



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



In Reply Refer To:
FWS/AES/DER/066893

NOV 03 2017

Memorandum

To: Regional Directors, Regions 1–8
Attn: Assistant Regional Directors – Ecological Services

From: Assistant Director, Ecological Services *CEDT*

Subject: Consulting with the U.S. Army Corps of Engineers (USACE) under section 7 of the Endangered Species Act when the USACE's action is limited to making a permitting decision for a small component of a larger project (aka small Federal handle)

The USACE and the U.S. Fish and Wildlife Service (Service) have agreed on the approach for conducting Endangered Species Act (ESA) section 7 consultations in situations where the Corps is considering permitting an action and their involvement is limited to making a permitting decision for a small component of a larger project (see attached). The agreed-upon approach enables efficient decision-making and provides the Service, USACE, and applicants with a pragmatic process for addressing ESA compliance.

The Service and USACE are developing training materials and tools to assist section 7 practitioners from both agencies to implement this consultation approach. In the next few weeks, we will provide you with a list of upcoming joint training sessions.

The consultation process and associated letters of agreement between the Service and the USACE are attached. If you have questions, please contact Mr. Ben Thatcher, Chief for the Branch of Environmental Review, at 703-358-2060, or by email at ben_thatcher@fws.gov.

Attachments



United States Department of the Interior



FISH AND WILDLIFE SERVICE

MAY 22 2017

In Response Reply To:
FWS/AES/065732

Mr. James C. Dalton
Director of Civil Works
U.S. Army Corps of Engineers
441 G Street, NW
Washington, DC 20314

Dear Mr. Dalton:

The purpose of this letter is to follow up on our July 27, 2015, meeting with your predecessor, Mr. Steven Stockton, where we discussed clarifying the consultation process under section 7 of the Endangered Species Act of 1973 (ESA) when the U.S. Army Corps of Engineers (Corps) is considering permitting an action where the Corps' involvement is limited to making a permitting decision for a small component of a larger project (e.g., installation of a culvert across a small stream that will provide access to a larger upland development area or the crossing of multiple streams to support the construction of a pipeline through areas that are predominantly uplands). As we discussed at that meeting, staff within both of our agencies have struggled to consult in a manner that is consistent with our respective laws, regulations, and policies.

The ESA and our interagency implementing regulations require that Federal agencies consult on the potential effects of projects they intend to fund, authorize, or otherwise carry out that may affect federally-listed species or designated critical habitat. The U.S. Fish and Wildlife Service (Service) must then consider the direct, indirect, and cumulative effects of the federal action (including effects of any interrelated or interdependent actions) in this consultation. In some instances, the federal action that triggers the section 7 consultation is smaller in scope than the overall project, and the biological opinion and associated incidental take statement consider effects that occur outside the jurisdiction of the action agency. This situation has sometimes resulted in extended negotiations as our staff have attempted to address the dual responsibilities of the Service and the Corps.

Enclosed is a summary of what we believe is an agreement in principle between our two agencies on how to address these projects going forward in a manner that respects the limits of the Corps' jurisdiction, adheres to the Service's consultation regulations, and provides the most efficient path forward for the Service, Corps, and applicants to address ESA compliance.

Process for Section 7 Consultation in Small Federal Handle Situations

The agreement in principle outlined below applies to situations where both of the following conditions apply: (1) where there is a legitimate Federal nexus to the larger project via activities subject to Clean Water Act or Rivers and Harbors Act of 1899 jurisdiction that cannot be avoided (i.e., but for the federal permit, the larger action could not occur); and (2) where the effects considered within the biological assessment and biological opinion are all appropriately within the scope of a section 7 consultation (i.e., the direct and indirect effects of the federal action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, and including consideration of cumulative effects).

- The Corps will provide the Service with a Biological Assessment (BA) for a proposed action that evaluates the larger project as a whole and is inclusive of all anticipated effects of the larger project (including those resulting from interrelated or interdependent activities) to listed species and critical habitat, along with consideration of cumulative effects. However, in situations where the Corps' involvement is limited to a small component of the larger project, in the BA the Corps will clearly distinguish between the areas and activities within the Corps' jurisdiction and the areas and activities outside the Corps' jurisdiction. The BA will also clearly distinguish between effects to listed species and designated critical habitat within and outside the Corps' jurisdiction.
- If the BA outlines avoidance and minimization measures that may lead to a "not likely to adversely affect" determination for the entire project, the Corps will work with the Service to finalize the informal consultation. The Corps may ask the Service to work directly with the permit applicant to develop avoidance and minimization measures, but the Corps will provide the final letter requesting concurrence regarding the determination of "may affect, not likely to adversely affect" for the project.
- For formal consultations, the Service will issue a biological opinion that evaluates all components of the larger project, including the effects of the larger project on listed species and critical habitat. Take that is anticipated to result from the larger project that is not likely to jeopardize the continued existence of a species, or that results from implementing a reasonable and prudent alternative in order to avoid the likelihood of jeopardy, will be addressed through an incidental take statement included with the biological opinion. As noted in section 7(o)(2), "any taking that is in compliance with the terms and conditions specified in . . . [an incidental take statement] shall not be considered to be a prohibited taking of the species concerned." The Service will identify in the incidental take statement what reasonable and prudent measures (RPMs) address impacts of activities within the Corps' jurisdiction and thus

which the Corps must implement through its permit. The Service will likewise identify those RPMs that address impacts of the larger project outside of the Corps' jurisdiction and will specify that they must be implemented directly by the applicant if the take exemption is to apply.

- The Corps will oversee compliance with RPMs, including monitoring and reporting the impacts of incidental take, that apply to the activities within its jurisdiction. For RPMs that apply to activities outside of the Corps' jurisdiction, the Service will monitor the impacts of the incidental take through reports submitted by the applicant on the progress of the action and its impact on the listed species, as specified in the incidental take statement. The Corps is required to request reinitiation of section 7 consultation when triggered by one of the reinitiation factors listed at 50 C.F.R. § 402.16 and "where discretionary Federal involvement or control over the action has been retained or is authorized by law." Reinitiation is triggered by, among other factors, exceedance of the extent of taking specified in the incidental take statement regardless of where such taking occurs.
- If the Corps never had or no longer retains discretionary Federal involvement or control over incidental take anticipated in the biological opinion, but the applicant is carrying out the action in full compliance with the associated incidental take statement, the Service will exercise its enforcement discretion and not seek section 11(e) enforcement against the applicant in these situations for the take that was anticipated in the incidental take statement. However, we recognize that the applicant in those situations will face some exposure to a citizen suit brought under section 11(g).
- The process outlined above will also apply to species and critical habitat addressed through conference opinions, as appropriate.

We appreciate your willingness to work with us to craft a mutually acceptable resolution of this issue, and we hope to continue our dialogue. Clarifying our respective roles and responsibilities will simplify future informal and formal consultations, thus saving time and money for both agencies and applicants. Please let me know if the process outlined in the enclosure is agreeable, and feel free to contact me at (202) 208-4646 or Gary_Frazer@fws.gov if you would like to discuss further.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gary Frazer', written in a cursive style.

Gary Frazer
Assistant Director for
Ecological Services

Enclosure



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, D.C. 20314-1000

OCT 02 2017

Mr. Gary Frazer
Assistant Director for Ecological Services
Fish and Wildlife Service
United States Department of the Interior
1849 C. Street, NW
Washington, D.C. 20240

Dear Mr. Frazer:

I am replying to your letter dated May 22, 2017, that clarifies the consultation process under Section 7 of the Endangered Species Act when the U.S. Army Corps of Engineers (Corps) is evaluating a permit application under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899 for an activity that is a small component of a larger project. I appreciate the collaborative efforts that resulted in this process that will assist landowners receiving Federal decisions in a timely manner.

The Corps agrees with the consultation process described in your letter. We look forward to working with your staff to develop training materials specific to the approach that has been developed. These materials will then be used by joint agency teams to train the field personnel of our respective agencies in implementing this consultation approach in cases where the Corps' permit action that triggers the Section 7 consultation requirement is smaller in scope than the overall project, and the biological opinion and associated incidental take statement consider effects to listed species or critical habitat that occur outside of the Corps' jurisdiction. Understanding that this effort will bring a needed benefit to the public, we would like to complete this training in all Corps Districts and all FWS regions before the end of this calendar year.

I remain committed to ensuring that the Corps continues to implement Section 7 of the Endangered Species Act within the scope of our permitting authorities, and in a transparent and efficient manner as possible. If you have any additional questions or concerns, please feel free to contact me. You may also contact Ms. Jennifer Moyer, Chief, Regulatory Program, at 202-761-4598 or jennifer.a.moyer@usace.army.mil.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Dalton".

James C. Dalton, P.E.
Director of Civil Works