Consultations | Frequently Asked Questions

What activities does section 7 apply to?
Under provisions of section 7(a)(2) of the Endangered Species Act, a Federal agency that carries out, permits, licenses, funds, or otherwise authorizes activities that may affect a listed species must consult with the Fish and Wildlife Service to ensure that its actions are not likely to jeopardize the continued existence of any listed species. (This same process also applies to the National Marine Fisheries Service and the species under their its jurisdiction.)

(return to top)

What steps are involved in a section 7 consultation?
The Federal agency, or the applicant as the designated non-Federal entity, contacts the appropriate local Service office to determine if listed species are present within the action area. The Service responds to the request by providing a list of species that are known to occur or may occur in the vicinity; if the Service provides a negative response, no further consultation is required unless the scope or nature of the project is altered or new information indicates that listed species may be affected.

If listed species are present, the Federal agency must determine if the action may affect them. A may affect determination includes those actions that are not likely to adversely affect as well as likely to adversely affect listed species. If the Federal agency determines that the action is not likely to adversely affect listed species (e.g., the effects are beneficial, insignificant, or discountable), and the Service agrees with that determination, the Service provides concurrence in writing and no further consultation is required.

If the Federal agency determines that the action is likely to adversely affect listed species, then it must request initiation of formal consultation. This request is made in writing to the Services, and includes a complete initiation package. Up to that point, interactions have been conducted as informal consultation; however, once a request for formal consultation is received, the process becomes formal, and specific timeframes come into play. Formal consultation is initiated on the date the package is received, unless the initiation package is incomplete. If the package is incomplete, the Service notifies the Federal agency of the deficiencies. If a complete package is submitted, the Service should provide written acknowledgment of the request within 30 working days. This written acknowledgment is not mandatory, but is encouraged so that there is documentation in the administrative record that formal consultation has been initiated.

From the date that formal consultation is initiated, the Service is allowed 90 days to consult with the agency and applicant (if any) and 45 days to prepare and submit a biological opinion; thus, a biological opinion is submitted to the Federal agency within 135 days of initiating formal consultation. The 90-day consultation period can be extended by mutual agreement of the Federal agency and the Service; however, if an applicant is involved the consultation period cannot be extended more than 60 days without the consent of the applicant. The extension should not be indefinite, and a schedule for completion should be specified.

(return to top)

What are the potential outcomes of a biological opinion?
The biological opinion is the document that states the opinion of the Service 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.

(return to top)

What section 7 responsibilities does a Federal agency bear if it is considering an action that may affect species proposed for listing under ESA?
Section 7(a)(4) requires Federal agencies to confer with the Services on any agency action that is

likely to jeopardize the continued existence of any species proposed for listing or result in the adverse modification of critical habitat proposed to be designated. A conference may involve informal discussions between the Services, the action agency, and the applicant. Following informal conference, the Services issue a conference report containing recommendations for reducing adverse effects. These recommendations are discretionary, because an agency is not prohibited from jeopardizing the continued existence of a proposed species or from adversely modifying proposed critical habitat. However, as soon as a listing action is finalized, the prohibition against jeopardy or adverse modification applies, regardless of the stage of the action.

(return to top)

Do Fish and Wildlife Service programs need to comply with section 7? How do they accomplish this?
Yes, the Fish and Wildlife Service does need to comply with section 7. This compliance is achieved through intra-Service consultations and conferences, processes by which the Service consults or confers on actions that may affect listed and proposed species.

(return to top)

What role does an applicant have in the process?
The Federal agency, which is ultimately responsible for the consultation process, determines the role of the applicant during the consultation process. The Federal agency can identify a non-Federal representative; however, the Services require that the designation be made in writing. The action agency does provide the applicant an opportunity to submit information for use during the consultation. If reasonable and prudent alternatives are necessary, the Service will seek the applicant's input on developing those alternatives.

(return to top)

What's the difference between informal and formal consultation?
Informal consultation is an optional process that is designed to help the applicant and the action agency determine whether formal consultation is needed. It includes all discussions, correspondence, etc., between the Services, the action agency, and the applicant, and has no specified timeframe for completion. Federal agencies and the designated non-Federal entity may use this period to work with the Services on project design and conservation actions that would remove all adverse effects and avoid the need for formal consultation. Formal consultation is a mandatory process for proposed projects that may adversely affect listed species, is initiated in writing by the Federal agency, and concludes with the issuance of a biological opinion by the Services. The Services strongly encourage the use of informal consultation so that projects can be designed with minimal impact to listed species, possibly resulting in a determination of no adverse effect, eliminating the need for formal consultation.

(return to top)

Must a Federal agency consult with the Services (i.e., receive concurrence) if it determines: a) no effect; b) beneficial effect; or c) not likely to adversely affect?
A Federal agency is not required to consult with the Services if it determines an action will not affect listed species or critical habitat. A Federal agency is required to consult if an action "may affect" listed species or designated critical habitat, even if the effects are expected to be beneficial. In many cases, projects with overall beneficial effects still include some aspects that will adversely affect individuals of listed species and such adverse effects require formal consultation. If an agency determines that its action is not likely to adversely affect listed species or critical habitat, it can request the concurrence of the Services with this determination. If the Services agree, consultation is concluded with a concurrence letter.

(return to top)

What's the difference between an Environmental Assessment and a Biological Assessment, and can I incorporate one into the other?
A biological assessment must be prepared if listed species or critical habitat may be present in an area to be impacted by a "major construction activity." A major construction activity is defined at 50 CFR §402.02 as a construction project (or an undertaking having similar effects) which 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)). Any project qualifying as a major construction activity under NEPA requires a biological assessment. The contents of a biological assessment are up to the discretion of the action agency, although the regulations do provide a list of recommended contents (50 CFR §402.12(f)). A biological assessment is not required if the action is not considered a major construction activity; however, if listed species are present in the action area, the Federal agency must document to the Services its evaluation of the effects of the action to the listed species. Environmental assessments are prepared in fulfillment of NEPA and assess social, cultural, and economic, effects in addition to biological effects. A biological assessment can be incorporated within an environmental assessment.

(return to top)

Does formal consultation have to be completed before an EA or EIS is written?
Biological assessments may be completed prior to the release of the Draft Environmental Impact Statement (DEIS) or the Environmental Assessment (EA). Formal consultation should be initiated prior to or at the time of release of the DEIS or EA. At the time the Final EIS is issued, section 7 consultation should be completed. The Record of Decision for an EIS should address the results of section 7 consultation. The action agency should initiate informal consultation prior to public scoping required for major construction activities as defined by the National Environmental Policy Act.

(return to top)

Who makes the call on adverse effect?
The Federal agency makes the determination of whether a project may affect a listed species, which includes a determination of whether the action is likely to result in adverse effects. Ideally,

the Services and the Federal agency, via informal consultation, determine if adverse effects are likely and work together to remove those effects.

(return to top)

What's the difference between reasonable and prudent alternatives and reasonable and prudent measures?
Reasonable and prudent alternatives are alternative methods of project implementation, offered in a biological opinion reaching a jeopardy or adverse modification conclusion, that would avoid the likelihood of jeopardy to the species or adverse modification of critical habitat. Reasonable and prudent measures are actions necessary to minimize the impacts of incidental take that is anticipated to result from implementing a project that the Service regarded as not likely to jeopardize the species or adversely modify designated critical habitat.

Does a Federal agency have to adhere to the reasonable and prudent alternatives or the reasonable and prudent measures, and what are the consequences if it doesn't?
In both instances, the action agency determines whether and how to proceed with its proposed action. If a jeopardy opinion containing reasonable and prudent alternative(s) is issued, the action agency may: 1) adopt the reasonable and prudent alternative(s); 2) not undertake the project (e.g., deny the permit); 3) request an exemption from section 7(a)(2); 4) reinitiate consultation based on modification of the action or development of a reasonable and prudent alternative not previously considered; 5) proceed with the action if it believes, upon review of the biological opinion, that the action satisfies section 7(a)(2). Regardless of what action the agency chooses, the agency must notify the Service of its final decision.

Reasonable and prudent measures and the implementing terms and conditions are actions intended to minimize the impact of incidental take. Those conditions are conveyed to the action agency in the form of an incidental take statement (ITS), are non-discretionary, and must be undertaken by the agency so that they become binding conditions of any grant or permit issued to an applicant for the exemption in section 7(o)(2) to apply. If the agency refuses to do so, then it and the applicant must be informed that the protective provision of the ITS may not apply, and both entities could be held responsible for any take that occurs as a result of the action.

(return to top)

Can formal consultation be stopped once it's started? Who can do it and under what conditions?
If the action under consideration is no longer viable (e.g., funding has been withdrawn, an applicant has decided to withdraw the permit application, or congressionally approved action has been deauthorized, etc.), then the action agency can withdraw its request for formal consultation. The agency should notify the Service in writing that consultation should be stopped, and briefly describe why the action is no longer being considered by the agency.

(return to top)

Who reinitiates formal consultation?
Reinitiation of formal consultation must be requested by the Federal agency or by the Services if: a) the amount or extent of taking specified in the incidental take statement is exceeded; b) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; c) the identified action is subsequently modified in a manner or to an extent that causes an effect to the listed species or critical habitat not previously considered in the biological opinion; or, d) a new species is listed or critical habitat designated that may be affected by the identified action.

(return to top)

What constitutes an irreversible or irretrievable commitment of resources?
Any action that has the effect of preventing the formulation or implementation of any reasonable and prudent alternatives needed to avoid jeopardizing the species or adversely modifying critical habitat.

(return to top)

Does an agency have to consult on a species that is protected due to similarity of appearance?
Regulations at 50 CFR §17.42 include special regulations for species protected due to similarity of appearance. Some of these species have rules regarding incidental take (e.g., some rules specify that incidental take is not prohibited for certain species, while other rules specify that incidental take is prohibited). Federal agencies are not responsible for fulfilling the requirements of section 7 with respect to actions that may affect species protected due to similarity of appearance; however, if their actions may result in the take of such species and no special rule addressing this circumstance exists, they must apply for a take permit in accordance with regulations at 50 CFR §17.52.

(return to top)

What is the action area?
The action area is defined by regulation as all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action (50 CFR §402.02). This analysis is not limited to the "footprint" of the action nor is it limited by the Federal agency's authority. Rather, it is a biological determination of the reach of the proposed action on listed species. Subsequent analyses of the environmental baseline, effects of the action, and levels of incidental take are based upon the action area.

The documentation used by a Federal action agency to initiate consultation should contain a description of the action area as defined in the Services' regulations and explained in the Services' consultation handbook. If the Services determine that the action area as defined by the action agency is incorrect, the Services should discuss their rationale with the agency or applicant, as appropriate. Reaching agreement on the description of the action area is desirable but ultimately the Services can only consult when an action area is defined properly under the regulations.

(return to top)

an you have an incidental take statement as part of a jeopardy/adverse modification Biological Opinion?

When the Services determine that a proposed action may jeopardize the continued existence of a listed species in the wild or result in adverse modification to designated critical habitat, the Services, with the assistance of the Federal agency and/or applicant, develop Reasonable and Prudent Alternatives that may be undertaken to avoid the likelihood of jeopardy or adverse modification. While these RPAs must avoid jeopardy or adverse modification, they may result in adverse effects to or take of listed species. If take will occur from the implementation of an RPA, an incidental take statement must be developed to exempt such take from section 9 prohibitions. For additional information see pages 4-41 through 4-48 of the Section 7 Consultation Handbook.

(return to top)

How is incidental take calculated? Does it account for reduced take through the Reasonable and Prudent Measures?

Generally incidental take is calculated and expressed as the number of individuals reasonably likely to be taken or the extent of habitat likely to be destroyed or disturbed. When preparing an incidental take statement, a specific number (for some species, expressed as an amount or extent, e.g., all turtle nests not found and moved by the approved relocation technique) or level of disturbance to habitat must be described. Take can be expressed also as a change in habitat characteristics affecting the species (e.g., for an aquatic species, changes in water temperature or chemistry, flows, or sediment loads) where data or information exists that links such changes to the take of the listed species.

In some situations, the species itself or the effect on the species may be difficult to detect. However, some detectable measure of effect should be provided. For instance, the relative occurrence of the species in the local community may be sufficiently predictable that impacts on the community (usually surrogate species in the community) serve as a measure of take (e.g., impacts to listed mussels may be measured by an index or other censusing technique that is based on surveys of non-listed mussels). In this case, the discussion determining the level at which incidental take will be exceeded (reinitiation level) describes factors for the non-listed mussels, such as an amount or extent of decrease in numbers or recruitment, or in community dynamics.

An incidental take statement identifies the level of take that is anticipated from implementation of a project as propsed. However, a Statement also contains reasonable and prudent measures and terms and conditions that are nondiscretionary actions designed to minimize the effects of the take, and that must be implemented in order for such take to be exempt from the section 9 prohibitions. Thus, while a Statement anticipates the potentially greater amount of take that may occur without implementation of the reasonable and prudent measures and the resulting terms and conditions, that level of take is only exempt if the terms and conditions are properly implemented. For additional information see pages 4-43 through 4-54 of the Section 7 Consultation Handbook.

(return to top)

What constitutes the "best available scientific and commercial information?"
When conducting section 7 consultation, the Services' biologists should use the best scientific and commercial information available. This information may include the results of studies or surveys conducted by the Federal action agency or the designated non-Federal representative, information contained in past biological opinions and biological assessments, status reports and listing rules, including critical habitat designations, recovery plans, and published and unpublished studies done on the species. However, at times even the best information available may not provide a sufficient basis to predict effects to a species. When this is the case, the Services should work with the action agency and applicant, if appropriate, to develop sufficient information to adequately evaluate the effects of the proposed action and its potential to jeopardize the species or result in adverse modification of designated critical habitat. If it is not possible to develop such information, the Services should use the information that is available and provide the benefit of the doubt to the species when evaluating the potential for jeopardy and adverse modification.

(return to top)

Does an agency have to get a permit under section 10 if the agency's action involves intentional take (e.g., handling, banding birds) as well as incidental take?
Generally, if the take is an intentional take (i.e., the intended result of the action), then a separate permit is required.

(return to top)

Go to Endangered Species Interagency Consultations (Section 7) page.