affect* – the appropriate determination if any adverse effects (for example, harm or take) to listed species or designated critical habitat may occur as a direct or indirect result of the proposed action, and the effects are not discountable or insignificant. If a “may affect, is likely to adversely affect” determination is made, a biological assessment (50 CFR 402.12(f)) must be drafted for major construction, or an equivalent document that contains information necessary to evaluate the effects of the action on listed species and critical habitat. The Federal action agency shall initiate the formal section 7 consultation process in writing to the appropriate Texas Ecological Services Field Office.

How do I assess whether an action may affect designated critical habitat?

If designated critical habitat is present in the action area (determined via [IPAC](#)), refer to the Federal rule that designated critical habitat for the species and determine whether Physical and Biological Features (PBFs; or alternatively, Primary Constituent Elements in earlier rules) are affected by the proposed action. These are the specific elements of the physical and biological features that provide for a species’ life history processes and are essential to the conservation of the species. If the critical habitat was designated without the PBFs or PCEs, contact the Austin Field Office to determine what features of the critical habitat should be considered. Adversely affecting designated critical habitat is not the same as adverse modification. The adverse modification or destruction of designated critical habitat means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species.

Note that the analysis for effects of the action on the species is separate and should also assess effects to habitat (including habitat that is not designated critical habitat) that affects the species.

What is and who can act as a non-Federal representative in the consultation process?

Non-Federal representatives (i.e. consultants, state agencies, county or local officials) may request and receive species lists, prepare environmental documents and biological assessments, and provide information for both informal and formal consultations to both the Service and the Federal action agency. However, the Service requires the Federal action agency designate non-Federal representatives in writing. If not designated, we recommend non-Federal representatives provide a complete record of their evaluation to the Federal action agency so that they may make a determination of effect and, if necessary, consult with the appropriate Service office on the proposed action.

The Service recommends the action agency and/or non-Federal representative maintain a complete record that identifies steps leading to the determination of effect, the qualified personnel conducting the evaluation, habitat conditions, site photographs, and any other related information.

What should I do if I’m participating in an HCP and need a section 7 consultation?

Project proponents can propose to participate in an HCP as part of their project description to the Federal action agency. The Service will review the proposal as part of consultation to verify that the biological opinion associated with the HCP assessed the proposed project type as a covered

activity and adequately assessed the impacts. If the effects were assessed in the existing biological opinion, the Service can provide concurrence with a “may affect, likely to adversely affect” determination, but would reference participation in the HCP as adequate to offset the impacts. Thus, no new biological opinion for that particular species would need to be rendered. It is possible that the HCP does not cover all of the affected species; therefore, some species may need to be addressed separately in a section 7 consultation.

What are the timelines for processing section 7 consultations?

Informal Consultation: Pursuant to 50 CFR 402.13, the Service shall provide written concurrence or non-concurrence with a Federal agency's determination within 60 days of receiving the initiation letter and all necessary information. The 60-day timeframe may be extended upon mutual consent of the Service, the Federal agency, and the applicant (if involved), but shall not exceed 120 days total from the date of receipt of the Federal agency's written request.

Formal Consultation: Typically, Federal action agencies submit a complete biological assessment along with their request for formal consultation. Pursuant to 50 CFR 402.14(e), formal consultation concludes within 90 days after its initiation unless extended. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant, which would result in a maximum of 135 days from acceptance of initiation to issuance of a biological opinion. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

- (1) The reasons why a longer period is required,
- (2) The information that is required to complete the consultation, and
- (3) The estimated date on which the consultation will be completed. A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant.

What are conservation measures and why are they important to include in a section 7 consultation?

Conservation measures, also called avoidance and minimization measures, can reduce potential impacts to species. Depending on the project details and proposed measures, conservation measures can also change the effects determination. For example, a project is proposed adjacent to or in endangered migratory bird habitat where no trees are being removed but may disturb the bird when they are present on the breeding grounds (possible take). However, the project proponent agrees to conduct the activity when the birds are on their wintering grounds, thereby avoiding harm to the species. This project could have originally needed formal consultation for take; however, with the proposed change in timeline (conservation measure), this project could be reduced to an informal consultation (may affect, not likely to adversely affect). Mitigation to offset the impacts of a project would also be considered a conservation measure and would be taken into consideration when analyzing the overall effects of a project on listed species.

What if my Federal project also affects migratory birds?

The Migratory Bird Treaty Act (MBTA) implements various treaties and conventions for the protection of migratory birds. Under the MBTA, taking, killing, or possessing migratory birds is

unlawful. Migratory birds may nest in trees, brushy areas, or other areas of suitable habitat. The Service recommends activities requiring vegetation removal or disturbance avoid the peak nesting period of March through August to avoid destruction of individuals, nests, or eggs. If project activities must be conducted during this time, we recommend surveying for nests prior to conducting work. If a nest is found, the Service may recommend a buffer of vegetation remain around the nest until the young have fledged or the nest is abandoned. For additional information concerning the MBTA and recommendations to reduce impacts to migratory birds, please visit the following links:

<https://www.fws.gov/program/migratory-bird-permit>

<https://www.fws.gov/library/collections/avoiding-and-minimizing-incident-take-migratory-birds>

<https://www.fws.gov/regulations/mbta>

<https://www.fws.gov/sites/default/files/documents/nationwide-standard-conservation-measures.pdf>