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### What activities does section 7(a)(2) of the Endangered Species Act apply to?

Federal agencies are required to consult with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service (jointly, the Services) to ensure they are not undertaking, funding, permitting or authorizing actions that are likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. The U.S. Fish and Wildlife Service has primary responsibility for terrestrial and freshwater organisms, while the responsibilities of the National Marine Fisheries Service are mainly marine wildlife such as whales and anadromous fish such as salmon. However, the agencies share responsibility for some species that occur in both marine environments and freshwater or terrestrial habitats, such as sea turtles and Atlantic salmon.

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### What steps are involved in a section 7 consultation with the U.S. Fish and Wildlife Service (Service)?

The Federal agency (action agency), or the applicant as the designated non-Federal entity, must obtain an official species list to determine if listed species or designated critical habitats may be present within the action area (the area that will be affected either directly or indirectly by the proposed action). This is done by either contacting the appropriate local Service office or going to the [Information for Planning and Consultation \(IPaC\)](#) system, where 24-hour self-service is available. If there are no protected resources in the action area, no consultation is required. Consultation may be required in the future if the scope or nature of the project is altered, or if new information indicates that listed species and/or designated critical habitat may be affected.

If listed species and/or designated critical habitat may be present, the action agency (or designee) must determine if the proposed action may affect them. A "may affect" determination includes those actions that are "not likely to adversely affect" as well as actions that are "likely to adversely affect" listed species and/or designated critical habitats. Guidance and tools for evaluating potential impacts are available through the IPaC system.

If the action agency determines that the action is not likely to adversely affect listed species or designated critical habitat (i.e., the effects are entirely 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 action agency determines that the action is likely to adversely affect listed species and/or designated critical habitat, then it must request initiation of formal consultation. This request is made in writing to the Service, and includes a complete initiation package. Prior to this point, interactions are conducted as informal consultation.

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 action 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 action agency within 135 days of initiating formal consultation. The 90-day consultation period can be extended by mutual agreement of the action 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 specify a schedule for completion.

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#### **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.

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#### **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.

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#### **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.

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#### **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.

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#### **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. The process is initiated in writing by the action 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 or not likely to adversely affect, eliminating the need for formal consultation.

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#### **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 Service on this determination. If the Service agrees, consultation is concluded with a concurrence letter.

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#### **What's the difference between an Environmental Assessment and a Biological Assessment, and can I incorporate one into the other?**

A Biological Assessment (BA) is prepared for "major construction activities" considered to be Federal actions significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act of 1969 (NEPA). A BA is required if listed species or critical habitat may be present in the action area; the contents for a BA are described in 50 CFR 402.12(f). "Biological Evaluation" (BE) is a generic term for all other types of analyses. Although agencies are not required to prepare a BA for non-construction activities, if a listed species or critical habitat is likely to be affected, the agency must provide the Service with an evaluation on the likely effects of the action. Often this information is referred to as a BE. Recommended contents are the same as for a BA, as referenced above. BAs and BEs should not be confused with Environmental Assessments (EA) or Environmental Impact Statements (EIS), which may be required for projects under NEPA. These EAs and EISs are designed to provide an analysis of multiple possible alternative actions on a variety of environmental, cultural, and social resources, and often use different definitions or standards than those used in consultations under the ESA. A BA can be incorporated into these NEPA documents.

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#### **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.

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#### **Who makes the call on adverse effect?**

The action 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 action agency, via informal consultation, determine if adverse effects are likely and work together to remove those effects when possible. The Service(s) determine whether or not they concur with *not likely to adversely affect* determinations, and issue biological opinions for actions that are *likely to adversely affect* protected species and critical habitats.

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#### **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) decide not to undertake the project (e.g., deny the permit); 3) request an exemption from the Endangered Species Committee (established under section 7(e) of the Act); 4) reinstate consultation based on modification of the action or development of a reasonable and prudent alternative not previously considered; or 5) choose to take other action if it believes, upon review of the biological opinion and best available scientific information, 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.

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#### **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.

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#### **Who reinstates formal consultation?**

Reinitiation of formal consultation must be requested by the action 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 is designated that may be affected by the identified action.

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#### **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.

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#### **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.

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#### **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 action 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.

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**Can you have an incidental take statement as part of a jeopardy/adverse modification biological opinion?**

When the Service determines 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 Service, with the assistance of the action agency and/or applicant, develop Reasonable and Prudent Alternatives (RPAs) 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.

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**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 biological 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 (consultation 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 proposed. However, an incidental take 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 an incidental take 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.

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**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 Service 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 Service 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.

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**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.

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