

# Conservation Opportunities for Federal Agencies through Section 7 of the Endangered Species Act

Carolyn Scafidi  
U.S. Fish and Wildlife Service  
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## Objectives

- Review conservation obligations, opportunities and tools established by the Endangered Species Act for federal agencies.
- Briefly review Section 7 process
- Discuss how that may apply to Taylor's checkerspot butterfly, the streaked horned lark, and the Mazama pocket gopher and their proposed critical habitats.

## ESA's Prime Directive

**“To provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved.”**

Conserved = Recovered

## ESA Overview

- Section 4
  - listing
  - recovery planning and implementation
  - 4 (d) rules
- Section 6
  - cooperative agreements with States

## ESA Overview

- Section 9
  - “take prohibition” - harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.
- Section 10 permits
  - 10(a)(1)(A) – Research & Education, Safe Harbor Agreements
  - 10(a)(1)(B) – HCPs

## Section 7

- Mandates that Federal agencies
  - Carry out programs to conserve listed species; ‘do good things’
  - Insure that actions do not jeopardize species or destroy or adversely modify critical habitat; ‘do not jeopardize’

## Section 7(a)(1) Affirmative Conservation Mandate

- ◆ Federal agencies shall use their authorities to carry out programs for the conservation of endangered & threatened species.

## Section 7(a)(2) Duty to Avoid Jeopardy/AM Mandate

- ◆ Federal agencies shall consult with the Services to insure that any actions they authorize, fund or carry out, do not jeopardize the continued existence of listed species or destroy or adversely modify critical habitat.

## Jeopardy...

- To appreciably reduce the likelihood of survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

## Adverse Modification of CH

- Critical habitat rangewide must remain functional, or retain its current ability to become functionally established, to serve its intended recovery role for the species.

## Interagency Cooperation

- ➔ Conferencing for proposed species and proposed critical habitat
- ➔ Consultation for listed species and designated critical habitat

## Conferencing

- Required for actions that are “likely to jeopardize” the continued existence of a proposed species or “destroy or adversely modify” proposed critical habitat.

## Conferencing

- Conferencing is optional but highly recommended in the following situation:
  - Ongoing (or not completed) action;
  - “May affect” proposed species or CH; and
  - Agency retains discretion over the action when a final listing becomes effective

## Conferencing

- Designed to identify and resolve potential conflicts early.
- Can involve
  - informal conference and conference letter
  - formal conference and conference opinion
- Conference opinions do not authorize incidental take.

## Conferencing

- Formal conference = Conference Opinion
- Informal conference = Conference Letter
- Advantage? Both conference opinions and conference letters can be adopted by the FWS as biological opinions or letters of concurrence prior to the effective date of a final rule, concluding the consultation process.

## Conference Advantages

- Significantly streamlines compliance and avoids unnecessary delays for ongoing actions with remaining agency discretion.
- Partnering early gives us a head start on the federal agency mandates to 'do not jeopardize' and contribute to recovery.

## Conferencing Advantages (cont.)

- “Incidental take” identified during conferencing can be authorized for federal agencies much more quickly if there’s a formal conference opinion available at the effective date of listing.
- Conferencing documents can be quickly converted into the necessary consultation documents, avoiding the need to stop or delay actions.

## Consultation/Conference ‘Triggers’

- Federal actions: actions or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies
- Called a “section 7 nexus” or a “federal nexus”

## Federal Actions

- **Examples:**
  - Conducting or funding projects;
  - Issuing permits, contracts, leases, easements, rights-of-way, or grants;
  - Actions directly or indirectly causing modifications to the land, water, or air.

## Evaluating Effects

- **Determine Species/CH presence and use**
  - Exposure Risk
- **Timing of action**
- **Duration of action**
- **Frequency and severity of disturbance and habitat impacts**
- **Risk of “take”**
- **We are available to assist you!**

## Effect Determinations Establish the Appropriate Process

- ◆ “No effect” – no consultation or conference required.
- ◆ “May affect” – conference is optional for proposed resources; consultation required for listed

## Conferencing Required

- When a federal agency thinks its action is “likely to jeopardize” proposed species or “likely to destroy or adversely modify” proposed CH

## “No Effect”

- Appropriate if the action will literally have no effect whatsoever.
- Does not require Service concurrence

## “May Affect”

- “Beneficial effect”
- “Not likely to adversely affect”
- “Likely to adversely affect”
- Requires formal or informal consultation, depending on the magnitude and likelihood of the effect. Conferencing optional but may be very helpful.

## “Beneficial Effect”

- Project must be fully beneficial, with NO adverse effects at any point in time.
- Any adverse effects, regardless of timing or significance, override long-term beneficial effects for purposes of section 7.
- Requires Service concurrence for listed resources

## “Not Likely to Adversely Affect”

- Insignificant
  - size of the impact
  - *effect* is not measurable or detectable.
- Discountable
  - likelihood of exposure/effect
  - extremely unlikely to occur.
- Requires Service concurrence for listed resources

## “Likely to Adversely Affect”

- When we cannot establish that potential effects are insignificant or discountable.
- When there is a reasonable certainty of incidental take (harm, harass, shoot, wound, kill...).
- Requires formal consultation and submittal of an initiation package for listed resources.

## Taylor's Checkerspot Butterfly



## Critical Habitat...Primary Constituent Elements

- Patches of early seral, short-statured, perennial bunchgrass plant communities
- Primary larval host plants
- Adult nectar sources
- Aquatic features

## Actions that “may affect” Taylor’s Checkerspot\* or PCEs

- Disrupting soil between July and March
  - Disturbing larval host/adult nectar plants between April and June
  - Fires (incidental and prescribed)
  - Insecticide/herbicide use
  - Pursuit of adult butterflies
  - Collection of any life stage
- \* Remember TCB are present year-round

## Recovery Actions for Taylor's Checkerspot Butterflies

- Removal of invasive species
- Tree or shrub removal
- Prescribed burning
- Planting of native species
- Mowing, brush removal
- Judicious herbicide use
- Experimental use of solarization, tilling, and short-term, seasonal, rotational grazing

## Streaked Horned Lark



## Critical Habitat...Primary Constituent Elements

- Areas having a minimum of 16% bare ground that has sparse, low stature vegetation composed primarily of grasses and forbs less than 13 inches high
- Large (300 ac), flat (0-5% slope) areas within a landscape context
- Areas smaller than 300 ac but that provide visual access to open areas such as open water or fields

## Actions that “may affect” Streaked Horned Lark or PCEs

- Activities that encourage dense vegetation
- Reducing/altering the “open landscape”
- Burning, tilling, or farming such that vegetation for food and cover is significantly reduced over a prolonged period (many years).
- Activities that attract crows, jays, predators and scavengers.



## Actions that “may affect” (cont.)

- People, vehicles, pets, etc. in nesting habitat that may crush eggs or chicks, flush adults from nests, and expose eggs or chicks to elements/predators.
- Military training (in open prairies), aircraft operations, and special air shows that increase risk of adult mortality and nest failure if conducted during the nesting season.

## Recovery Actions for Streaked Horned Larks

- Habitat restoration/maintenance
  - tree or shrub removal; prescribed burning; re-establishment of native species
- Protecting high-quality prairie habitats
- Protecting nest sites from people, pets, vehicles, disturbance
- Continuing research and monitoring efforts

## Mazama Pocket Gophers



### Critical Habitat...Primary Constituent Elements

- Friable, loamy, and deep soils (generally on slopes less than 15%)
- Areas equal to or greater than 50 ac in size
  - Less than 10% woody vegetation cover
  - Vegetative cover suitable for foraging by MPG
  - Few, if any, barriers to dispersal

## Actions that “may affect” MPG

- Habitat alterations that reduce suitability and compact soils, crush tunnels, or destroy forage:
  - tilling, trenching, digging, heavy equipment, trampling, flooding, rock/clay placement
  - Planting woody vegetation or lawns, removing forage plants
- Traps, poisons, gopher wire, disturbance, handling, domestic predators (dogs, cats)

## Recovery Actions for MPG

- Tree/shrub removal; prescribed fire
- Planting forage plants and native vegetation
- Protection from predators (fencing; signage)
- Removing barriers
- Discrete herbicide application

## Reinitiation Requirements

- Amount of incidental take is exceeded
- New information reveals “new effects”
- Action is modified such that species are affected differently than previously considered
- **A new species is listed or new critical habitat is designated in the action area.**

## In closing...

- Consider conferencing now on actions that will be ongoing in the fall and that may adversely affect these species if a final listing rule becomes effective.
- Partner with us to develop a conservation program (do some good!)
- Partner with us to avoid or minimize risk from ongoing and future actions (do not jeopardize)

# Questions?

