

THE CONSULTATION PROCESS IN BRIEF

Section 7 of the Endangered Species Act requires federal agencies to ensure that their actions do not jeopardize the continued existence of listed species. To comply with section 7, the consulting Federal agency or its designated non-federal representative must review the proposed project for potential impacts to federally protected species. Informal consultation provides an opportunity for the action agency and the Service to explore ways to modify the action to reduce or remove adverse effects to the species or critical habitat.

This process typically starts with a request for listed species that may be in the action area. Based on its analysis, the Federal agency makes one of three determinations of effect for listed species:

“No effect” is the appropriate conclusion if the proposed action will not affect listed species. If a “no effect” determination is made, the Federal agency is not obligated to contact the Service for concurrence, and informal consultation ends.

“Is not likely to adversely affect” is the appropriate conclusion when effects to listed species are expected to be discountable, insignificant, or completely beneficial. If a “not likely to adversely affect” determination is made, the Federal agency must contact the Service for written concurrence.

“Is likely to adversely affect” is the appropriate conclusion if any adverse effect (including take of an individual) to listed species may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions. If a determination of “is likely to adversely affect” is made, the Federal agency must initiate formal consultation with the Service.

Formal consultation is a process in which the Service assesses the action’s potential to jeopardize the listed species, to result in the destruction or adverse modification of critical habitat, or to result in incidental take of a listed species. Formal consultation concludes when the Service issues a biological opinion. For the purposes of section 7, “action area” means all areas to be affected directly or indirectly by the proposed action, not merely the immediate area involved in the action (i.e. project footprint).

Informal consultation concludes when a determination of “no effect” is made, when the Service concurs with a “not likely to adversely affect” determination, or when the action agency initiates formal consultation.

For additional information consult the USFWS and NMFS Endangered Species Consultation Handbook, available on line at <http://endangered.fws.gov/consultations/s7hndbk/s7hndbk.htm>.

THE STEPWISE CONSULTATION PROCESS

1. Federal agency (action agency) or its designated non-Federal representative proposes action (2)
2. Federal agency requests species list from Service (3)
3. Service responds within 30 days of receipt of request with list of proposed and listed threatened and endangered species (including proposed and designated critical habitat) that may occur in the action area (4)
4. Action agency determines if there are potential impacts to species provided by Service (4a, 4b)
 - a. Action agency determines “no affect”; informal consultation stops
 - b. Action agency determines “may affect”; informal consultation continues (5)
5. Action agency determines if the proposed action is “major construction” (5a, 5b)
 - a. Proposed action is not major construction; informal consultation continues (6)
 - b. Proposed action is “major construction”; action agency prepares a biological assessment; informal consultation continues (6)
6. Action agency makes preliminary determination regarding whether proposed action is or is not likely to adversely affect a listed species or critical habitat and requests Service concurrence in their determination (6a, 6b, 6c)
 - a. Action agency determines “is not likely to adversely affect listed species” and Service concurs (within 30 days); informal consultation stops
 - b. Action agency determines “is not likely to adversely affect listed species” and Service does not concur (6bi, 6bii)
 - i. Action agency modifies project design to minimize affects; informal consultation continues (6)
 - ii. Action agency submits biological assessment and requests formal consultation; Service responds (within 30 days) to either initiate formal consultation or request additional information (7)
 - c. Action agency determines “is likely to adversely affect listed species” and Service concurs
 - i. Action agency modifies project design to minimize affects; informal consultation continues (6)
 - ii. Action agency submits biological assessment and requests formal consultation; Service responds (within 30 days) to either initiate formal consultation or request additional information (7)
7. If either the action agency or the Service determines that the action is likely to adversely affect then formal consultation is required and the Service writes a biological opinion. The BO has two purposes (7a, 7b)
 - a. To determine the proposed action’s potential to “jeopardize” the listed species or result in “destruction or adverse modification” of critical habitat (7ai, 7aii)
 - i. “Jeopardy” or “destruction or adverse modification” would not result (7b)
 - ii. “Jeopardy” or “destruction or adverse modification” would likely result (7aii1)
 1. The Service develops Reasonable and Prudent Alternatives (7b)
 - b. To determine if the proposed action will result in incidental take (harm, harassment) either directly or indirectly (7bi, 7bii)
 - i. The proposed action will not result in incidental take (8)
 - ii. The proposed action will result in incidental take (7bii1)
 1. An incidental Take Statement is included in the BO, including mandatory Reasonable and Prudent Measures and their associated Terms and Conditions, which are designed to reduce the amount and/or extent of incidental take of the proposed action. (8)
8. Formal consultation concludes with issuance of the BO (135 day process; 90 days to evaluate and negotiate; 45 days to write). In the case of “jeopardy” and “destruction or adverse modification” BOs, the action agency may apply for an exemption. See 50 CFR Part 451 for procedures.